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POLICING (TRANS)GENDER

Trans and Gender Diverse Interactions with the Australian Criminal Legal System Since the Twentieth Century

Submitted by

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Bachelor of Arts (Honours)

A thesis submitted in total fulfilment of the requirements of the Doctor of Philosophy degree

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DECLARATION

This thesis contains no material that has been extracted in whole or in part from a thesis that I have submitted towards the award of any other degree or diploma in any other tertiary institution.

No other person's work has been used without due acknowledgment in the main text of the thesis.

All research procedures reported in the thesis received the approval of the relevant Ethics/Safety Committees (where required).

ABSTRACT

This thesis examines the history of trans and gender diverse experiences in the Australian criminal legal system throughout the twentieth century and into the present day. By tracing the developments of trans and gender diverse history in relation to the criminal legal system in Australia across this broad period, this thesis explores the policing and regulation of gender in a range of forms and settings. It looks at the policing of gender nonconforming behaviour and presentation such as arrests of 'masqueraders' in the early decades of the twentieth century, policing of transgender sex work in Kings Cross and Darlinghurst from the 1970s, parliamentary debates in the 1980s around providing gender affirming care to transgender inmates, and modern trans and gender diverse policing and incarceration issues. Alongside these themes, this thesis traces the shifting discourses since the turn of the twentieth century around gender diversity – from narratives around so-called 'sexual deviance' to present-day debates over trans and gender diverse rights and inclusion. Throughout this period, understandings of what gender diversity is and what it means to be transgender have changed dramatically. However, the existence of gender diversity has consistently challenged assumptions and exposed flaws built into the criminal legal system. While these flaws do not only impact trans and gender diverse people, gender diversity provides a critical lens for interrogating many mechanisms of the criminal legal system to understand who they work for, and who they work against. By examining these shifts, this thesis aims to provide an overview of an under-researched aspect of Australian crime history and analyse the ways that the policing of gender is intertwined with the development of Australian trans and gender diverse history and the past and present mechanisms of the criminal legal system.

ACKNOWLEDGEMENTS

Five years ago, in 2017, I came out as a transgender man. I was twenty-five at the time and coming out, for me, was a process of accepting a truth about myself that I had postponed for quite a while out of a sense of bureaucratic inconvenience and of loyalty to a queer feminist sisterhood that I felt I should remain part of. I started writing this thesis mid-2019. At the time, I had yet to update my name or gender markers on any legal documents, and knowing I had to submit a thesis under my legal name served, if nothing else, as a good incentive to get paperwork lodged. These last few years have been a turbulent time both to grow into myself as a trans person and to write a thesis on trans history. There have been strides forward – Victoria removing legislative requirements for trans people to undergo surgery to amend their legal gender was a very helpful one for me. There have also been many challenges. Trans people are being victimised, scrutinised, and villainised on a global stage, and it feels like every day that some beloved novelist or sitcom writer posts something online that we, as trans people, are forced to defend ourselves against. As of the moment I am writing this, it has been less than a week since neo-Nazis at an anti-trans rights rally performed the Nazi salute on the steps of the Victorian parliament in Melbourne, the city where I live.

Writing this thesis has been at times painful and at times cathartic. Sometimes it is amusing and ironic to look back over discourses of decades past and laugh at how much things have stayed the same. Often it is infuriating. I am frequently left asking myself how it is we have not yet moved past some aspect of transphobic rhetoric. And yet, instead of fading away, these harmful narratives and representations keep intensifying. But it has been very helpful to have a thesis to pour these frustrations into. Because much of the topics discussed throughout this work are doom and gloom, I want to start by saying this up front: gender diversity is wonderful. Being trans is wonderful. And, importantly, trans history is wonderful. As a trans historian, I can attest that it took being able to see people like myself in the past for me to accept who I was, and who I could be.

There are many people without whom I could not have written this thesis. First and foremost is, of course, my principal supervisor, Professor Noah Riseman. This thesis was funded through Noah's ARC Discovery project, *Transgender Australians: The History of an Identity*. I cannot express how grateful I am for all the work Noah has done in the field of Australian trans history and for bringing me on under this project. Noah has been a source of tremendous support for me throughout this thesis and before, going all the way back (as he often brings up) to waiting for an ambulance with me when I fainted in one of his first-year lectures.

My huge thanks also to my co-supervisor, Associate Professor Nell Musgrove, and my associate supervisor, Brenda Appleton OAM. Nell has been a source of fresh insights and great support throughout this project, always giving a fresh angle and new perspective on everything I have sent her, and her feedback has always pushed me to improve my work and consider elements I would otherwise have overlooked. I cannot overstate my gratitude to Brenda for lending her immeasurable wealth of experience to supporting me in this project. Brenda's decades of experience championing trans and gender diverse rights and wellbeing in Victoria as chair of Transgender Victoria and later the co-chair of the Victorian LGBTI Task Force have been vital to the development of this research project, which would have been much depleted without her help, support, and advice. I would also like to thank Dr Ellen Warne for her encouragement and reference as I was applying for this PhD – I'm enormously grateful.

Thanks to Associate Professor Melissa Bellanta, Dr Andy Kaladelfos, Dr Rachel Busbridge, and Dr Mary Tomsic for all their feedback at each of my review milestones. At every step they provided advice, assistance, and a welcoming atmosphere that made these reviews a wonderful experience rather than something to be feared.

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helping me promote this research (and of course, for all the work these organisations do for trans and gender diverse people around Australia). Thanks also to the *Behind Closed Doors* podcast for having me on to speak about my work, and thanks to Sasja for taking the time to speak with me and help get the word out there. Shout outs as well to Teddy Cook, Sam Elkin, Tobi Evans, the team at the *Inside Out Australia LGBTIQ+ Prisoner Solidarity Network*, and everyone who helped promote this project out there in the community. My huge thanks as well to the Australian Queer Archives (with special thanks to Nick Henderson for all his guidance) and the Public Record Office of Victoria for their aid in sourcing materials for this project.

Sections of the first two chapters of this thesis have been published as an article, *Policing gender nonconformity in Victoria, 1900–1940*, in PROV's journal, *Provenance*. Parts of these chapters are also due to be published in the edited collection *Women's Criminalisation and Offending in Australia and New Zealand* published by Routledge in 2023. I would also like to thank Dr Matthew Mitchell and Isabelle Skaburskis (and Brenda Appleton, again) for the project we did together on *Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System*, the insights gleaned from which greatly informed my own research – and for their friendship and support.

I would also like to extend a huge thanks to those who volunteered their time to be interviewed for this project. To protect their privacy, I have not named anyone I interviewed during this research, but I could not have done this without their generosity, and I have nothing but gratitude for them graciously sharing their stories with me.

Finally, I would like to extend some personal thanks. These have been hard years for all of us, but my friends and family have been a wonderful source of care and distraction as I have been working on this project. I would like to thank Dr Naja Later, for telling me right at the beginning that no one finishes their thesis on time and spurring me on to (attempt to) do so out of spite. Thank you to Cameron Burke, for helping me edit many, many things, as always. Thank you, Bea and Kass, for all your love and patience, and my parents for always

supporting me in what I do. Finally, a special shoutout to all my trans friends and loved ones, for all your strength, joy, and resilience.

This thesis was written where I live, on the stolen lands of the Wurundjeri people. I would like to extend my respects to Elders past and present and acknowledge that sovereignty was never ceded. This always was and always will be Aboriginal land.

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INTRODUCTION

Whenever trans people encounter the criminal legal system, they challenge it. Cultural gender norms affect all aspects of society and, likewise, inform the assumptions and conventions which underpin the criminal legal system. Every interaction between this system and trans and gender diverse people forces us to question those gendered assumptions. Right now, questions of where trans and gender diverse people fit into the criminal legal system in Australia are being publicly dissected and debated – not always with the best interests of trans and gender diverse people at heart. From police officers sharing details of ex-AFL coach Dani Laidley's arrest in a private group chat and making transphobic remarks about her, to Melbourne's *Herald Sun* condemning the 'radical trans lobby' for advocating transgender women be housed in women's prisons, it often seems that transgender issues are a hot – and modern – topic for intense scrutiny.[1]

Trans and gender diverse people, however, are not new. Current discourses around transgender people and their relation to the criminal legal system are also not new, nor are the public debates and scandals. The forms these discourses take, however, has changed significantly over the last one hundred and twenty years – as have popular concepts of gender diversity itself. From 'boy-girls' and 'masqueraders' at the turn of the twentieth century, to transgender killers and girls in bikinis at Long Bay Gaol in the 1980s, to the present-day debates over trans people in prison, as ideas of what it means to be transgender have evolved, so too have the ways in which the criminal legal system has regulated and policed gender.

This thesis explores transgender and gender non-conforming people's interactions with the Australian criminal legal system across the twentieth and twenty-first centuries. I examine the interplay between transgender or gender nonconforming expression and these interactions

[1] "Police officer who shared Dani Laidley photos has all charges dropped," *The Age*, 8 May 2022, https://www.abc.net.au/news/2022-03-08/dani-laidley-photo-leak-senior-constable-cleared/100891416 (accessed 6 November 2022); Rita Panahi, "Safety of female inmates must rule over radical trans lobby," *The Herald Sun*, 16 August 2022, https://www.heraldsun.com.au/news/opinion/rita-panahi/rita-panahi-safety-of-female-inmates-must-rule-over-radical-trans-lobby/news-story/a59523b4b2067bae186268c5ffa4df66 (accessed 19 August 2022).

with criminal legal institutions to analyse how the criminal legal system polices gender and polices people who transgress the boundaries of acceptable gendered behaviour and presentation. What I mean by 'policing' in this instance is both the work of police officers in performing their duties to regulate public order, and the subtle forms of social reinforcement of gender roles and norms carried out within a society. Judith Butler has described the act of performing and reinforcing gender systems as 'those punitively regulated cultural fictions alternately embodied and deflected under duress,' and this form of cultural policing forms the gender norms of any given society and time period.[2] For this research, I explore the overlap of these two forms of policing, to examine the ways in which law enforcement, prisons, courts and the law have policed non-normative gendered expression, and how this has informed and has been informed by the societal policing of gender.

In researching this topic, I have several key research questions. The first is: how was gender nonconforming expression policed in both law and practice across the twentieth century? I state 'gender nonconforming expression' to highlight one of the key tensions in this research (which I shall expand on below), which is the challenge of naming individuals as part of trans and gender diverse history when this language may not have necessarily applied to them. Indeed, even if the language did exist, these historical figures may not necessarily have claimed to be trans. This is a challenge of anachronisms, in that the language we use in the current day does not always translate to the past, and interiority, as applying terminology to historical subjects who may themselves have rejected it is complicated business. What I propose in undertaking this research is not that all of the individuals discussed in this research were necessarily themselves transgender. Rather, I argue that people we would now consider transgender have existed at all points of history and exploring gender nonconforming behaviour can shed insight on the societies in which these people lived. By looking at instances of people being policed for publicly 'cross-dressing,' for instance, we can identify a space for understanding what transgender people risked in living their lives, either closeted or in their affirmed gender. By identifying these silences and spaces of possibility, we can begin to ask questions. Were people deterred from presenting in accordance with their gender

[2] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 2007), 227.

identities? Did some do so regardless of the risks? What did gender nonconforming people experience within the criminal legal system? And, of course, the ever-present question: How can we know how these people saw themselves?

When it comes to policing, it is important not only to look at what Australian states and territories encoded into law, but also the ways in which police carried out enforcing these laws. The charge of vagrancy in the early decades of the twentieth century (as an example) was not specifically designed to target gender non-conforming individuals, but rather to police the public presence of 'disorderly' persons, including sex workers, the homeless, and the poor.[3] However, when we examine the way police applied vagrancy charges in practice, we can see that one further use of these laws was to police gender, and especially those who transgressed gendered norms in public. In many instances the letter of the law and what is happening on the ground – from police work to court functions and prison environments – reveal different stories.

The second question is, what changed across the twentieth and twenty-first centuries in the policing of gender nonconforming expression and trans and gender diverse people, and what factors led to change? The late twentieth century saw transgender activists fight for legal recognition, equality and depathologisation. The late twentieth century also witnessed other social movements which changed the way society understood, interpreted, expressed, and policed gender. There were many stories, for instance, in the late nineteenth and early twentieth centuries of women dressing as men to obtain better employment opportunities.[4] However, as women gained greater rights and economic participation (although remaining marginalised) across the twentieth century, these narratives and instances declined and there were different understandings of why people assigned female at birth may dress and live as men.

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[3] Julie Kimber, "'A Nuisance to the Community': Policing the Vagrant Woman," *Journal of Australian Studies* 34, no. 3 (2010): 275-76.
[4] Lucy Sarah Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life* (Sydney: Sydney University Press, 2008).

Trans and gender diverse people's experiences of the criminal legal system across the twentieth and twenty-first centuries and across Australian states and territories varied significantly due to shifting discourses about gender and mental health, and later the medicalisation of gender diversity. In the first decades of the twentieth century Western ideas were gradually emerging which linked gender nonconformity with mental health disorders, introducing terminology and concepts which had not previously existed. The new models to understand mental health, including their associations with a mentally 'fit' nation and the eugenic ideals that went along with it, changed the way Australians conceptualised, diagnosed and treated perceived mental illnesses.[5] In some instances, international discourses on transvestism and 'eonism' were beginning to appear in Australian newspapers between the 1910s and the 1930s.[6] After the Second World War, the focus had shifted to new models which conceptualised transsexuality/transsexualism as a medical condition. By the 1970s, the international medicalisation of transsexuality/transsexualism was prevalent in Australia. On the one hand this provided some access to gender affirmation procedures for trans people. Yet, this also formed an environment with rigidly defined parameters for acceptable 'transsexuality,' controlled by doctors, psychiatrists, and surgeons.[7] Medicalised thinking could impact transgender or gender nonconforming people's interactions with the criminal legal system, shaping how people were charged, what discourses they could use to defend themselves, and how they were perceived in relation to their gender.

The last key question that this thesis asks is: what can trans and gender diverse histories tell us about Australia's criminal legal system, its aims, and its efficacy? A common theme throughout this thesis is that trans and gender diverse interactions with the criminal legal system consistently point to tension points or flaws in how police and prisons respond to changing ideas of gender, sexuality, and gender nonconformity. For instance, the position of

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[5] Catharine Coleborne and Dolly Mackinnon, "Psychiatry and Its Institutions in Australia and New Zealand: An Overview," *International Review of Psychiatry* 18, no. 4 (2006): 374.

[6] Eonism is a term coined by Havelock Ellis in 1920 to describe what we would now consider transgender identities. The word derives its name from the French 19th century diplomat Chevalier Charles Éon de Beaumont. Noah Riseman, "Searching for Trans Possibilities in Australia, 1910-39," *Journal of Australian Studies* 44, no. 1: 43-46.

[7] Ibid., 13-18; Noah Riseman, "A History of Trans Health Care in Australia: A Report for the Australian Professional Association for Trans Health (Auspath)," (AusPATH, 2022), 13-18.

trans sex workers in 1980s Sydney following the decriminalisation of street-based sex work highlights the tensions in New South Wales law between sex work decriminalisation and the continued existence of laws against soliciting for homosexual men. Trans women sex workers caught up in these legal contradictions challenged state assumptions about gender and sexuality and how the law should respond to them. Questions about housing trans and gender diverse prisoners today challenge binary sex segregation built into our institutions. These histories not only tell us about trans and gender diverse experiences of gender in Australia's criminal legal system; they also provide key insights into the regulation of gender and bodies for all people within society.

Research into trans and gender diverse people's experiences with the criminal legal system provides valuable insight into transgender history and the lived experiences of trans and gender diverse people across time. Crime history can tell us a lot about the concerns, tensions, and anxieties of a period. State law canonises what is and is not seen as moral or acceptable within a time period, and changes to law over time provide insight into changing attitudes and beliefs within society. Crime history also exposes tensions and 'battlegrounds' where laws may be at odds with developing or changing attitudes. This is very apparent in relation to laws policing gender and sexually marginalised behaviour across the twentieth and twenty-first centuries, due to the enormous shifts in both social and legal acceptance for gender diversity across this time. By looking at policing of transgender and gender nonconforming behaviour in this research, I explore these points of tension and examine what they can tell us about trans experiences from the margins.

THESIS STRUCTURE

This thesis is divided into three parts, each one consisting of two pairs of chapters examining similar, or overlapping, themes. There is also one additional shorter chapter which serves as a 'bridge' between two of the sections. I have structured the thesis in this way primarily due to the large stretch of time being covered. Throughout the 122 years discussed, a lot has changed regarding concepts of trans and gender diversity, criminal legal institutions, legislation and practice, and practical elements around archives, access, and availability of trans and gender diverse materials.

The first two chapters examine the period from the turn of the twentieth century to around the 1950s. Chapter 1 looks at the 1900s and the 1910s, focusing primarily on the preponderance of female assumed people presenting as male within reports of arrests for vagrancy and offensive behaviour. Chapter 2 then looks at the shift throughout the 1920s and the 1930s as male assumed people presenting as female took up a larger role in crime reporting. Together, these chapters explore the dynamics of gender, respectability, 'deviance,' and vagrancy as they related to 'female and male masqueraders,' and they discuss the reasons why the focus of this cases changed over time – primarily due to the increased policing of 'sexual deviance', especially for male assumed people.

The first part focuses primarily on Victoria. One reason for this was limitations due to the Covid-19 lockdowns and border closures: this entire thesis was written during the pandemic, and these chapters were particularly affected, as they were researched and written during the 2020 lockdowns. While many of the sources could be accessed online through Trove, it was important, where possible, to compare the newspaper reporting with the available court records, which are mostly un-digitised. With access to archives restricted, and interstate travel particularly unfeasible, I chose to focus on Victoria. While this was a limitation, Victoria makes a good case study as one of the most populous states in Australia with relatively detailed police/court records and archives. Significant work has already been done in Victoria through work such as the Criminal Characters project and the Public Record Office of Victoria's (PROV) efforts to digitise their collections, again making this state an excellent case study, record-wise.[8] While using specific states as case studies was necessary in this thesis, this limitation points to areas of important future research to expand on these topics and explore differences between states and territories.

Chapter 3 of this thesis is the bridging chapter. It explores primarily the 1950s and the 1960s and covers a distinct period of change: in the first two chapters, terminology to describe gender diversity was sparse, and the concepts of gender were themselves were very different

[8] Alana Piper, "Digital Crowdsourcing and Public Understandings of the Past: Citizen Historians Meet Criminal Characters," *History Australia* 17, no. 3 (2020): 525-41.; Alana Jayne Piper and Victoria M Nagy, "Risk Factors and Pathways to Imprisonment among Incarcerated Women in Victoria, 1860–1920," *Journal of Australian Studies* 42, no. 3 (2018): 270.

to those we understand today. A 'female masquerader' was not synonymous either theoretically or in practice with what we may now describe as transmasculinity, for example. However, this began to change mid-way through the twentieth century. During the 1950s, early examples of 'sex change operations' made headlines, and gradually, 'transsexualism' or 'transsexuality' became recognised as something distinct from other forms of so-called 'sexual deviance,' such as homosexuality. However, this was not an overnight transition, and there was a long period of overlapping discourses and social negotiations around what these concepts meant – and this period of negotiation is what this chapter examines. Chapter 3 also explores this period in relation to the heightened policing of homosexuality which took place and what this meant for trans and gender diverse people caught up in this persecution.

Chapters 4 and 5 are the next set of paired chapters, and they both focus on New South Wales primarily in the 1980s and early '90s. Chapter 4 focuses on prison issues and changes to legal recognition for trans and gender diverse people, and political responses to 'scandals' regarding transgender prisoners. Chapter 5 examines trans sex work, particularly in Sydney, and especially in relation to the partial decriminalisation of street-based sex work in New South Wales in 1979 and the disproportionate impacts this had on trans sex workers. These chapters focus on New South Wales for a couple of reasons. Firstly, important events took place in New South Wales relating to trans and gender diverse criminal legal experiences which did not take place in other states or territories. For example, there was the previously mentioned decriminalisation of street-based sex work, landmark legal cases that brought transgender issues into public discourse, and political discourse around transgender people in specific prisons. Secondly, and often thanks to activist Roberta Perkins' invaluable work, there is a wealth of historical records around transgender communities in New South Wales unmatched in other states and territories. This is a blessing and a curse. It is a blessing for the number of detailed records we have for New South Wales, and a curse in that it highlights what is missing elsewhere. Together, these chapters examine a period where transgender identities were becoming more known (and often vilified) in the general public and where transgender people themselves were building their own communities and making significant, although not often coordinated, pushes for activism and recognition. Thematically, these

chapters look at how these changes played out in trans and gender diverse interactions with the criminal legal system in two main areas: prisons, and policing (of sex work).

The final pair of chapters (6 and 7) examine ‘modern’ trans and gender diverse experiences within the criminal legal system. Chapter 6 looks at the 1990s and 2000s, decades during which trans and gender diverse advocacy saw nation-wide legislative progress for trans and gender diverse recognition. This period also saw police and prisons around Australia begin to implement policies and procedures for managing trans and gender diverse individuals. The chapter explores how authorities implemented these practices and their inadequacies. Chapter 7 examines the next ‘wave’ of change from the 2010s, where further amendments to legislation and policy addressed prior gaps and expanded categories of who would be classed as transgender. The key focus of this final chapter is on the ways that gender diversity seems continually to be unreconcilably at odds with the methods and goals of the Australian criminal legal system as it currently exists.

This thesis structure shapes these histories both progressively, over the course of the timespan covered, and thematically, focusing in on key regions, events, tensions, and communities when they came to the fore. There are undoubtedly gaps and points where there is room for deeper historical research. It is my goal that this thesis will contribute to the (currently scant) body of Australian trans and gender diverse crime history by providing a broad perspective which can highlight key areas for future research.

Literature Review

Defining ‘Transgender’ and Terminology

It is necessary at the outset to define what I mean by the terms ‘transgender,’ ‘trans,’ and ‘trans and gender diverse.’ Language and terminology around transgender identity have changed significantly across the period under review. From being practically non-existent at the beginning of the twentieth century, language describing modern trans identity has undergone an explosion of similar, overlapping, contradicting and changeable terms. In this thesis, I primarily use the terms ‘transgender,’ ‘trans and gender diverse’ and ‘trans’, sometimes more-or-less interchangeably. I also use the term ‘gender nonconforming’ when

referring to individuals whose identities are not apparent or identifiable, but who still fall within the scope of this research. I define 'transgender' here as someone who has moved away from living as the gender assigned to them at birth to living life as another gender, permanently or temporarily. This definition is borrowed from historian Susan Stryker, who emphasises the 'movement across a socially imposed boundary … rather than any particular destination or mode of transition.'[9] 'Trans' is used here as a deliberately broad umbrella term, intended to capture anyone of trans or gender diverse identity or experience. Likewise, I use 'trans and gender diverse' broadly to capture all individuals who have a 'diverse' experience of gender, even if they may not strictly identify as transgender or trans.

One widely held origin for the term 'transgender' is that Virginia Prince coined it in the 1980s to describe individuals who fit neither the category of 'transsexual' (defined as someone who sought gender affirmation surgeries) or 'transvestite' (someone who wore the clothing of the opposite gender episodically). 'Transgender' in this usage described individuals who sought to transition socially without surgery. Following this, 'transgender' may have shifted to something closer to its present meaning when Leslie Feinberg used it to capture a much broader umbrella category of anyone who transgressed gender boundaries.[10] However, Kelly Rawson and Cristan Williams have challenged this narrative around the development of the term 'transgender.' They argue that this narrative is overly simplistic and ignores the multitude of ways in which community usage, parallel development, regional needs, and other contextual elements shaped the development of the term. They insist that the term is still developing, and to impose a rigid definition and narrative around etymology undermines its complexity as an identifier.[11] Williams has reinforced this elsewhere, arguing that 'transgender' is a word which evolved through diverse uses across a variety of regions and sources, and that its expansiveness is what gives it its power today.[12] Language around gender diversity continues to evolve, and many other terms exist in addition to the terms outlined

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[9] Susan Stryker, *Transgender History: The Roots of Today's Revolution* (New York: Seal Press, 2017), 1.
[10] K. J. Rawson, "Accessing Transgender // Desiring Queer(Er?) Archival Logics," *Archivaria*, no. 68 (2009): 123-40.
[11] Kelly Jacob Rawson and Cristan Williams, "Transgender*: The Rhetorical Landscape of a Term," *Present Tense* 3, no. 2 (2014): 1-9.
[12] Cristan Williams, "Transgender," *Transgender Studies Quarterly* 1, no. 1-2 (2014): 232-34.

above to describe various aspects of trans and gender diverse experience.[13] While I have endeavoured throughout this thesis to use best practice and historically appropriate terminology, it is important to acknowledge that different trans and gender diverse individuals and communities will have their own preferences regarding terminology.

When it comes to pronouns, in general, I default to the gender-neutral pronoun 'they' when discussing gender nonconforming individuals in this research, unless the individual has a stated preferred pronoun or there is strong evidence to suggest identification with a binary gendered pronoun. In present-day usage, the use of 'they' as a personal pronoun often signifies identification with a nonbinary gender (or lack thereof). However, I am not using it here to signify such (not to rule out that in some cases it may apply). Instead, I use it simply to acknowledge that I have no insight into a person's preferred identifiers and to avoid arbitrarily assigning them as male or female.

On a different point of terminology, I use the term 'criminal legal system' in this thesis rather than 'criminal justice system' because it more accurately describes what I am discussing. 'Justice' carries the suggestion of an ethical weight to the actions of these systems, one which is hard to justify when examining the experiences of over-policed and marginalised groups and their interactions with these institutions. As stated by the Vera Institute: 'Accuracy in language matters, and these systems do not deliver justice, nor have they ever.'[14] Certain marginalised demographics are more likely to have contact with criminal legal systems, not due to their individual actions, but due to differential treatment from the criminal legal system, such as over policing.[15] Duarte et al explain the usage of 'criminal legal system' over 'criminal justice system' as an 'acknowledgment of its unjust application,' and the authors also broaden the scope of the term beyond the typical sites of operation such as courts and carceral settings to include the manifestation of criminal legal practices within other settings,

[13] "Language," TransHub, https://www.transhub.org.au/language (accessed 5 November 2022); Stryker, *Transgender History: The Roots of Today's Revolution*, 10-44.
[14] Erica Bryant, "Why We Say 'Criminal Legal System,' Not 'Criminal Justice System,'" Vera Institute, https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system (accessed 2 December 2022).
[15] Alex Kornya et al., "Crimsumerism: Combating Consumer Abuses in the Criminal Legal System," *Harvard Civil Rights-Civil Liberties Law Review* 54 (2019): 112.

such as the community or home.[16] While this thesis focuses on interactions with police, courts, and prisons, it is important to acknowledge that criminal legal practices are embedded and ingrained throughout society. Regulation of gender nonconformity does not start or end with police and prisons. Gender norms are enforced and coerced at home, in families, in communities, in schools, in doctors' offices – in all aspects of our lives. Criminal legal practices of regulating gender are an extension and model of all these systems. Considering these points, I have elected to use 'criminal legal system' rather than 'criminal justice system' to step away from the language of 'justice' and to move towards a term which better encapsulates what we are looking at here: systems of laws, the institutions which regulate law and punishment, and the mechanisms through which laws are enforced.

TRANS AND GENDER DIVERSE AUSTRALIAN HISTORICAL FIGURES

There are several characters from Australian history known for traversing gender boundaries and who have been the subject of historical interest, often related to their interactions with the criminal legal system and the law. Some of the most prominent and widely researched are Edward De Lacey-Evans, Marion-Bill Edwards, Gordon Lawrence, and Harry Crawford/Eugene Falleni. One of the most notable scholars of gender crossing in Australia is Lucy Chesser, whose work *Parting with my Sex* explores the cultural politics and anxieties surrounding several of these individuals across Australian history, focusing on the late nineteenth and early twentieth centuries.[17] Chesser investigates some high-profile cases to discuss what gender crossing can tell historians about society's construction of gendered expectations and what was and was not acceptable gender transgressing behaviour. This text provides us with an impression of the larger gender nonconforming figures from the Australian historical record, and for the purposes of this thesis it is pertinent to note that most of these individuals are captured in the historical record due to their interactions with the legal system. From a methodological standpoint, Chesser provides a useful framework for identifying and interrogating cases, focusing on cases identified from newspaper records.

[16] Catherine d P Duarte, Leslie Salas-Hernández, and Joseph S Griffin, "Policy Determinants of Inequitable Exposure to the Criminal Legal System and Their Health Consequences among Young People," *American Journal of Public Health* 110, no. S1 (2020): S44.
[17] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 374.

However, as Chesser acknowledges, such newsworthy cases also limit the scope of the research and miss the smaller 'everyday' instances of gender transgression which would not have hit the media.

Marion-Bill Edwards was an assumed female individual who spent most of their adult life presenting as male and reached public prominence in two court cases in 1906 and 1916. Chesser explored how Edwards formulated 'strategic and complex constructions' of gender by challenging networks of authority and power.[18] Chesser highlighted how historians can view Edwards as a carefully negotiated figure through the records left behind a combination of documents from a place of structural power (court records, etc.) as well as Edwards' own words in their autobiography. What is particularly challenging is that, although we have some access to Edwards' self-description, still Edwards had to craft an acceptable narrative which would benefit their public image. This demonstrates that even with access to autobiographical accounts about a person's gendered experience, historians must interpret these texts within the social context they were produced.

Edwards' case also demonstrates valuable insights into the elements which could make gender nonconformity and queer lives acceptable or unacceptable in the eyes of the press, courts and public. Chesser explored the model 'type' of 'girl in male attire' of the period, which relied upon youth and adventurous spirit as key components of acceptability. Edwards harnessed these traits in their first trial, but was less willing or able to play into them during the second court appearance a decade later.[19] Kay Saunders has also addressed this, describing the shift between Edwards' first and second court appearances, emphasising that the focus in the latter case seemed to be more on rooting out any potential sexual deviance in how Edwards and their co-accused, Annie McClelland, shared a bed.[20]

The chapter in Kay Saunders' book *Notorious Australian Women* which discusses Marion-Bill Edwards compares them with Edward de Lacey Evans. Evans, like Edwards, was a

[18] Lucy Chesser, "'When Two Loving Hearts Beat as One': Same-Sex Marriage, Subjectivity and Self-Representation in the Australian Case of Marion-Bill-Edwards, 1906–1916," *Women's History Review* 17, no. 5 (2008): 724.
[19] Ibid., 738-39.
[20] Kay Saunders, "Notorious Australian Women," (Sydney: Harper Collins, 2011): 80-81.

prominent figure in the Australian press, infamous for their gender transgressive expression and treated within the late nineteenth century hospital and asylum system as a medical anomaly to be examined, and ultimately coerced into feminine presentation.[21] When Evans' third wife, Julia Marquand, charged her brother in law in 1879 for failure to provide for the child she had with him, Evans appeared in court in female attire and was forced to downplay their relationship with their wife of then-eleven years.[22] What is worth noting here is the different ways gender nonconforming people negotiated these appearances and how it impacted the way they were perceived, positively or negatively depending on a range of factors including age, relationships, and gendered presentation.[23]

Susanne Davies explored the ways in which Victorian police used vagrancy charges to criminalise an individual named Gordon Lawrence for publicly presenting as a woman in Melbourne in 1888. The criminalisation and effectiveness of Lawrence's presentation highlighted the constructed nature of sex and disrupted the understood construction of gender. Davies discussed the ways that sex and gender have been understood within society and the mechanisms through which challenges to gendered norms (such as Lawrence's) necessitate societies and cultures renegotiating these categories to reenforce their validity.[24] Several historians have written about the 1920 trial of Harry Crawford/Eugene Falleni (henceforth referred to as Crawford). Ruth Ford discusses how the court case framed their gender crossing presentation as evidence of an innately deceptive nature. The narratives surrounding Crawford's case are particularly interesting to consider in contrast to some of the earlier examples noted above. The less favourable treatment of Crawford by the courts and press may be evidence of changing perceptions of gender crossing and sexuality, as well as a result of conceptualisations of race and racism. As stated by Ford, between 1880 and 1920 there was 'a fundamental shift from the idea of 'sexual inversion' – which conceptualised same-sex desire in terms of deviant gender behaviour – to 'homosexuality,' seen in terms of same-sex object choice, either as a congenital or a psychological

[21] Ibid., 68-74.
[22] Ibid., 74-75.
[23] Ibid., 79.
[24] Susanne Davies, "Sexuality, Performance, and Spectatorship in Law: The Case of Gordon Lawrence, Melbourne, 1888," *Journal of the History of Sexuality* 7, no. 3 (1997): 395-408.

abnormality.'[25] It is possible that Crawford's case reflects some of the impacts of this shift on how transgender or gender nonconforming people were understood in contrast to prior decades, particularly by those in the medical field.

As Ford discusses, new works around psychology and sexuality were taxonomising cross-gender identification and same-sex attraction into categories (such as sexual inversion) which were slowly beginning to take root in the Australian medical profession.[26] Although these ideas were yet to gain much traction in the public space, the medicalisation of Crawford's gender crossing was cautiously raised during their case, as the defence called upon medical professionals to prove that their cross-dressing and same sex affairs were the result of genuine sexual inversion – although these arguments were unsuccessful in the trial and still marginal at the time. Crawford was also 'poor, working-class, illiterate and an Italian migrant,' all intersecting identities which shaped their public perception in addition to their gender nonconformity.[27] Robin Eames has also written about this case and its position within the realms of transgender history. Eames highlights the issues that scholars have grappled with in identifying Crawford's gender, selecting pronouns and language to describe them, and the ways in which positioning Crawford as gender crossing without explicitly tying them into transgender history acts to write this element of Crawford's story out of existence, even unintentionally.[28] I will return to the topic of Crawford in Chapter 2 of this thesis in the context of discussing the shifting discourses around gender nonconformity and sexual 'deviance' within the realms of psychology and sexology.

HISTORICISING TRANS EXPERIENCE

All of these figures present a challenge to historians regarding how to write about their lives when positioning them in the realm of trans history. As Chesser has stated:

[25] Ruth Ford, "'The Man-Woman Murderer': Sex Fraud, Sexual Inversion and the Unmentionable 'Article' in 1920s Australia," *Gender and History* 12, no. 1 (2000): 159.
[26] Frank Bongiorno, *The Sex Lives of Australians: A History* (2013), 118-20.
[27] Ford, "'The Man-Woman Murderer': Sex Fraud, Sexual Inversion and the Unmentionable 'Article' in 1920s Australia," 167.
[28] Robin Eames, "Problem Bodies and Queer Legacies: Rethinking Approaches to Trans History in the Case of Harry Crawford, Sydney, 1920," *Lilith* 25 (2019): 50-62.

> These identity categories have become so much part of how we understand ourselves and the basics of human psychology, it is now almost taken for granted people can be sorted into categories based on their sexuality (organized around the sex of their preferred sexual partner) and their gender identity, which, although seen as separate – and sometimes contrary – to anatomical sex, is nevertheless viewed as utterly fundamental and inalterable, a building block of individual human psychology.[29]

Chesser notes the tension that historians face when assigning people from the past aspects of present-day identity categories, due to a lack of insight into the interior self-conception of the subject, the limitations of the language of the era, and the tendency for historians to feel defensive or entitled to claim past figures for their own purposes.[30]

This sheds light on an intrinsic tension of transgender studies, one with no easy answer. Specifically, who do we capture when we are looking for evidence of trans history? How do we identify trans people of the past, and when is it ethical/appropriate to label them as such without access to their own self-perception? In '"Trans*historicities": A Roundtable Discussion,' C. Riley Snorton states that in their own work, 'this has meant pursuing a historiographical practice that identifies how events, actors, and places illustrate the conditions of possibility for gender transformation.'[31] This mirrors my own theoretical approach, in that identifying transgender history can be less about imposing a transgender identity onto individuals from the past, and more to do with identifying the social conditions which create reflections of and insights into transgender history. By looking at trans possibilities from history and the reactions to gender nonconforming behaviour, we can begin to see the spaces left behind where transgender circumstances are missing and can be illuminated. One framework which is useful for approaching this dilemma is that of 'transgender capacity,' as described by David J Getsy: 'Transgender capacity is the ability or the potential for making visible, bringing into experience, or knowing genders as mutable,

[29] Lucy Chesser, "Transgender-Approximate, Lesbian-Like, and Genderqueer: Writing About Edward De Lacy Evans," *Journal of Lesbian Studies* 13, no. 4 (2009): 373-94.
[30] Ibid., 373-75.
[31] M. W. Bychowski et al., "'Trans*Historicities': A Roundtable Discussion," *TSQ: Transgender Studies Quarterly* 5, no. 4 (2018): 660.

successive, and multiple … It may emerge at any site where dimorphic and static understandings of gender are revealed as arbitrary and inadequate.'[32]

Susan Stryker, Paisley Currah and Lisa Jean Moore write about the practice of 'transing' theory – in a similar vein to 'queering' discourses – to articulate the crossing of categories not only regarding gender, but across any number of socially defined boundaries. They emphasise the concept of 'trans' as a way of moving across and orienting within space, whether that is between gendered spaces, or across the realms of embodied power, hierarchy, and politics.[33] When looking at transgender history, this is an important element to bear in mind. The gender categories we are working with are not fixed or permanently defined, so when we examine how people move across gendered categories, we are not only looking at gender crossing but also crossing other social and political spaces which are culturally delineated and constructed.

Genny Beemyn has argued that it would be 'inappropriate to assume that people who are "transgender," as we currently understand the term, existed throughout history. The best we as historians can do is to acknowledge individuals whose actions would seem to indicate that they might be what we would call "transgender" or "transsexual" today without necessarily referring to them as such.'[34] As has been outlined by Nikolas Rose, 'the self' – including such attributes as gender – is a historically and linguistically (and I would add culturally) situated construction which can never be truly understood for its inner workings, but rather only described through the language we have available. Although socially constructed and not innate, the categories and language that we use to construct our identities have their own history, within which they have come to be formed and understood.[35] As described by Michel Foucault, as societies grapple with problematization, they generate normative practices and categorisations in response.[36] These categories often were constructed out of aims to regulate

[32] David J. Getsy, "Capacity," ibid.1, no. 1-2 (2014): 48.
[33] Susan Stryker, Paisley Currah, and Lisa Jean Moore, "Introduction: Trans-, Trans, or Transgender?," *WSQ: Women's Studies Quarterly* 36, no. 3 (2008): 11-22.
[34] Genny Beemyn, "A Presence in the Past: A Transgender Historiography," *Journal of Women's History* 25, no. 4 (2013): 113.
[35] Nikolas Rose, *Inventing Our Selves: Psychology, Power, and Personhood* (Cambridge: Cambridge University Press, 1996), 8-10.
[36] Michel Foucault, *The History of Sexuality Volume 2: The Use of Pleasure* (London: Penguin, 1992), 11-12.

or police those who were identified in certain terms (e.g., 'transsexual'), and have generally been met with a mix of refusal, reclamation and identification which gradually forms a mobile concept which may no longer point to the purpose for which it was initially developed.[37] For the purposes of this research, I operate on the basis that all eras had gendered constructions and also had people who crossed them – and it is through this lens that I am looking for trans possibilities, acknowledging that the language being used arises out of our present-day understanding of, and terminology describing, gender.

TRANS MOVEMENTS AND LAW REFORM IN AUSTRALIA

There is also a gap in the secondary literature about transgender history in Australia across the mid to latter parts of the twentieth century. However, significant shifts were happening which changed the lives of transgender Australians. Noah Riseman has discussed the development of transgender medicine and advocacy in the second half of the twentieth century. The establishment of the Monash Gender Dysphoria Clinic in 1975 was a key milestone for transgender medicine in Victoria.[38] Clients were held to rigid standards by the medical and psychiatric professions who gatekept the transition process, although by the 2000s and 2010s there was a shift to an informed consent-based model for hormones. In the 1970s, Australia also saw the establishment of its first transgender organisations, such as the Sydney-based Seahorse (with national membership), and later off-shoot branches and organisations in other states. It is worth noting that these groups primarily marketed themselves as spaces for heterosexual men who considered themselves transvestites. The Victorian Transsexual Coalition (established 1979) was the first transgender activist organisation, and the New South Wales-based Australian Transsexual Association turned to activism in the early 1980s. Riseman's reports on New South Wales and Victorian trans history document the movements towards anti-discrimination laws, legal recognition and more diverse organisations and opportunities for trans people.[39] The work of Roberta Perkins,

[37] Rose, *Inventing Our Selves: Psychology, Power, and Personhood*, 39.
[38] Riseman, "A History of Trans Health Care in Australia: A Report for the Australian Professional Association for Trans Health (Auspath)," 19.
[39] "Victoria's Transgender History," (Melbourne: Transgender Victoria, 2021).; "Transgender Activism and Anti-Discrimination Reform in 1990s New South Wales and Victoria," *Journal of Australian Studies* 46, no. 3 (2022): 321-38; "New South Wales Trans History," (ACON & The Gender Centre Inc, 2022).

trans and sex worker rights activist and sociologist, provides invaluable insight into the experiences of transgender people in New South Wales and Australia-wide. Her work on the 1980s-90s especially covered a wide breadth of topics related to trans experience, ranging from sex work, 'drag queen' scenes in Sydney, HIV/AIDs risk, employment, social and cultural barriers, and experiences in prison.[40]

During much of the mid-late twentieth century, society viewed transgender women and gay men as challenges to the same anxieties around gender and sexuality. While one could say that often transgender women were viewed as just another subcategory of homosexual men, it could also be argued that homosexuality itself was considered a gender inversion, and someone who transitioned was the logical extreme of that inversion. As such, many of the offences which were used to police transgender people were those laws used to prosecute gay men. Graham Carbery has explored the development and removal of these laws, highlighting that police continuously charged gay men with 'buggery' and 'acts of gross indecency' across Australia until the 1980s, and authorities used these laws to target transgender women as well as gay men.[41]

During the 1950s, police increasingly targeted homosexual acts in contrast to prior decades, as Graham Willett, Andy Kaladelfos and Lisa Featherstone have detailed.[42] Where instances of same-sex encounters would have once been charged under the Vagrancy Act as a relatively minor offence, under new legislation the charges for sodomy and indecent assault became much more serious – being indictable and carrying a potential prison sentence. The introduction of a segregated homosexual prison in the 1950s at Cooma, New South Wales led to discussions about the best ways to approach the distribution of the homosexual prison population, a discourse with striking similarities to later and ongoing debates around housing

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[40] Roberta Perkins, "The Drag Queen Scene," in *Blending Genders: Social Aspects of Cross-Dressing and Sex-Changing*, ed. Richard Ekins and Dave King (Psychology Press, 1996); *Transgender Lifestyles and HIV/AIDS Risk* (Canberra: Australian Government Publishing Service, 1994); "Transsexuals in Prison," *Journal of Social Justice Studies* 4 (1991): 97-100; *The 'Drag Queen' Scene: Transsexuals in Kings Cross* (North Sydney: Allen & Unwin, 1983).
[41] Graham Carbery, *Towards Homosexual Equality in Australian Criminal Law - a Brief History* (Sydney: Australian Lesbian & Gay Archives, 2010), 1-58.
[42] Graham Willett, "The Darkest Decade: Homophobia in 1950s Australia," *Australian Historical Studies* 27, no. 109 (1997): 120-32.

of transgender prisoners.[43] These discourses played out time and again in new forms because the cultural concerns and anxieties they grappled with were one and the same. Homosexuality was seen as a problem with gender, with gay and lesbian individuals failing appropriately to perform their gender within a heteronormative paradigm. That is, being gay and being transgender both defied the same rigid expectations of gendered behaviour.[44] Graham Willett has described the 1950s as the darkest in Australia's history for gay and lesbian people, with increased pressure from the state and increased police enforcement of charges against these populations.

Andy Kaladelfos and Yorick Smaal have written about sexual violence in Australian male prisons, and they summarise the arsenal of offences which Australian states utilised to varying degrees to persecute homosexual acts, including offences for gross indecency, sodomy, indecent assault, vagrancy, soliciting and public order offences.[45] At the late nineteenth and turn of the twentieth century, the practice for prosecuting homosexual behaviour tended to deploy less serious, but easier to prosecute, offences – such as 'gross indecency' for fellatio and 'vagrancy' for public displays such as cross-dressing.[46] As Chapter 3 especially explores, the mechanisms used by police and the criminal legal system to enforce laws against homosexual acts would likewise be used against transgender individuals in similar ways.

INTERNATIONAL TRANS HISTORY

Although the literature on Australia's trans history is thin, there are key texts which examine trans history across the century from an international perspective. Susan Stryker's *Transgender History: The Roots of Today's Revolution* provides a comprehensive overview

[43] Lisa Featherstone and Andy Kaladelfos, *Sex Crimes in the Fifties* (Carlton: Melbourne University Press, 2016).
[44] One example of this has been discussed by Sedgwick, who draws attention to the removal of "homosexuality" from the DSM-III in 1980, but highlights the addition, in the same year, of "Gender Identity Disorder of Childhood". Sedgwick attests that the "depathologization of an atypical sexual object-choice can be yoked to the new pathologization of an atypical gender identification", emphasising that these categories both betray a fear of gender nonconformance in children. Eve Kosofsky Sedgwick, "How to Bring Your Kids up Gay," *Social Text*, no. 29 (1991): 20-21.
[45] Andy Kaladelfos and Yorick Smaal, "Sexual Violence and Male Prisons: An Australian Queer Genealogy," *Current Issues in Criminal Justice* 31, no. 3 (2019): 350-51.
[46] Bongiorno, *The Sex Lives of Australians: A History*, 114.

of transgender history in the United States. This text charts the course of the trans movement from approximately the mid-nineteenth century to the present day, examining the development of a slowly defined and gradually shifting transsexual/transgender identity, transgender medicine, political advocacy movements, the formation of transgender organisations, pushbacks, revolts, and gradual resistance through to the present. Although the text does not focus on crime, it does address modern trans incarceration issues and how they are presented in the media.[47] Joanne Meyerowitz published *How Sex Changed*, which also explores the United States transgender movement, exploring how concepts of sex and gender changed along with medical advances. The text does not focus on law, although it does offer insight into the fear many trans people experienced when interacting with police that they would be arrested for cross-dressing.[48] Leslie Feinberg wrote *Transgender Warriors*, a text which explores various gender transgressing and cross-dressing behaviours throughout history. The text is highly personal and political, exploring Feinberg's past and motivations for seeking out these histories and asking the reader to challenge normative assumptions about sex and gender.[49] While these texts do not explicitly focus on the criminal legal system, their insights into trans history have been foundational in establishing the trans history field.

From a British perspective, Christine Burns edited *Trans Britain*, which is a collection of chapters from various contributors outlining the transgender movement across the second half of the twentieth century. The collection features autobiographical accounts from trans people and allies involved in the trans movement, as well as sections on political movements, the press, media, and the law.[50] The book details the British partial decriminalisation of homosexuality in 1967, under which transsexuality and cross-dressing were considered a 'subcategory'. Contributor James Morton discusses the process of implementing a self-

[47] Stryker, *Transgender History: The Roots of Today's Revolution*.
[48] Joanne J. Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* (Cambridge: Harvard University Press, 2004).
[49] Leslie Feinberg, *Transgender Warriors: Making History from Joan of Arc to Dennis Rodman* (Boston: Beacon Press, 1996).
[50] Christine Burns, *Trans Britain: Our Journey from the Shadows* (London: Unbound Publishing, 2018).

declaration basis for prison housing in Scotland and the need for prison policies to compensate for trans people's safety and dignity.[51]

The historians who deal most directly with gender nonconformity and criminality in the United States are Clare Sears and Emily Skidmore. Skidmore's book explores the diverse ways transgender men lived at the turn of the twentieth century, and how they expressed and negotiated their gendered presentation. Skidmore emphasises that an ability to conform to acceptable positions of whiteness, class and heteronormativity sometimes translated to being able to live a visibly queer life that was not available to people who were considered 'deviant' or otherwise did not fit dominant privileged positions. In the context of my research, this was especially true in relation to how society perceived criminality in relation to an individual's race, gender, and class. Skidmore also discusses how criminality could drastically alter how popular narratives constructed one's gender variance; for instance, reshaping someone's gender transgression from being a mastery and an accomplishment to being evidence of deviance was dependant on their association with criminality. As Skidmore argues, while in some circles, such as sexologists, a gender variant body was assumed to be deviant, the public and press were more likely to be forgiving only so long as the gender transgression was accompanied by whiteness and masculinity.[52]

For non-white or immigrant people, however, gender and sexual deviancy had no comparable path to public acceptability. This can be seen within an Australian context from the discourses around Harry Crawford, whose status as an Italian immigrant contributed to their construction as being deviant within the public image. C. Riley Snorton has written about the positioning of transness and race within a historical frame, and how historical theory and political concepts construct conceptualisations of blackness, transness, temporality, and the grammar used presently and historically to narrate these categories. Snorton demonstrates how intertwined theories of gender and race are, including how deeply anti-blackness has

[51] James Morton, "A Scottish History of Trans Equality Activism," in *Trans Britain: Our Journey from the Shadows*, ed. Christine Burns (London: Unbound Publishing, 2018), 231-46.
[52] Emily Skidmore, *True Sex: The Lives of Trans Men at the Turn of the Twentieth Century* (New York: New York University Press, 2017).

historically been intertwined with Western constructions of gender and transgender legibility.[53]

Jen Manion examined ‘female husbands’ (that is, people assumed female at birth who lived, worked, and married as men) in the United Kingdom and the United States in the eighteenth, nineteenth and early twentieth centuries, describing their lives, relationships, press responses, and how they are constructed by sexologists and authorities. As Manion noted, the criminal legal system often struggled to navigate such cases. Arrests would occur, but authorities would release those arrested on the basis that they had not technically committed any crime. Despite the eventual release, however, such cases were nonetheless examples of the criminal legal system interrogating gender and sexual difference and making decisions on why these issues were important to society.[54]

Clare Sears explored the San Francisco cross-dressing laws of the nineteenth century, which prohibited wearing the clothes of the ‘other sex’ as part of laws against public indecency. Sears argued that these laws served to police queer communities right through to the mid-twentieth century as a method of creating and enforcing structures of normative gender. While similar laws were never passed in most of Australia (with the notable exception of Tasmania), the insights from this text shed light onto the motivations and mechanisms of policing of gender nonconformance, and how states and societies construct and enforce codes of normative gender behaviour and presentation. For instance, Sears discusses how the laws signalled the increased role the local governments were taking as social and moral arbiters of the city, as they targeted gender nonconformity and sex work as moral problems. The book also explores the way the laws were enacted and used outside of their initial intention, as authorities used them to respond to multiple gender-based offences, such as feminist dress reformers, female impersonators, and women who dressed as men for increased social

[53] C. Riley Snorton, *Black on Both Sides - a Racial History of Trans Identity* (Minneapolis: University of Minnesota Press, 2017).
[54] Jen Manion, *Female Husbands: A Trans History* (New York: Cambridge University Press, 2020), 3-4.

engagement. This demonstrates that the utilisation of these laws consistently responded to gendered social threats which challenged the normative social order.[55]

Additionally, Sharon Ullman has looked at the practice of female impersonation in early twentieth century America, and the anxieties it exposed in the culture of the time, especially around homosexual activity and gender certainty. Ullman emphasises the experience of gender subversion as both an act of control and one of crisis, which frequently played out as a tool for dealing with other societal anxieties.[56] From these analyses we can see that Australian transgender history, while having its own context and legal development, saw many of the same trajectories and cultural anxieties as other Western nations. International histories can provide useful hypotheses for developments in trans and gender diverse histories in Australia, which I compare and dissect across the course of this thesis.

TRANS CRIMINOLOGY

Although few historians have written about trans people's experience in the Australian criminal legal system, more criminologists have written on this subject in recent years. These studies are mainly contemporary, but they provide valuable insight into trans people's prison experiences, contact with the police, and protections or discriminations under the law. While this thesis is primarily a history research project, there is significant overlap with the criminology field, particularly in the later chapters as the research moves towards the present day. This interdisciplinary approach provides a valuable lens for interrogating and understanding trans experiences of the criminal legal system as something which remains complex and problematic today.

The legislation and policies in place in Australian states and territories pertaining to trans people and the criminal legal system can provide a valuable framework for identifying where legal and legislative shifts have focused over time. Sam Lynch and Lorena Bartels published a paper in 2017 on the laws, policies and legislation pertaining to transgender prisoners

[55] Clare Sears, *Arresting Dress: Cross-Dressing, Law, and Fascination in Nineteenth-Century San Francisco* (Durham: Duke University Press, 2015).
[56] Sharon Ullman, "'The Twentieth Century Way': Female Impersonation and Sexual Practice in Turn-of-the-Century America," *Journal of the History of Sexuality* 5, no. 4 (1995): 573-600.

operating in Australia. The article highlights gaps in the research around the perspectives of transgender prisoners and emphasises that where correctional institutions failed to account for the needs of transgender prisoners, they were failing to uphold trans prisoners' human rights or their duty of care.[57] Toby Miles-Johnson has conducted several pieces of research on relationships between police and lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) people in Australia, as well as the need for comprehensive operational procedures in Australian police forces to establish guidelines for interacting with transgender individuals.[58] This research claimed (as of 2015) that of the eight Australian states and territories, four had publicly available procedures online relating to engagement with the LGBTIQ community, while one specifically detailed procedures for conduct when engaging with transgender individuals.[59]

There has been a longstanding tension between studies focused on LGBTIQ populations and criminology. Jordan Woods has written about the need for criminologists to engage in more nuanced takes on how queer people experience crime. He argues that while historically criminologists pushed a 'deviancy' narrative that framed negative criminal stereotypes towards queer people, the current state of the field is one of relative reticence and hesitancy to engage in the topic of queer criminality, leading to a state where the stereotypes from the past remain unchallenged.[60] J.B. Woods published an overview of the state of queer criminology as of 2013 which identifies the lack of modern data or research on LGBTIQ offenders. Woods states that most of the criminological study on LGBTIQ populations and crime was done prior to the 1980s and focused on homosexuality as a form of criminal deviance, further stigmatising LGBTIQ populations. Woods calls for greater engagement

[57] Sam Lynch and Lorana Bartels, "Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy," *Flinders Law Journal* 19, no. 2 (2017): 185-231.
[58] Toby Miles-Johnson, "Policing Transgender People: Discretionary Police Power and the Ineffectual Aspirations of One Australian Police Initiative," *SAGE Open* 5, no. 2 (2015): 1-14; "Perceptions of Group Value: How Australian Transgender People View Policing," *Policing and Society* 26, no. 6 (2016): 605-26; "LGBTI Variations in Crime Reporting: How Sexual Identity Influences Decisions to Call the Cops," *SAGE Open* 3, no. 2 (2013): 1-15.
[59] "Policing Transgender People: Discretionary Police Power and the Ineffectual Aspirations of One Australian Police Initiative," 3-4.
[60] Jordan Woods, "Queer Contestations and the Future of a Critical 'Queer' Criminology," *Critical Criminology* 22, no. 1 (2014): 5-19.

with queer criminology and argues for research from both an identity and a deconstructionist approach to capture a diverse range of discourse and experiences. The major challenge that Woods identifies is the necessity to conduct nuanced research which does not further stigmatise or pathologise LGBTIQ people.[61]

In recent years, more authors have been discussing the ways in which queer theory and criminology can be utilised together. Matthew Ball has written about how queer criminology can be positioned within other critical criminologies and how it aligns to other deconstructive theoretical approaches within the field.[62] Ball explored several different approaches to queer criminology (e.g., studies which examine criminological issues relevant to queer people, studies which utilise queer theory as an approach to doing criminology), and calls for a 'queering' of criminology, separate from sexuality and gender categories. Ball advocates for queer criminology as an approach which works against the grain of conventional or mainstream discourse, rather than as a category which exclusively refers to an identity category or a set of practices.[63] Derek Dalton has highlighted the challenge of applying queer theory, which emerged from literary studies and deconstructionist ideas, to criminology, which 'demands that ideas be anchored to real-life problems like access to justice, discriminatory police practices, hate crime sentiment and the like.'[64] Dalton cautions against the straight translation of queer theory's propensity for textual analysis to a field which may focus on more tangible benefits for queer victims and offenders. Overall, Dalton argues for LGBTIQ individuals to become visible within a field which has been traditionally resistant to embracing marginalised perspectives.[65]

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[61] Jordan Blair Woods, ""Queering Criminology": Overview of the State of the Field," in *Handbook of LGBT Communities, Crime, and Justice* (New York: Springer, 2014), 15-41.
[62] Matthew Ball, "Queer Criminology, Critique, and the "Art of Not Being Governed"," *Critical Criminology* 22, no. 1 (2014): 21-34.
[63] *What's Queer About Queer Criminology?*, Handbook of LGBT Communities, Crime, and Justice (New York: Springer New York, 2014), 531-55.
[64] Derek Dalton, "Reflections on the Emergence, Efficacy, and Value of Queer Criminology," in *Queering Criminology*, ed. Matthew Ball, Crofts Thomas, and Dwyer Angela (London: Palgrave Macmillan, 2016), 15-35.
[65] Ibid.

Research looking directly at trans and gender diverse people's experiences of the criminal legal system provides essential insight into the current state of transgender policing. In a 2017 study, Wilson et al examined the experiences of transgender women in Australian men's prisons and discussed the specific vulnerabilities and risks these women saw, especially around sexual violence. Some of the key findings presented were that transgender women were generally much safer from sexual assault when placed in women's prisons, and that additional work needed to be undertaken to address the ways that sexual violence and fear tactics played out in a prison environment.[66] At present, this is one of the only studies looking directly at the experiences of incarcerated trans women in Australia.

Leslie Moran and Andrew Sharpe have investigated the relationship between transgender Australians and policing in Sydney, using data from the year 2000. This research highlights the limits of police responses to transgender individuals' experiences of violence, especially when it comes to how police categorise and report on crimes related to transgender people. They also identify a tendency to homogenise or 'transgenderise' such crime – that is, treat an individual's transgender identity as integral to their experience of crime regardless of context – rather than accounting for differences and intersecting axes of experience.[67] While this article primarily looks at crimes perpetrated against transgender people, and is also limited in terms of region, the questions raised by this research and its findings shed light on the relationship between trans people and policing in Australia and highlight challenges around recording data about trans people.

Another very relevant piece of research (which I will discuss in some detail in Chapter 7 of this thesis) is an article by Matthew Mitchell, Isabelle Skaburskis, Brenda Appleton, and myself on trans and gender diverse experiences within Victoria's criminal legal system. This research project consisted of surveys targeted at both trans and gender diverse people and lawyers who have represented trans and gender diverse clients. We aimed to capture the lived

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[66] Mandy Wilson et al., "'You're a Woman, a Convenience, a Cat, a Poof, a Thing, an Idiot': Transgender Women Negotiating Sexual Experiences in Men's Prisons in Australia," *Sexualities* 20, no. 3 (2017): 380-402.
[67] Leslie J. Moran and Andrew N. Sharpe, "Policing the Transgender/Violence Relation," *Current Issues in Criminal Justice* 13, no. 3 (2002): 269-85.

experiences of trans and gender diverse people with the criminal legal system and found that trans and gender diverse people face ongoing structural harm when interacting with both prisons and police. Significant work is needed both to redress these harms and to source more data and information on these experiences, as research is currently so limited.[68]

It is also worth noting that there are still significant gaps in the current research on LGBTIQ populations and criminology. Angela Dwyer has discussed the gaps in the research literature (as of 2011) around the policing of LGBT young people in the Australian context.[69] Dwyer identifies some key understudied themes such as the impacts of secondary victimisation, biases of police and courts towards LGBT populations, the changing modes of homophobic and transphobic hate speech, and the over/under policing of LGBT communities.[70] Dwyer's ongoing research into LGBTIQ experiences with police demonstrates that cis-heteronormativity[71] is embedded within policy, administration, and practice within Australian police institutions.[72] As noted by Dywer et al, even when police make efforts to implement systems to facilitate interactions with LGBTIQ people, such as LGBTIQ police liaison programs, these efforts are limited in their effectiveness by existing homophobia and transphobia within policing organisations and mistrust, scepticism, and cautious engagement from LGBTIQ communities.[73] Chapters 6 and 7 of this thesis will explore this topic in more detail and within a trans-specific context.

Another body of sources are government reports such as *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights 2015*[74] and *TranzNation: A report on the*

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[68] Matthew Mitchell et al., "Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System," *International Journal for Crime, Justice and Social Democracy* 11, no. 2 (2022): 1-14.
[69] Note: I primarily use the acronym LGBTIQ throughout this thesis, except where another acronym is used by another author.
[70] Angela Dwyer, "Policing Lesbian, Gay, Bisexual and Transgender Young People: A Gap in the Research Literature," *Current Issues in Criminal Justice* 22, no. 3 (2011): 416-33.
[71] That is, the pervasive idea that to be cisgender (having a gender identity aligned to one's assigned gender at birth) and heterosexual is the default or 'normal' mode within society.
[72] Angela Dwyer, "Queering Police Administration: How Policing Administration Complicates LGBTIQ–Police Relations," *Administrative Theory & Praxis* 42, no. 2 (2020): 172-90.
[73] Angela Dwyer et al., "Barriers Stopping LGBTI People from Accessing LGBTI Police Liaison Officers: Analysing Interviews with Community and Police," *Criminal Justice Studies* 33, no. 3 (2020): 256-75.
[74] Commission Australian Human Rights, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015).

health and wellbeing of transgender people in Australia and New Zealand.[75] They share the perspective of the targeted group and provide valuable feedback into the current state and statistics about trans lives in Australia today. The *Resilient Individuals* paper echoes and broadens the findings of Wilson et al, stating that transgender men and women in prison are especially vulnerable to abuse, assault, and self-harm when incarcerated.[76] The Victorian Gay and Lesbian Rights Lobby's *Enough is Enough* report from 2000 looked at the experience of discrimination and abuse facing LGBT populations in Victoria. It found that transgender participants were more likely than other groups to report discrimination related to law enforcement and police, specifying significant prejudice from police.[77] This report sought transgender inclusion in the questions to redress the lack of information relating to transgender issues in prior reports (such as the 1994 GLBTQ Legal Advocates and Defenders ((GLAD)) report);[78] however only eighteen transgender people participated in the survey (of a total of 929 respondents). The Australia-wide *Writing Themselves In 4* report can also provide insight into tensions for LGBTQA+ people and their interactions with police: according to the report, only 2% of young people who had experienced harassment or assault based on their sexuality or gender identity had received any help from the police, contrasted with a range of other community connections and service providers.[79] Other national reports, such as the *Diversity in Health* report (2012) made key recommendations for the protection of trans and gender diverse Australians in the criminal legal system, emphasising the need for police to train staff in trans and gender diverse issues and prisons to ensure the appropriate placement of prisoners in gendered facilities while ensuring their safety and providing access to appropriate health care.[80]

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[75] Murray Couch et al., "Tranznation-a Report on the Health and Wellbeing of Transgendered People in Australia and New Zealand," (Melbourne: La Trobe University, 2007).
[76] Australian Human Rights, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights*, 63.
[77] "Enough Is Enough: A Report on Discrimination and Abuse Experienced by Lesbians, Gay Men, Bisexuals and Transgender People in Victoria," (Fitzroy: Victorian Gay and Lesbian Rights Lobby, 2000).
[78] G.L.A.D, *Not a Day Goes By: Report on the Glad Survey into Discrimination and Violence against Lesbians and Gay Men in Victoria* (Parkville: Gay Men and Lesbians Against Discrimination, 1994).
[79] Adam Hill et al., "Writing Themselves in 4: The Health and Wellbeing of Lgbtqa+ Young People in Australia. New South Wales Summary Report," (2021): 76.
[80] National LGBTI Health Alliance, "Diversity in Health: Improving the Health and Well-Being of Transgender, Intersex and Other Sex and Gender Diverse Australians," (2012), 17.

Sociologist Stephen Kerry has written about the experiences of transgender people living in the Northern Territory and the unique challenges they face accessing supports and health care and overcoming barriers to acceptance. Key themes explored in Kerry's book are difficulties participants faced to access medical care due to their remoteness from major cities, the transitory nature of the medical and psychiatric professionals coming through the Territory, social isolation from other transgender individuals, mental health issues including drug and alcohol abuse and suicidality, and problems specific to transgender First Peoples.[81] Many of the topics discussed in Kerry's text are specific to the Northern Territory; however, much of the methodology of Kerry's study, specifically around conducting oral history interviews with trans Australians, is very relevant to the methodology of my own research.

POLICING TRANS AUSTRALIANS

When looking at crime history, it is important not only to look at the perpetrators and victims of crime, but also the institutions which regulate and legitimise what is considered criminal activity: namely prisons, courts, and police institutions.

Mark Finnane has written on the history of policing,[82] and the history of punishment and incarceration in Australia,[83] while Robert Haldane has published an in-depth history of Victoria's police force.[84] These texts examine the development of the police force, the political, social, and technological developments that led to changes in policing, and the pressures, internal and external, which impacted how the police engaged with their work. When looking at the intersection of marginalised groups such as trans and gender diverse people and policing, it is important to examine what forms the basis and driving force of police action and procedure. As Haldane states:

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[81] Stephen Kerry, *Trans Dilemmas: Living in Australia's Remote Areas and in Aboriginal Communities* (New York: Routledge, 2018).
[82] Mark Finnane, *Police and Government: Histories of Policing in Australia* (New York: Oxford University Press, 1994); *Policing in Australia: Historical Perspectives* (Kensington: New South Wales University Press, 1987).
[83] *Punishment in Australian Society* (Melbourne: Oxford University Press, 1997).
[84] Robert Haldane, *The People's Force: A History of the Victoria Police*, 2nd ed. (Carlton: Melbourne University Press, 1995).

> Since 1836 almost every important decision and action on the development of policing in Victoria has come from beyond the force. The police have generally been a conservative, often reactionary, group of public servants who, on low pay and under poor working conditions, have ambled along at the behest of the public.[85]

This is not to imply that police are powerless actors who do not shape social forces through their own actions. Rather, it highlights that the ways in which these interactions play out is a complicated back and forth between police, political influences, and the community at large. As Emma Russell has argued, policing plays an active role in producing and reproducing a social order which classifies queerness as threatening, criminal, and deserving of scrutiny and repression.[86]

A key tool used to police gender non-conforming expression in the first half of the twentieth century were vagrancy laws. As has been described by Dean Wilson, vagrancy laws were an import from England which provided police with ample discretionary powers.[87] Susanne Davies has written about vagrancy laws, discussing the ways in which gender played a motivating factor in how authorities executed these laws, highlighting that 'vagrancy' charges were generally targeted towards people who failed to conform within the acceptable social parameters of respectability. Davies describes how behaviours which fell outside the gendered norm – be that sexual impropriety, failure to participate in the labour market if male, or visibly gender nonconforming behaviour – all were viewed as grounds for a vagrancy charge.[88] Woods has also discussed these uses of the vagrancy laws, specifically noting that (in reference to England and the United States) it was the charge often levied against gender nonconforming people (as I will explore in more detail in Chapter 1).[89]

It is also worth noting how the act of policing itself can affect public perception and law reform. An example of this, although not directly related to policing of trans people, is the

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[85] Ibid., 321.
[86] Emma K. Russell, *Queer Histories and the Politics of Policing* (New York: Routledge, 2020), 20.
[87] Dean Wilson, "On the Beat: Police Work in Melbourne, 1853-1923," Doctoral Thesis (Monash University, 2000).
[88] Susanne Elizabeth Davies, "Vagrancy and the Victorians: The Social Construction of the Vagrant in Melbourne, 1880-1907," Doctoral Thesis (University of Melbourne, 1990), 30.
[89] Woods, "Queer Contestations and the Future of a Critical 'Queer' Criminology."

context which led to homosexual law reform in Australia. In 1976, methods from Victoria Police to set plain clothed police officers to imitate and arrest gay men for 'soliciting with homosexual intent' led to public outrage from politicians, activists, and the community questioning police actions of entrapment. This backlash ultimately led to creating the climate for law reform in 1980.[90] This serves as an instance of how policing, law, the press, and the public all influence one another, and the actions of one element of this dynamic cannot be interpreted without consideration of how they feedback into the system itself.

Policing of gender norms also occurs in the field of medicine, where boundaries of what is considered acceptable gendered behaviour can be regulated from a position of authority. There is a lot of overlap between transgender studies and women's/gender studies when looking at the psychological changes which shifted the way transgender people were pathologised across the twentieth century. Jill Julius Matthews has written on the rise of the medical field and how it enforced gendered expectations in Australian society in the early twentieth century. As Matthews states: 'Medicine proclaimed monogamous heterosexuality to be the scientific standard of normality, … then began to categorise, theorise and attempt to cure all forms of feelings, thoughts and relationships that did not conform.'[91] Ruth Ford has also addressed this topic, citing that Australian doctors, lawyers and journalists were drawing from theories which presented homosexuality as a psychological abnormality and congenital deficiency.[92] As chapters 2 and 3 will show, ideas about homosexuality, sexual inversion, and gender-nonconformity were frequently intertwined.

As this thesis moves towards the twenty-first century, the analysis of criminal legal institutions shifts to discuss the ways that, despite many changes to policy and practices within both prisons and policing organisations to be more inclusive of trans and gender diversity, many problems are not only ongoing, but embedded in these institutions. As noted by Emma Russell, police play a 'systematic role in upholding the "acceptable" boundaries of

[90] Graham Willett, "Police Go Gay," in *Secret Histories of Queer Melbourne*, ed. Graham Willett, Wayne Murdoch, and Daniel Marshall (Australian Lesbian and Gay Archives, 2011), 115.
[91] Jill Julius Matthews, *Good and Mad Women: The Historical Construction of Femininity in Twentieth-Century Australia* (Sydney: George Allen & Unwin Australia, 1984), 113.
[92] Ford, "'The Man-Woman Murderer': Sex Fraud, Sexual Inversion and the Unmentionable 'Article' in 1920s Australia," 158-96.

sexuality and gender.'[93] Police are now typically enthusiastic to present a public face of being LGBTIQ inclusive through participation at Pride events and implementation of Gay and Lesbian/LGBTIQ Liaison Officers. Historically, however, police have played a key role in enforcing homophobic and transphobic laws and societal biases.[94] In many ways, recent developments to integrate LGBTIQ people into the social groups 'protected' by police involves assimilating LGBTIQ people into 'dominant citizenship structures,' with an emphasis on respectability politics.[95]

Similarly, the nature and structure of prisons creates many challenges for integrating trans and gender diverse inclusion in any meaningful way. In *Captive Genders: Trans Embodiment and the Prison Industrial Complex*, the authors state: 'gender, ability, and sexuality as written through race, class, and nationality must figure into any and all accounts of incarceration, even when they seem to be nonexistent.'[96] As I argue throughout this thesis, and particularly in the later chapters, Australian criminal legal systems, and prisons especially, have historically (and, in many ways, presently) worked on the assumption that trans and gender diverse people do not exist. We can see this clearly in the rigid binary gender divisions built into prisons. But it is essential to interrogate this assumption of nonexistence – firstly, because trans and gender diverse people do exist, and therefore have unique challenges within these structures, and secondly, because an interrogation of carceral practices through the lens of trans and gender diversity exposes issues with the efficacy and purpose of incarceration for all groups.

METHODOLOGY

As this thesis spans a large time period which saw much social and legal change in relation to transgender and gender nonconforming lives, it is necessary to utilise multiple methods and sources. I primarily utilise archival sources including media reports, however I also conducted oral history interviews to supplement the research in part 3. Part 2 also includes

[93] Russell, *Queer Histories and the Politics of Policing*, 2.
[94] Ibid., 3.
[95] Ibid., 6.
[96] Eric A. Stanley and Nat Smith, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Edinburgh: AK Press, 2011), 4.

excerpts from oral histories conducted by my supervisor, Professor Noah Riseman, from his broader ARC Discovery project on Australian trans history. Inclusion of first-hand sources is necessary, as one of the main weaknesses of archival research when looking at trans history is the lack of voices from the community itself, as most sources come from those in positions of institutional power.

Rawson has discussed some of the research challenges in trans archival history. They highlight both the flexibility as an umbrella term of the word 'transgender,' and its position as terminology arising out of predominately white, middle-class experience. As Rawson states:

> It seems that there are two potential pitfalls with the use of 'transgender' in archives. First, it can be used too specifically to only refer to those materials that self-referentially use the term. Or second, it could be used too liberally and could start describing people who would explicitly counter-identify with the term.[97]

Rawson also emphasises the necessity of archival researchers to think beyond the category of 'transgender' in research, especially when dealing with older records. While the records may exist, they are likely to be coded in language which does not conform to present usage.[98] Kathleen P Long has also discussed the relationship between trans history, the archives and the researcher, noting that even when we find documents which provide 'unmediated' testimony from the trans subjects themselves, these testimonies are generally presented through the subject's own efforts to make their experiences acceptable or legible to authorities. Therefore, historians working with these documents are required to interpret and mediate between these documents, the context in which they were produced, the individuals' statements, and the audiences.[99]

For my research, I utilise a range of available archival sources. My main sources for (approximately) the first half of the century are a combination of Victorian press coverage

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[97] Rawson, "Accessing Transgender // Desiring Queer(Er?) Archival Logics," 131.
[98] Ibid.
[99] Bychowski et al., "'Trans*Historicities': A Roundtable Discussion," 663-64.

recorded on Trove to identify cases, and the documents held by PROV relating to justice, crime, and law. These included criminal trial briefs, police correspondence records, registers of prisoners, and records of court cases. For the post-Second World War period, I primarily use a combination of newspaper reporting accessed through the State Library of Victoria (including newspapers from other states and territories) and archival sources from the Australian Queer Archives (AQUA). These sources are diverse and range from curated press clippings to ephemera from Roberta Perkins' personal archives. Other smaller archival offerings have also provided useful insight, such as the records of the *Polare* publication through the Gender Centre archives online. Throughout the century I also utilise Hansards from the state parliaments around Australia, as they provide important debate and insight into the political progression of issues relating to trans and gender diverse incarceration particularly.

To supplement this archival research, I obtained approval from the ACU Human Research Ethics Committee to conduct oral history interviews with trans and gender diverse Australians who have had interactions with the Australian criminal legal system. I have also drawn from oral history interviews conducted by other researchers where relevant. I advertised online through relevant groups, including Transgender Victoria's social media pages and trans and gender diverse Facebook pages. Additionally, I went through ethics processes and advertised through Thorn Harbour Health and ACON's channels and social media. These are the peak LGBTIQ health bodies in Victoria and New South Wales respectively and thus have great reach. The number of interviewees was small, which was expected due to the sensitive nature of the project and the fact that interviews were conducted in 2020 and 2021 during the Covid-19 pandemic. I conducted six interviews – two interviewees were transgender men (one of whom was a Brotherboy[100]), two were nonbinary, one was a transgender woman, and one was a cisgender man. Three interviewees had been in prison and the remainder had interactions with police (as did those who had been incarcerated). The cisgender interviewee had been incarcerated alongside transgender

[100] Note: Brotherboy and Sistergirl are terms used by many Aboriginal and Torres Strait Islander people to describe trans and gender diverse identities. See: "Trans Mob," TransHub, https://www.transhub.org.au/trans-mob (accessed 12 December 2022).

prisoners and worked while in prison as a peer educator in an LGBT support group. All interviewees' interactions with the criminal legal system had taken place in the twenty-first century, and therefore they feature in chapters 6 and 7. The sources I have used in this thesis are deliberately diverse: trans and gender diverse histories are often scattered and inconsistently recorded, and it is my intention to use what has been available in a period of restricted access (due to the Covid-19 pandemic) to explore these themes in a flexible and organic way. These histories are not exhaustive, but part of the joy of trans history can come from 'queering' these eclectic sources and examining them to begin to paint a picture of a shared history.

Regarding my methodology for collecting and conducting oral history interviews, I have been influenced by the work of sociologist Stephen Kerry, whose research used several tools to collect data from transgender Australian participants. Kerry initially consulted with individuals and organisations with knowledge of transgender issues in the Northern Territory to determine the need for the research being conducted, and for input on the research focus areas. Kerry then conducted a pilot online survey to gauge participant engagement in the research. Following this, Kerry conducted a smaller number of in-depth interviews with select participants. For both the online survey and the interviews, engagement with local and national organisations involved in trans and gender diverse issues assisted in advertising and recruiting participants. Although my research is in the field of history rather than sociology and deals with the additional factor of experience with the criminal legal system, Kerry's method is useful for several reasons. It demonstrates the feasibility of conducting a small number of interviews with trans Australians to produce insightful research, and Kerry's detailed methodology provides a clear example of this working. Kerry's research also highlights the researcher's own position as an outsider to the communities being engaged with and shows some clear ways of negotiating these barriers.[101]

In conducting this research and undertaking oral history interviews, I needed to be mindful of how I was positioned in relation to interviewees, whether it be as a community insider or

[101] Kerry, *Trans Dilemmas: Living in Australia's Remote Areas and in Aboriginal Communities*.

an outsider. There are several layers to this. As I was conducting interviews with ex-prisoners, I am someone who has not been a prisoner and thus there were likely to be cultural/experiential barriers in these discussions. As Ken Howarth has discussed, 'tuning-in' to the prison culture is a challenge to those outside it. Along with this, a researcher is likely to bring their own biases and assumptions about prison culture and prisoners with them.[102]

There are also specific considerations to conducting interviews with transgender subjects. M. Paz Galupo has written on the practice of researching as a cisgender academic,[103] highlighting pitfalls when cisgender researchers approach trans topics. These pitfalls include overlooking important issues when formulating research topics and phrasing interview questions, barriers in how willing trans participants are to engage with a cis researcher, how well participants trust their intentions, and how cis perspectives may interpret results. While these might not seem immediately relevant because I am transgender, in many ways these issues remain pertinent even when both interviewer and interviewee are trans. In my experience, the rapid development of transgender activism in the last few decades has resulted in stark 'generation gaps' between older and younger transgender people. Language and understandings of transgender identity have changed significantly and often lead to something of a cultural barrier between transgender people of different ages and experiences. Many of the approaches offered by Galupo – such as prioritising a range of trans perspectives in citation and collaboration, seeking input from trans communities, and reflecting on the biases of our own experiences – are also essential to add depth and diversity in my own work.[104]

Oral history has some clear challenges as well as unique benefits which must be considered and negotiated while conducting research. Oral historians work with memory and personal accounts. Memory is a complex process and the way that people recall and recount events from their past changes over time. Lawrence Langer has highlighted that factual distortions

[102] Ken Howarth, "The Strangeways Prison Oral History Project," *Oral History* 20, no. 1 (1992): 76.
[103] Note: 'cisgender' refers to an individual whose gender identity aligns with their assigned gender at birth.
[104] M. Paz Galupo, "Researching While Cisgender: Identity Considerations for Transgender Research," *International Journal of Transgenderism* 18, no. 3 (2017): 241-42.

which occur in the telling of our history may not necessarily be weaknesses, and that memory shifts around past events can provide insight into the complex layers of how individuals recall and make sense of their past.[105] There are many factors which may cause memory to become distorted over time. Alistair Thomson has described how Australian and New Zealand Army Corps (ANZAC) soldiers' accounts adapted over time to make sense retrospectively of significant events, changing language and cultural meanings, and changing life circumstances. These adaptations can tell us a lot about how culture and narrative shifts around events in people's recollection.[106] This does not mean that there is not also value in corroborating testimony with other available sources. Rather, that doing so further sheds light on the processes of how memory changes to exaggerate, reduce or incorporate and amend elements.[107] As Michael Frisch has stated:

> Far from being restricted to the historian's study, these capacities are shown to be not only present, but central to the way we all order our experience and understand the meaning of our lives. There seems to be no reason why, in order to decipher the meaning of memory, historians should feel uncomfortable about applying the same reflective, generalizing intelligence to the documents of oral history.[108]

We must also consider the position of interviewer within the context of an oral history interview. The interviewer is not a neutral third party. Testimony from an interviewee is mediated through their perceptions of their audience, the interviewer, their culture, and their own formulation of their self. The interviewer's questioning and their own dynamic with the interviewee create the shared product of the interview. These subjectivities are not a weakness, but they are something which must be acknowledged, with the understanding that

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[105] Lawrence L. Langer, *Holocaust Testimonies: Ruins of Memory* (New Haven: Yale University Press, 1991), xv.
[106] Alistair Thomson, "Anzac Memories Revisited: Trauma, Memory and Oral History," *The Oral History Review* 42, no. 1 (2015): 25.
[107] Mark Roseman, "Surviving Memory: Truth and Inaccuracy in Holocaust Testimony," *The Journal of Holocaust Education* 8, no. 1 (1999): 1-20.
[108] Michael H. Frisch, *A Shared Authority: Essays on the Craft and Meaning of Oral and Public History* (Albany: State University of New York Press, 1990), 13.

preconceptions on both sides of the interview will impact on the primary source document that is produced. As historians it is our job to analyse and decode this product.[109]

One of the strengths of oral history is its position as a practice which can give voice to those who are often excluded from historical narratives. However, even as oral history empowers those who have been silenced, it is not free from methodological problems relating to power within its own production. There are power imbalances in the interview relationship, and the historian remains the final editor of the publication and interpretation of the interview.[110] Frisch advocates for shared authority and the production of oral history interviews to democratise the process and foster greater historical literacy between academia and the public. Of course this kind of methodology creates challenges for the historian, for whom it is more time consuming, demanding, and challenging when researcher and subject's interests in the final product do not align.[111] Oral history also comes with a challenge regarding representation: any given interview or testimony will only ever be one person's perspective and even taken together it would not be possible (especially in a project of this scale) to have a truly representative historical account. There is a tension then, as Frisch has discussed, that even when presented as only a sampling of perspectives, the very act of presenting these voices services to create a narrative to those who consume it which will, by the very act of presenting it, become representative.[112]

There are limitations to the interviews that I have conducted for this research. Interview participants who opted into the project all had interactions with the criminal legal system within the 2000s-2020s, meaning their experiences were heavily focused in the period covered by the last section of the thesis. Interestingly, the interviewee demographic slanted towards transgender men and transmasculine nonbinary people over transgender women or transfeminine people. I can only speculate on why this may have been the case, and it may relate to my own positionality as a transmasculine researcher – perhaps participants felt more comfortable sharing their stories with a researcher who shared similar gendered experiences

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[109] Lynn Abrams, *Oral History Theory* (London: Routledge, 2010), 55-76.
[110] Ibid., 154-62.
[111] Frisch, *A Shared Authority: Essays on the Craft and Meaning of Oral and Public History*, xx-xxii.
[112] Ibid., 155.

to their own. Regardless of the reason, it is an important element to consider when reading these interviewees' experiences. In some ways, however, this is also a strength: much of the research which has previously been conducted on trans experiences in the criminal legal system has focused on the experiences of trans women, and transmasculine and nonbinary interactions are a welcome addition to these histories.

Another interview limitation was the Covid-19 pandemic, and the restrictions it placed on both finding and speaking to interviewees. I conducted all interviews over Zoom, which had both strengths and weaknesses. It may be harder over online video formats to create a space quite as conducive to conversation required for interviewing. Missing physical and verbal cues may impact the natural flow of conversation, and it may be more challenging for an interviewer to establish rapport with an interviewee. However, conducting interviews in this format also made it possible to speak easily to participants from all around Australia, to the benefit of the research. However, the pandemic also meant that it was not possible to speak to participants who were currently incarcerated (although this would have come with challenges even in a non-pandemic world). While I did advertise this project through the *Inside Out Solidarity Network* newsletter, only one interviewee was in prison when we began correspondence, and he was released prior to the interview itself. These limitations are notable, but they demonstrate the necessity of ongoing research in this area to ensure a wide range of perspectives and experiences continue to be gathered.

Negotiating these challenges demonstrates the necessity of trans research. Due to the scarcity of archival sources which deal directly with trans identity, historians are challenged to find methods and approaches to identify and reconstruct this history which is otherwise sorely underrepresented. Likewise, the collection of primary historical accounts through methods such as oral history provides us with tools to capture histories from the perspectives of trans people which cannot be found through other means.

CONCLUSION

There are many challenges and complex issues to face when it comes to researching trans and gender diverse crime history. However, there are also opportunities. Changes in language

and terminology, as well as how we understand and conceptualise gender, mean that it is difficult to identify transgender subjects early research without labelling them anachronistically. Reading into these histories, however, provides ways to examine how legal reactions to gender nonconformity have shaped the experiences of trans, gender diverse, *and* cisgender people in all periods. By examining law and police practices, we can observe how social and political shifts, with new concepts of gender and medicine impacting how trans and gender diverse people were understood socially and legally over the century in turn shaping the ways that law was constructed and enforced.

In the past, Australian transgender history has primarily looked at high-profile cases of gender crossing individuals, and there is a significant gap in the research literature for the mid to latter part of the twentieth century. This thesis addresses some of the gaps in Australian transgender criminal legal history, using both a historical and a criminological lens. While I cannot hope to fill in everything that is currently missing, this thesis provides a broad overview of some of the key themes, tension points, and ongoing issues to present a current state of the field and advocates for continuing research and broad systemic change in the Australian criminal legal system.

CHAPTER 1

POLICING GENDER 'MASQUERADERS'

At the turn of the twentieth century and in the decades immediately following, Australians, by and large, had not yet been exposed to emerging concepts of trans and gender diversity. This did not mean, however, that gender nonconforming expression and behaviour escaped the attention of the criminal legal system. This chapter examines the policing of gender nonconforming presentation behaviour under vagrancy and offensive behaviour laws during the first two decades of the twentieth century. Such policing occurred around Australia; however, I focus on Victoria primarily because, as one of the most populous states with robust archival records, it makes an excellent case study.[113] During these decades, most press reports of warrants and arrests for gender nonconforming presentation focused on 'female masqueraders' – female assumed individuals presenting as male within public spaces.[114] I use the terms 'female masquerader' and 'male masquerader,' as well as the term 'masquerading' throughout this chapter to discuss this specific brand of gender nonconforming behaviour, as these were common phrases used in the press at the time. It is important to note, however, that 'masquerading' did not only refer to gender nonconformity: it could refer to a range of boundary crossing behaviours, including presenting oneself as a member of a social or financial class or occupation that one did not 'belong' to. These arrests usually fell under the charge of vagrancy, which police used to target a range of public order offences. Although designed to police those who were consorting, habitually drunk, had no means of support, or other similar offences, in practice police used these charges to enforce a type of middle-class morality and to police what was deemed to be mainstream acceptable

[113] Additionally, for practical reasons, as this thesis was written during the Covid-19 pandemic and these chapters were particularly impacted by ongoing lockdowns, interstate travel to access physical archives for court records was not feasible.
[114] For the purposes of this chapter, I will be referring to these cases using the terminology of many of the reports surrounding them: 'female and male masqueraders.' 'Female masquerader' referred to an individual assumed to be female at birth and presenting as male. 'Male masquerader' referred to an individual assumed male at birth and presenting as female.

behaviour. To this end, vagrancy was not only a charge, but also a label. 'The vagrant' was an outcast social type, defined by poverty and a cycle of criminal behaviour.[115]

There was also a narrative 'type' of woman who disguised herself as a man, usually to seek work or adventure, who was sometimes depicted in public discourse.[116] This character, usually presented as a young, bold girl, was an accepted and even celebrated individual: a woman who was able to tackle the tough grind of a man's work in the harsh environment of Australia.[117] This adventurous figure contrasted with the image of the vagrant, who was considered an unproductive, immoral individual, impoverished and unable to conform to the social expectations of their gender.[118]

How much, then, did the positive connotations of the adventurous ideal of the 'female masquerader' make their way into sentencing within the courtroom, and (vice versa) to what degree did the negative image of the vagrant influence how the press reported these cases? A deciding element was the perceived social class and/or respectability of the accused. In cases where the 'masquerader' was deemed otherwise respectable or conducted themselves in line with middle-class ideals, the gender nonconformity was more likely to be read in line with the positive narratives of the female 'masquerader' and was less likely to be charged with an offence. When the gender nonconforming person had been previously charged for other crimes or when they failed to meet middle-class social ideals of respectability, they were more likely to receive fines or face imprisonment and be presented in an unfavourable light in the media. In either case, the gender crossing was not the crime in and of itself, even if it might have been the reason for arrest: the crime was being gender nonconforming *while* being publicly poor or criminal.

Male 'masqueraders,' on the other hand, had no prevailing positive narrative model with which to align themselves. Cases involving this type of gender nonconformity were less frequently reported (however, as will be expanded on in Chapter 2, would grow in number

[115] Kimber, "'A Nuisance to the Community': Policing the Vagrant Woman," 276.
[116] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 34.
[117] Ibid., 47.
[118] Davies, "Vagrancy and the Victorians: The Social Construction of the Vagrant in Melbourne, 1880-1907," 12.

in the decades to follow). When they appeared, they were more likely to be reported on as offensive or indecent behaviour rather than vagrancy, suggesting that they were being interpreted within a different framing. Judging from the categorisations in the Victorian *Police Offences Acts*, charges for offensive or indecent behaviour tended to focus on actions in public places which were considered obscene and insulting.[119] Often the accused would frame these incidents as jokes, and whether charges were sustained would rely on whether the accused could demonstrate that they did not behave in an immoral manner. These cases were thus more likely to raise questions of public indecency and deviant sexuality.

The vagrant archetype was gendered in such a way that it did not typically include male assumed people presenting as female. Likewise, the concept of sexual deviancy was gendered to apply differently to those perceived as male and those perceived as female. Gender nonconformity was not categorically deviant for female assumed people, for whom deviance focused much more on heterosexual fidelity and sexual behaviour within marriage.[120] The distinction in methods of prosecution for what was, on the surface, the same act, provides valuable insight into perceptions of gender and gender nonconformity in the early twentieth century.

This chapter examines how established narratives, class, and constructs of criminality determined how each case would play out in charges, sentencing and press reports in the first two decades of the twentieth century. Most cases discussed in this chapter related to non-indictable petty offences, meaning that reporting (being the dominant source of information on them) was influenced by the newsworthiness of the case: in most instances, the intrigue of the 'masquerade.' When alongside an indictable charge which was more serious, gender nonconformity still factored into sentencing by raising questions in the courts about the perpetrator's mental soundness and capacity. The most important aspect for those charged

[119] *Police Offensive Amendment 1891* (VIC), S.26.
http://www.austlii.edu.au/au/legis/vic/hist_act/poa1890140.pdf
[120] Nell Musgrove, "'Filthy' Homes and 'Fast' Women: Welfare Agencies' Moral Surveillance in Post-Second World War Melbourne," *Journal of Australian Studies* 27, no. 80 (2003): 112-13.

was to frame their presentation in a way that fit within acceptable parameters of dress and behaviour, lest they be framed as disruptive or obscene.

Policing Gender Nonconformity and Public Order

There are two types of policing which I examine here: first, the mechanisms of policing in Victoria at the turn of the century, particularly when it came to petty or non-indictable offences. Second, I discuss 'policing' in reference to gender regulation. Just as socially we do not exist outside of the jurisdiction of the law/criminal legal system, the criminal legal system does not exist outside the social norms which regulate society, meaning individuals are subject to both the law of the criminal legal system, but also the 'laws' of society which govern social interactions, identity and meaning. Society creates these norms through the production of a common standard. As stated by François Ewald: 'The norm is a means of producing social law, a law constituted with reference to the particular society it claims to regulate and not with respect to a set of universal principles.'[121] The power behind these societal norms exerts itself over the actions of individuals, both in public and in private, and how they govern their own behaviours. Societies do this by creating the systems, constraints, and structures which persuade individuals to act in accordance with these norms.[122] What is formally criminalised and what is policed on the ground are not always the same, and the latter depends on what norms and societal values are being enforced through policing.[123]

As within the judicial system, stepping outside of the designated boundaries of the gender binary was seen as breaking a social law which could be corrected through punishment. [124] Judith Butler outlines this dynamic in *Gender Trouble,* where they argue that society polices gender in order to maintain gender's cultural credibility and produce its meaning.[125] Because the social customs associated with gender are all-encompassing to how people navigate their lives, it would be a mistake to treat such constraints as separate from the judicial laws and

[121] Francois Ewald, "Norms, Discipline, and the Law," *Representations*, no. 30 (1990): 154-55.
[122] Michel Foucault, "The Subject and Power," *Critical inquiry* 8, no. 4 (1982): 789.
[123] Nicola Lacey, "Historicising Criminalisation: Conceptual and Empirical Issues," *The Modern Law Review* 72, no. 6 (2009): 943.
[124] Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 141.
[125] Ibid., 190.

policing when looking at criminology or crime history. The police and judicial laws exist within the social context in which they operate. Likewise, the social customs of gender could not exist without the regulatory practices which codify and sanction them – which may in some cases include law enforcement. Instead, contravening of gender norms is, as Butler puts it, 'already embedded in the pervasive and inarticulate law and, indeed, generated by the very law [it is] said to defy.'[126]

One of the key mechanisms that police used to monitor and regulate social behaviour, including gendered presentation and activity, was public order laws. Regulatory offences expanded significantly during the nineteenth century as increasingly urbanised lifestyles required, in the view of 'respectable' citizens from the middle and upper classes, laws which could enforce social standards of moral, respectable public conduct in an industrialised world.[127] Vagrancy laws, which were enacted in Britain centuries prior with the intention of controlling the movement and actions of the unemployed, were adopted into Victorian (and other states) laws as a means of monitoring and controlling the 'vagrant' population.[128] Policing aimed to prevent both crime and low-level disorder, as well as disruptive and anti-social behaviour, in line with these values of respectability and public conduct.[129] Nineteenth century Victoria was socially tumultuous as the population boomed and government systems relied on police to project an ideal of stability and authority, as well as (ideally) modelling the kind of moral and respectable behaviour that citizens were expected to follow. However, towards the end of the nineteenth century, the role of police as a symbolic ideal for moral conduct was beginning to shift towards a focus on identifying and policing 'aberrant' individuals.[130]

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[126] Ibid., 133.
[127] Nicola Lacey, "In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory," *The Modern Law Review* 64, no. 3 (2001): 365. David Philips and Susanne Elizabeth Davies, *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (Carlton: Melbourne University Press, 1994), 145.
[128] *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia*, 145.
[129] Barry S. Godfrey, *History and Crime*, ed. Paul Lawrence and Chris M. J. Williams (California: SAGE Publications, 2008), 53-55.
[130] Barry Godfrey and Graeme Dunstall, *Crime and Empire 1840 - 1940* (United Kingdom: Willan Publishing, 2005), 109-13.

Although I use the terms 'middle and upper classes' above, social classes in Australia were fluid in a way that shaped how Australians interacted with ideas of social position and signifiers. Some early colonists settled as landholders, with aspirations to build estates for themselves which would function as landed elite like back in England. However, the end of penal transportation and the boom of the gold rushes changed the social dynamics of the colonies, replacing this potential for a gentry with a diverse economy of immigrants. This led to a widespread anxiety about where standards of moral social virtue in the colonies would derive. Australians needed some way to mark status in society, but without the hierarchies and pedigrees back in England, new tools needed to be established.[131]

The policing of disorder and public behaviour was a form of social control motivated by ideas which linked social class to perceived personal characteristics and morality.[132] During the latter decades of the nineteenth century, Melbourne saw a massive population boom and grew into a metropolitan centre. With this increasing urbanisation came concerns about the kinds of moral decay which could accompany these changes.[133] The character of the vagrant exemplified this fear, and the poor and working class were intrinsically linked with criminality within this stereotype. As the poor or working class were likely to inhabit or be present in public spaces, where police authority was strongest, [134] they were also more likely to be targeted by these laws. [135] Systems like vagrancy laws or police patrolling 'beats' focused on managing these classes and criminal types. The specific policing of public crimes against morality or decency was deliberate: these regulatory frameworks were about criminalising that which constituted public immorality. The same acts in private fell out of

[131] Penny Russell, "The Brash Colonial: Class and Comportment in Nineteenth-Century Australia," *Transactions of the Royal Historical Society* 12 (2002): 433-35.
[132] Philips and Davies, *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia*, 143.
[133] Ibid., 142.
[134] Godfrey, *History and Crime*, 53.
[135] Davies, "Vagrancy and the Victorians: The Social Construction of the Vagrant in Melbourne, 1880-1907," 23.

the scope of policing in a sort of reluctant tolerance that, if kept hidden, the acts would not be punished (although this would begin to change in the decades to follow).[136]

There was a gendered aspect to how public order offences were policed in Victoria both broadly, and specifically related to gender nonconformity. Records from the *Victoria Police Gazette* show that around the turn of the twentieth century, men were arrested for vagrancy or offensive/indecent behaviour almost twice as often as women.[137] However, this chapter is asking a somewhat different question harder to capture in the data, which cannot tell us which of those arrests related specifically to gender nonconformity – a much less common offence than other public order concerns. It seems that, for gender nonconformity specifically, the gendered element to policing played out differently. From searches in press reports related to gender nonconforming expression, it appears that between 1900 and 1919, female assumed people presenting as male were arrested and reported on more often than male assumed people presenting as female, and there was a significant difference in the charges they received. I found no examples of male assumed people presenting as female from this period in Victoria who were charged with vagrancy. All male 'masquerading' cases were charged with offensive behaviour. By contrast, female assumed people presenting as male were charged with either offence, but vagrancy much more often than offensive behaviour.[138] Vagrancy as a charge by no means excluded men – more men were arrested for vagrancy overall than women – but why was this different when it was specifically related to gender nonconformity? The differences in how authorities applied these charges speaks to the

[136] Clare Sears, "Electric Brilliancy: Cross-Dressing Law and Freak Show Displays in Nineteenth-Century San Francisco," *Women's Studies Quarterly* 36, no. 3-4 (2008): 177. See Chapter 2 of this thesis for discussion on the policing of private spaces in the 1920s-40s.

[137] *Historic Trials Data*, via The Prosecution Project, https://app.prosecutionproject.griffith.edu.au/ (accessed 15 November 2020). This data was sourced from the Victorian Police Gazette Collection, as this captures low-level offences for both genders. The data for this collection goes from 1857-1906, so does not capture the full period under review, but gives an idea of the proportions of arrests at the beginning of the twentieth century.

[138] This is based off data sourced by searching the TROVE collection using key words relating to crime ("Vagrancy", "Offensive Behavior", "Indecent Behavior" combined with "Dressed", "Masquerader", etc.), and only includes Victorian cases. This sampling by no means includes all reporting in relation to gender noncompliance for the period under review: only those which were captured in the search terms and were evidently relevant to the research topic. However, as a representative sample, it can provide an estimate of the prevalence of reporting on these incidents. For a more detailed breakdown see: Adrien McCrory, "Policing Gender Nonconformity in Victoria, 1900-1940," *Provenance*, no. 19 (2021).

differences in how male and female gender nonconformity was understood, and what issues and anxieties factored into how they were policed.

The policing of public order and gender nonconforming presentation can provide insights into the kinds of social anxieties to which the police – and society at large – were responding. Clare Sears has argued in the American context that laws against cross-dressing used clothing as part of a wider practice of policing those within society who inhabited public spaces during a time of large scale social upheaval.[139] While most Australian states and territories did not have formal cross-dressing laws as in San Francisco (the focus of Sears' work), the use of other regulatory laws appears to have served a similar purpose, with dress likewise being used as a method of identifying those who did not 'belong' in public view. Although judges and those who enforced judicial authority did so with the intent of supporting the 'public interest,' the reality that judges were drawn from the educated middle and upper classes meant they tended to promote the interests of that group.[140] The mechanisms through which the poor or working class were policed, and how class factored into policing and court experiences, was a two-way process. Social order laws such as vagrancy disproportionately targeted the working class. Likewise, the perceived social class of an individual (including how they presented themselves to align with an ideal of respectability) influenced how police or court officials perceived their crime.

RESPECTABILITY

Although intertwined, the concept of respectability goes beyond just class. What we would now consider middle class values developed in many ways out of respectability.[141] While 'respectability' did align strongly with social status, in contrast to earlier concepts such as gentility, it did not rely intrinsically on someone's birth status. Instead, a person's behaviour became the focus of whether they were respectable. In a world which was changing rapidly

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[139] Sears, "Electric Brilliancy: Cross-Dressing Law and Freak Show Displays in Nineteenth-Century San Francisco," 170.
[140] Alan W. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, Third ed. (Cambridge: Cambridge University Press, 2014), 34-35.
[141] Woodruff D. Smith, *Consumption and the Making of Respectability, 1600-1800* (New York: Routledge, 2002), 221.

in response to industrialisation, revolution and new forms of wealth, control over the body, sexuality and decorum became important as 'respectable' society sought to create codes which could govern behaviour.[142] Theoretically, one could be respectable regardless of class (excluding the lowest classes), and to conduct oneself in a respectable manner demonstrated moral competency.[143] Performing respectability was beneficial to those who were not wealthy, as the standards of behaviour and the means to control their public perception provided relief from 'the stigma of being poor and powerless.'[144] Respectability was in many ways centred around the family: virtuous behaviour was to be modelled within the family, and the ability to project the image of the family as a unit living up to these practices of respectability was essential to maintaining the status.[145] This is important because a family's status as respectable could heavily influence how people were treated when they came into contact with the criminal legal system.[146]

Although focusing on nineteenth-century Kent, Carolyn Conley's study of respectability and criminal legal systems provides insight into many of the interplays between the processes of class, respectability, and policing – not only for those who were deemed respectable, but also for those who were not. How respectability played into sentencing was complex and tended to draw a line between those who came from a respectable background and those who were 'real' criminals – with respectable people usually receiving lighter sentences. One-off incidents of charges such as vagrancy or offensive behaviour from respectable people could be excused as stemming from extenuating circumstances. The logic that people of overall good behaviour and repute were less likely to cause ongoing offences for the community meant that they were deserving of leeway. [147]

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[142] George L. Mosse, *Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe*, First ed. (New York: H. Fertig, 1985), 4-9.
[143] Smith, *Consumption and the Making of Respectability, 1600-1800*, 206 - 10.
[144] Janet McCalman, "Class and Respectability in a Working-Class Suburb: Richmond, Victoria, before the Great War," *Historical Studies* 20, no. 78 (1982): 101.
[145] Smith, *Consumption and the Making of Respectability, 1600-1800*, 210.
[146] Ibid., 205.
[147] Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (United States: Oxford University Press, 1991), 173-201.

Policing of public order offences in the first decades of the twentieth century responded to and reinforced concerns regarding public decency and morality, including regulating the boundaries of what was acceptable for gendered presentation. Although these ideals of respectability derived from what would broadly be considered upper- or middle-class values, they were deeply internalised, also, by the working class. The working classes were, therefore, rhetorically divided in the public image into two groups: the deserving (or respectable), and the undeserving (or rough).[148] Respectability was not simply an ideal pushed downward, from above, but something which the working class would measure themselves against, and police their families and themselves accordingly.

Respectable people existed in contrast to those who were considered the 'criminal classes.' The concept of a criminal class – separate and distinct from the rest of society – was appealing in many ways. It was comforting for people to think that society's ills could be placed upon a body of vagrants and thieves who were incurably viceful and not suited to the demands of society. In this framing, solving crime was merely a matter of solving the problem of this class, rather than considering that crime may come from all parts of society. If properly educated, the young people of this class may become moral, respectable individuals over time – and the criminals would gradually die off.[149] The presence of this vagrant population served also as a caution to the respectable classes of the precarity of their own position if they failed to live up to appropriate behavioural standards.[150]

This meant that rehabilitation was not considered an option for those already inducted into the criminal way of life. They could not be reintegrated into community and society.[151] For those who were stuck in this cycle of poverty, crime, homelessness, and unemployment, therefore, it became impossible to escape the consistent relapses into the criminal legal

[148] Anthony Birch, "Framing Fitzroy: Contesting and (De) Constructing Place and Identity in a Melbourne Suburb" Doctoral Thesis (University of Melbourne, 2002), 20-21.
[149] Conley, *The Unwritten Law: Criminal Justice in Victorian Kent*, 172.
[150] McCalman, "Class and Respectability in a Working-Class Suburb: Richmond, Victoria, before the Great War," 97.
[151] Conley, *The Unwritten Law: Criminal Justice in Victorian Kent*, 143.

system.[152] Systems of reform discursively divided people along the categorical lines of 'rough' versus respectable, and resources and efforts were allocated accordingly.[153]

Respectability was also highly gendered in terms of what behaviour was acceptable within public spaces. Throughout the nineteenth century, the public spaces of Melbourne were in practice gender segregated territories, and ideas about the 'delicacy' of women were invoked to construct which spaces and sites were suitable for a respectable woman to view or move through.[154] A respectable woman was one who was white, virtuous, delicate, passive and appealing, but physically and intellectually lesser than men.[155] Middle and upper class women were also very active in disseminating and maintaining standards of respectability, upheld as moral gatekeepers and actively regulating the boundaries of respectability, especially in the familial sphere.[156]

The activities that men engaged in – especially young and unattached men – were battlegrounds over what was considered respectable. Spaces where roles and identities were more anonymous or fluid, such as music halls, public houses or the seaside, created spaces which allowed for more 'risqué social behaviour' from men, who could then return to their 'respectable' roles in other contexts.[157] This demarcation between spaces where less respectable behaviour was contextually tolerated, versus the maintenance of a respectable public face in other spaces, will be expanded on later in this chapter, when looking at the policing of male assumed people presenting as female.

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[152] A. J. Busch, "The Unwritten Law: Criminal Justice in Victorian Kent: Conley, Carolyn A.: New York: Oxford University Press 244 Pp., Publication Date: January 1991," *History: Reviews of New Books* 20, no. 3 (1992): 148.
[153] Kate Boyer, "Place and the Politics of Virtue: Clerical Work, Corporate Anxiety, and Changing Meanings of Public Womanhood in Early Twentieth-Century Montreal," *Gender, Place and Culture: A Journal of Feminist Geography* 5, no. 3 (1998): 266.
[154] Andrew Brown-May and Peg Fraser, "Gender, Respectability, and Public Convenience in Melbourne, Australia, 1859–1902," in *Ladies and Gents: Public Toilets and Gender*, ed. Olga Gershenson and Barbara Penner (Philadelphia: Temple University Press, 2009), 76-78.
[155] Leigh Straw, ""The Worst Female Character": Criminal Underclass Women in Perth and Fremantle, 1900-1939," *Journal of Australian Studies* 37, no. 2 (2013): 209.
[156] Mike Huggins, "More Sinful Pleasures? Leisure, Respectability and the Male Middle Classes in Victorian England," *Journal of Social History* 33, no. 3 (2000): 587.
[157] Ibid., 590, 93.

Case Studies – Female Assumed Gender Nonconformity

The following two cases show how authorities treated female assumed gender nonconforming people perceived to be of a 'respectable' class, as opposed to when they were not. As with most vagrancy cases, they were both minor incidents, but ones which display these differences in sentencing and discourse clearly.

The first case is Jessie Rogers, a sixteen-year-old who was arrested and charged with vagrancy in 1901 while dressed in male clothes. Ultimately, they were discharged. The second case pertains to a person in 1915 named Violet Woolley, who was also charged for vagrancy while dressed in male attire and, by contrast, was sentenced to three months imprisonment. By looking at the context surrounding the cases, the discourses within them and where they fit within broader understandings of gender nonconformity and crime at the time, we can see that the perceived respectability of the subjects and their social positions factored heavily into how they were treated.

Like many of these cases, Jessie Rogers' appearance in the court of petty sessions resulted in only a small mark on the court register. Their record states their name, the name of the arresting police constable, that Rogers was arrested on view for having no visible means of support on 28 November 1901, and one word under the court's decision: 'discharged.'[158] There is no mention in the register of petty sessions that Rogers was arrested in male attire. Despite this, the press presented Rogers' case with significantly more detail and interest; reports fleshed out the details of the incident and paid significant attention to the 'masquerade' element.

The newspaper coverage informed readers that Rogers 'appeared to be highly intelligent and respectable,' and their family was suggested to be reputable .[159] Their father, a salesman for a firm of sewing machine manufactures, was described as 'evidently respectable.'[160] The

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[158] PROV, VA 4143 Williamstown Courts, VPRS 361 Court of Petty Sessions Cause List Books (1869 - 1888), Court of Petty Sessions Registers 1888 1957), Index To Convictions (1890 - 1958), Unit 30, 1901–1902 Petty Sessions Registers.
[159] "In Male Attire," *The Herald* (Melbourne), 29 November 1901.
[160] "Masquerading as A Man," *The Age* (Melbourne) 29 November 1901; "In Male Attire," *The Herald* (Melbourne) 29 November 1901.

coverage emphasised Rogers' intelligence in descriptions of them behaving in court in a manner which 'conveyed the idea that she appreciated the humour of the situation', as well as giving their name in a humorous fashion as 'Dick Richards' upon arrest.[161] Rogers' youth, recent behaviour and ability to adapt their gender presentation to meet their needs were key factors which influenced perceptions of their gender nonconformity. Family and friends stated that Rogers had undergone a change in character in the month prior to the arrest. Rogers had been employed in the city, but the employment was terminated when they began to wear excessive amounts of makeup.[162] The family Rogers was staying with described their change in character as being 'a little bit "off her head."' In other instances, Rogers was described as going through 'an erratic turn' or a 'freak.' Nonetheless, the same family's account considered Rogers to be honest, trustworthy and a person of 'excellent character.'[163]

It is impossible to say what motivated Jessie Rogers' apparent change in behaviour, which culminated in them driving a milk cart through Newport, Melbourne, wearing male clothing and with their hair cut short.[164] However, to look at how it was interpreted and why Rogers was easily discharged, we can examine this incident in relation to the wider cultural understanding of female 'masqueraders' as adventurous, witty youths: a character that Rogers appeared to fit. Marion-Bill Edwards was a notorious example of the effectiveness of this figure within the Australian consciousness during the early twentieth century. Jessie Rogers' encounter with the courts preceded Edwards' own by five years; however, there are similarities between how they conducted themselves in court which played into the same cultural myths. Edwards was a favourite character of the Australian press, treated as a larrikin-esque, savvy, attractive and quick-witted public figure for years after their trial.[165] Indeed, following their case it was not unusual to see Edwards' name referred to in other

[161] Ibid; "A Girl in Masquerade," *The Age* (Melbourne) 30 November 1901.
[162] "A Girl in Masquerade."
[163] "In Male Attire."
[164] "In Male Attire."
[165] Saunders, "Notorious Australian Women," 79-80.

reports of female ‘masqueraders,’ often suggesting that the gender nonconforming person was a successor of some sort to Edwards’ lineage.[166]

Although I use the term ‘larrikin’ above in its current usage – affectionately to denote a character who may be young, a little rough, and have a disregard for convention or authority – the word did not start with the same connotations as it has today and used to refer to a genuinely perceived threat. An apparent rise in public order offences took place in the 1870s, and the working-class young people at the centre of this spike were branded ‘larrikins.’[167] However, in the early decades of the twentieth century, measures to reform policing of young people and first time offenders began a gradual shift toward softening the perception of the group.[168] Reformers advocated for leniency with first time offenders and correctional systems for young people which focused on reform rather than punishment. This stemmed from an overall move away from the values of prior decades where young people had been sent to adult gaols or prison-like correctional institutions, and young offenders were broadly considered to be part of a criminal/delinquent class.[169] As reformers worked to change the handling of juvenile crime, fears of young ‘larrikins’ began to dissipate. Concurrently, the connection between the diggers of the First World War and their larrikin image meant that by late-1910s and more firmly towards the 1930s, the term was beginning to shift to its contemporary positive or jovial associations.[170] While individuals like Edwards and Rogers pre-date the positive meaning of the term, they occupy this period of shifting conceptions. Rogers may have benefitted from these reforms which pushed lighter sentences for young people, and they might also have benefitted from the changing and softening narratives around young offenders.

Lucy Chesser has argued that the cultural narrative lens through which newspapers reported about Edwards was one which ‘drew upon the familiar stereotype of the high-spirited young

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[166] See for example: "A Girl's Freak," *The Age* (Melbourne), 5 October 1908; "Audacious Adventuress," *Truth* (Perth), 29 February 1908.; "Missquerading Men," *Truth* (Perth), 25 October 1913.
[167] Melissa Bellanta, *Larrikins: A History* (Queensland: University of Queensland Press, 2012), 5.
[168] Ibid., 141-42.
[169] Peter Erwin Quinn, "Unenlightened Efficiency: The Administration of the Juvenile Correction System in New South Wales 1905-1988," (2004): 9, 19.
[170] Bellanta, *Larrikins: A History*, 182.

woman disguised "in male attire" whose motivations were found in a love of adventure, and financial necessity.'[171] For individuals presumed female, presenting as male could allow access to social realms and means of support which were otherwise denied to them. Chesser emphasises that these individuals were not uncommon in the press in the early decades of the twentieth century, and they tended to be young and to receive relatively positive treatment.[172] In her writing on Marion-Bill Edwards, Chesser focuses on the romantic, sexual, and theatrical connotations of these performances. However, I am interested instead in how these gender stereotypes and tropes fed back into and influenced the criminal proceedings.

The descriptions of Rogers' appearance in court and their prior 'freak' suggest that they were dissatisfied with their prospects in domestic service and adopted the male attire in order to find work as a farm labourer.[173] Rogers was described continuously as 'bright,' 'highly intelligent,' 'respectable' and 'good and very honest,' which had the effect of casting their 'freak' and gender nonconformity as something which did not impugn their character.[174] Rather, the press reports implied a sense of humour and adventure. The respectability with which both Rogers and their family were imbued could have made courts more likely to perceive this incident as something from which Rogers could recover, rather than as part of a broader pattern of morally questionable behaviour.

In addition, Rogers' willingness and ability to revert to feminine attire allowed their gender nonconformity to be read not as a legitimate threat to gender norms, but as a presentation which could be easily discarded – and therefore reintegrated into a normative framework of how their gender was perceived. After being arrested, Rogers apparently 'told the constable she was a girl' and later 'appeared in court clad in the habiliments of her sex.'[175] Marion-Bill Edwards employed a similar approach at their committal hearing: attending in female clothes and causing an eager commotion, with a cheering crowd seeing off Edwards' departure after

[171] Chesser, "'When Two Loving Hearts Beat as One': Same-Sex Marriage, Subjectivity and Self-Representation in the Australian Case of Marion-Bill-Edwards, 1906–1916," 725.
[172] Ibid.
[173] "Strange Freak," *Albury Banner and Wodonga Express* (NSW), 6 December 1901.
[174] "A Girl in Masquerade"; "In Male Attire."
[175] "A Girl in Masquerade."

the hearing.[176] Considered along with Edwards' other choices, such as presenting themselves as younger than they were in order to better fit the 'young adventurous' image for a gender nonconforming female assumed person, this seems to have been a conscious choice on Edwards' part to cast themself in a favourable light.[177] In both cases, the willingness to revert to female attire can be understood as part of the process of the audience – the courts and the press – making sense of these gender crossings within the context of social law and punishment. Using the right clothing to demonstrate social/moral position was also a way to flag status as a respectable subject.[178] By demonstrating that they could meet their gendered expectations, Rogers reinforced the broader gender framework, and their 'masquerade' was cast as a 'freak' – a lone instance of divergence which could be corrected. People perceived to be female were also generally considered to be mentally weaker than males, but for women in particular, the ability to perform femininity appropriately was regarded as evidence of sanity. In asylums in the late nineteenth century, for instance, doctors explicitly used women's ability to perform feminine tasks (cleaning, sewing, etc.) and to dress and present themselves in a sufficiently feminine way as a measure of returning to mental wellness.[179] Therefore, Rogers return to feminine attire could be considered evidence that they were recovering from their 'freak', or mental break.

Violet Woolley was also young (nineteen) when they were charged with vagrancy while travelling in masculine attire. It does not appear, however, that their youth allowed them to fit the cultural image that worked to the advantage of Rogers and Edwards. The newspaper accounts of Wooley's appearance in court read less favourably by comparison, and rather than being discharged, they were imprisoned for three months following their arrest.[180] To compare Woolley with Rogers, whose respectable family and return to feminine presentation demonstrated to the court that their 'freak' incident was a one-off event which could be dismissed, we can see that the courts felt that Woolley clearly required a stronger penalty.

[176] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 244.
[177] Ibid., 245.
[178] Smith, *Consumption and the Making of Respectability, 1600-1800*, 173.
[179] Graham Edwards, "'Madness' in Australia: Histories, Heritage and the Asylum," *Medical History (pre-2012)* 48, no. 4 (2004): 53.
[180] "Arrested in Boy's Attire," *Violet Town Sentinel* (Vic), 16 March 1915.

The reason for this comes back to the concept of the vagrant as a type, their character defined by their poverty and the intrinsic nature of their cyclical criminal patterns. Woolley's circumstances and presentation classed them as a less respectable, redeemable subject than Rogers.

Violet Woolley was arrested in Victoria Park, Melbourne in March 1915, along with two male companions, and was brought before the court. While Rogers was able to present to the court in feminine clothing, Woolley was 'not too neatly dressed' as a man and apparently caused some commotion in the court when spectators realised their assumed sex.[181] Along with the two young men, Woolley had been travelling by foot from Melbourne to Ardmona, camping along the way. The three companions were reportedly looking for fruit picking work and had been struggling to make money. The three of them had decided to travel with Woolley disguised in male clothing for Woolley's safety.[182]

This was not the first time Woolley had been in contact with the police. They moved around a lot, travelling to 'Bendigo and other places' and had been in Shepparton but had been told by police to 'clear out of town.'[183] The exact reason police told Woolley to leave is unclear from the reporting, which cites only their 'conduct.'[184] Between their issues with money, their continuous relocations, prior encounters with police, and the descriptions of their appearance, which tend to focus on the 'shabbiness' of their male dress, it seems that Woolley fitted the vagrant character narrative well. In one instance, the link between their circumstances and their moral character is drawn clearly, with the senior constable stating that they 'used to knock about Shepparton some two years ago … and was not leading a moral life.'[185]

Woolley's choice of company may also have contributed to their 'immorality'. Increased unsupervised interaction between the sexes in the early twentieth century – as young women

[181] "Dressed as A Man," *Shepparton Advertiser* (Vic), 15 March 1915.
[182] "Arrested in Boy's Attire"; "Dressed as A Man."
[183] "Girl in Male Attire," *The Argus* (Melbourne), 13 March 1915.
[184] "Dressed as A Man," *Shepparton Advertiser* (Vic), 15 March 1915.
[185] Ibid.

joined new fields of work, such as the factory[186] – led to concerns about the dangers of sexual immorality. Notions of respectability set standards of behaviour in friendships, work, and gendered interaction, and advocates of moral reform considered this unsupervised interaction dangerous to women's wellbeing. The public domain was increasingly being positioned as a sexualised space which was eroding innocence.[187] People perceived as women who committed crimes were held to different standards from those perceived as male. In public discourse women were moral guardians of men, and women's crime or immorality could lead men into drunkenness and criminality[188] Reformers who sought to curtail these behaviours proposed and enacted measures which targeted the actions of both men and women. They particularly limited the freedoms of women, increasing public scrutiny of their behaviours and strengthening pressures to maintain the home as women's primary domain.[189] For men, roaming for work was a way of life in Australia, elevated to a national ideal.[190] The choice to dress in male attire to pursue this work may have been Woolley's method to travel freely, but when the gender nonconformity was noticed, the implications of a young woman travelling with two men drew increased scrutiny.

Although Woolley did not receive favourable presentation in the media and was sentenced more harshly than Rogers, it is also important to note that the police nonetheless treated Woolley with some leniency compared to their male companions. All three were arrested together, but police stated that they did not intend to press the more serious charge of stealing a horse and gig for Woolley. The other two young men were both remanded and charged for this. The police also stated that they had brought Woolley to court 'in her own interests' so

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[186] 'Factory girls' in particular became emblematic to social reformers who feared what they represented for modern femininity would erode the social fabric and break down authority and the family unit. Danielle Labhaoise Thornton, "Factory Girls: Gender, Empire and the Making of a Female Working Class, Melbourne and London, 1880-1920," Doctoral Thesis (University of Melbourne, 2007), 70.

[187] Ellen Warne, "Sex Education Debates and the Modest Mother in Australia, 1890s to the 1930s," *Women's History Review* 8, no. 2 (1999): 314.

[188] Jeffrey S Adler, "Streetwalkers, Degraded Outcasts, and Good-for-Nothing Huzzies: Women and the Dangerous Class in Antebellum St. Louis," *Journal of Social History* (1992): 737.

[189] Chris McConville, "Rough Women, Respectable Men and Social Reform: A Response to Lake's 'Masculinism'," *Historical Studies* 22, no. 88 (1987): 436-39.

[190] Marilyn Lake, "Historical Reconsiderations IV: The Politics of Respectability: Identifying the Masculinist Context," ibid., no. 86 (1986): 125.

that 'she may be dealt with', regarding Woolley's apparent inability to lead a 'moral' life.[191] There is a suggestion here that Woolley's perceived sex meant that the police were less inclined to sentence them with harsher, more punitive charges. This came out of a sense of paternalism, where women were categorically considered more childlike: gender biases in court can historically be seen in laws related to diminished responsibility, where individuals identified as female were considered less culpable for offences.[192]

Rogers and Woolley's cases are useful for demonstrating how cases might play out when one 'masquerader' was framed as coming from a respectable background, versus when one was classed as a habitual vagrant. Cases of female assumed gender nonconformity appeared intermittently in the press across the first two decades of the twentieth century and did not always fit these archetypes quite so cleanly. The outcomes in court and the treatment from the press in these cases varied, depending on a mix of factors such as age, prior contact with police and courts, and sexual impropriety.

Elizabeth Ramsay was arrested in Echuca in 1901 on a vagrancy charge while 'disguised as a boy' and going by the name Leslie Adams (which I will use henceforth). When they appeared at court a 'large crowd of the curious' gathered, although they were dispersed before Adams' case was heard.[193] Adams was eighteen years old, and most reports highlighted their youth, as well as the effectiveness of their 'masquerade,' with reports noting that Adams 'would deceive any person as to her sex.'[194] Most accounts of Adams' story emphasised their ability to engage seamlessly in 'masculine' activities, including their intention to volunteer for war in South Africa.[195] The courts discharged Adams on their charge of vagrancy when their parents expressed that they would take Adams home and would pay all expenses.[196]

The representation of Adams' family life was mixed. On the one hand, by taking them home and paying the court expenses, they resolved the return to a familial structure similar to cases

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[191] "Dressed as A Man."
[192] Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 264 - 65.
[193] "A Girl's Escapade," *The Age* (Melbourne), 22 January 1901.
[194] "In Male Attire," *Weekly Times* (Melbourne), 26 January 1901.
[195] "A Girl Masquerading as A Youth," *The Elmore Standard* (Vic), 25 January 1901.
[196] "A Girl Masquerading as A Youth."

like Rogers'. Unlike Rogers' case, however, where the respectability of Rogers' family was noted in their favour, Adams had run away from home allegedly to escape their parents' 'drunken habits.' Alcoholism in the family unit was a clear reminder of the risks of failing to uphold respectable values.[197] The press also noted that Adams' family used to live in South Melbourne. Like other Melbourne inner-city suburbs such as Richmond or Prahran, many residents of South Melbourne were facing debt challenges in the early decades of the twentieth century.[198] Politicians repeatedly spoke about areas of 'slums' and poor housing conditions in South Melbourne over the years, signalling a concern with disreputable residents of the suburb.[199] Like Rogers, Adams was discharged to returned to their family. Although Adam's background was not quite as upstanding as Rogers', the key purpose of bringing them before the court – that is, the enforcement of a return to a normative gendered ideal and position within the family unit had been achieved.

The act of reuniting with the family after the masquerading 'adventure' and returning to a feminine role commonly resolved these cases. Jen Manion discussed (in the context of nineteenth century Pennsylvania) how single women who were 'spoken for' by respectable men were less likely to be imprisoned than women who were not.[200] A similar dynamic took place in these 'masquerading' cases, where the courts saw gender nonconforming female assumed people returning to their respectable families as a satisfactory outcome. Another instance pertains to Adelaide Maude Lyons, a sixteen-year-old who was the subject of a significant amount of reporting in early October 1908 after a warrant was put out at the request of their family for their arrest, with a vagrancy charge and a larceny charge.[201] Lyons ran away from home after their mother sent them to work for a dressmaker in Prahran, Melbourne. They stole a suit, boots and a hat, and hastily cut off their own hair before finding

[197] Janet McCalman, *Struggletown: Portrait of an Australian Working-Class Community* (Ringwood: Penguin, 1988), 25.
[198] Ibid., 41.
[199] See for examples: "Housing Conditions," *The Argus* (Melbourne), 7 July 1914; "Housing Conditions," *The Argus* (Melbourne), 3 October 1917; "The Housing Problem," *The Age* (Melbourne), 24 March 1914.
[200] Jen Manion, *Liberty's Prisoners: Carceral Culture in Early America* (Philadelphia: University of Pennsylvania Press, 2015), 90-91.
[201] "Girl Dressed as A Man," *The Bendigo Independent* (Vic), 6 October 1908.

a barber for a cut 'like a man's', after which they absconded for several days.[202] A number of reports explicitly compared their adventure to Marion-Bill Edwards, with the press stating that a masquerade like this could allow them to 'evade detection for years,' as Edwards had.[203] However, Lyons (labelled a 'boy-girl') was eventually found and returned home, at which point the warrant was cancelled with no further charges, despite the theft of the clothes.[204] The reason Lyons gave for running away was that they could find better wages presenting as male than they could as female.

When a gender nonconforming person did not have youth on their side, they were also less likely to receive favourable outcomes or representation in the press, as can be seen in the case of Norah Kelly, who was arrested while presenting in men's clothes in February 1907. Their husband had died and, according to Kelly's statements, they had adopted male attire in order to find work and travel in safety.[205] Unlike the prior cases, Kelly was arrested on a charge of insulting behaviour, rather than vagrancy, and was described as 'a woman of advanced years.'[206] The court remanded Kelly to Bendigo Hospital for medical observation on suspicion of insanity.[207] Although Kelly was not sent to prison, the role of the asylum was still closely tied to the criminal legal systems. Australia adopted its framework for asylums from the English system to commit 'dangerous lunatics' to asylums rather than gaol. This inextricably linked the role of the asylum with the detention of 'criminal' individuals, rather than positioning them as health institutions first and foremost.[208] According to reports, however, when Kelly addressed the court they 'spoke rationally and intelligently, and by no means betrayed any evidence of insanity.'[209] They also stated: 'I don't know that I did anything wrong. Mr. Maxwell said in open court in November last that it was perfectly legal

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[202] "Girl Dressed as A Man."
[203] "A Masquerading Girl," *Barrier Miner* (Broken Hill), 7 October 1908.
[204] "Boy-Girl Returns Home," *The Bendigo Independent* (Vic), 9 October 1908.
[205] "Woman Masquerader," *Bendigo Advertiser* (Vic), 29 January 1907.
[206] "Masquerading Woman," *The Australasian* (Melbourne), 2 February 1907.
[207] "Another Man-Woman," *Kerang New Times* (Vic), 29 January 1907; "Another Man-Woman," *Barrier Miner* (Broken Hill), 29 January 1907.
[208] Mark Finnane, "From Dangerous Lunatic to Human Rights?: The Law and Mental Illness in Australian History," in *'Madness' in Australia: Histories, Heritage and the Asylum*, ed. Catherine Coleborne and Dolly Mackinnon (St Lucia: University of Queensland Press, 2003), 27.
[209] "Woman Masquerader."

for a woman to wear man's attire.'[210] Legal though it may have been, this did not seem to assuage the criminal legal system from prosecuting Kelly for insulting behaviour and committing them for insanity. As Ruth Ford has argued, where police deemed gender nonconforming behaviour threatening enough to the wellbeing of society – as offensive – medical intervention through the asylum could step in to regulate the boundaries of acceptable gender presentation in lieu of the ability to formally prosecute (as no actual crime had been committed).[211] Kelly's age excluded them from representation within the positive ideal of female assumed gender nonconformity. Therefore, the 'offensiveness' of their behaviour meant they had to be prosecuted within the mechanisms available: in this case, commitment to the asylum.

Outcomes and narratives were less sympathetic in cases where the subject was either not young or alternatively was unable to integrate back into their expected social context. In June 1905, Alice May Bunting was arrested on the charge of vagrancy while presenting in masculine attire. Bunting had previously been charged with larceny in 1904 and was fined £20 and sent to prison for two months when they could not pay.[212] Bunting's apparent cycle with poverty and crime marked them as the vagrant type, and despite their youth (they were eighteen at the time of their 'masquerading' arrest), reports did not frame them with the same intrigue or adventurous spirit as other cases of gender nonconformity. Instead, the sparse reports described Bunting as 'covered with dirt,' framed as poor and less than respectable.[213] Sexual impropriety may also have played a factor in this case. Bunting was pregnant when arrested (reportedly sent to the Lying in Hospital of the Ballarat Benevolent Asylum),[214] and was stated to have been living with a man, presumably unmarried.[215] The number of young, unmarried women entering refuges for unwed mothers concerned moral reformers at this

[210] "Woman Masquerader."
[211] Ruth Ford, "Sexuality and 'Madness': Regulating Women's Gender 'Deviance' through the Asylum, the Orange Asylum in the 1930s," in *'Madness' in Australia: Histories, Heritage and the Asylum*, ed. Catharine Coleborne and Dolly Mackinnon (St Lucia: University of Queensland Press, 2003), 115.
[212] "Two Months' Imprisonment," *Bendigo Advertiser* (Vic), 20 October 1904; "Ballarat," *The Bendigo Independent* (Vic), 12 October 1904.
[213] "Country News," *The Age* (Melbourne), 15 June 1905.
[214] "Young Girl's Predicament," *The Ballarat Star* (Vic), 15 June 1905.
[215] "Country News."

time, who were concerned with men taking advantage of young women, and with the moral corruption women faced being removed from domestic, familial spheres.[216] Someone like Bunting, who was unmarried, pregnant, and seemingly stuck in a cycle of criminal behaviour and poverty, served as an example of the kinds of social issues to which these reformers were responding. Bunting was charged again the following year with larceny, although with no further mention of gender nonconformity, apparently still in the cycle of vagrant offences.

At the heart of these incidents, we can see why age and respectability were so important to resolving female assumed gender nonconformity cases. If the key concern on the part of the criminal legal system was regulating acceptable gendered behaviour, then the social and moral character of the gender nonconforming individual was central to the case. For those who were young and respectable, an incident could be forgiven, if their overall character was good. Those who were stuck in a cycle of vagrant behaviour or who had aged out of the positive ideals, however, required alternative regulation.

Male Assumed Gender Nonconformity

For the first two decades of the twentieth century, arrests of male assumed gender nonconformity were less frequently reported and, when they did appear, were framed in different terms. There was no positive ideal of a male 'masquerader,' no popular archetype with which they could present themselves to receive leniency from the public and the criminal legal system. The closest thing was the actor. Cross-gender performances on stage were popular throughout nineteenth- and early twentieth-century Australia.[217] On stage, men could perform in female roles in either comedic or serious performances, at a professional or amateur level. However, these 'masquerades' were limited to the context of performance.

The vagrant character was also less relevant to male assumed gender nonconforming people, who were more likely to be charged under provisions for offensive or indecent behaviour. This points to a division between the two types of 'masquerade.' Both charges – vagrancy

[216] McConville, "Rough Women, Respectable Men and Social Reform: A Response to Lake's 'Masculinism'," 436.
[217] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 74.

and offensive behaviour – were concerned with public spaces, decency, and morality. Vagrancy provisions primarily were used as a tool to police the poor for being visibly poor in public. Offensive behaviour charges, however, were more concerned with individual conduct and sexuality. If vagrancy charges were about offending public decency by existing, offensive behaviour charges were about offending public decency through actions. There was a gendered assumption being made at the point of contact with police that male 'masqueraders' were doing something that was *offensive* to public sensibilities, whereas most female assumed gender nonconforming people required regulation and reversion to acceptable gendered presentation without the assumption that they were intrinsically causing offence.

The scarcity of reports of male assumed gender nonconformity prior to the 1920s means that it is difficult to know how often such arrests occurred. It is possible that police made more arrests than were reported by the press. The lack of a prevailing narrative akin to that of the adventurous female 'masquerader' may have meant that the press considered the arrests less newsworthy – at least until new narratives began entering the public discourse and linked male assumed gender nonconformity to dangerous sexual deviancy and homosexuality. It is not possible to identify most of these kinds of cases on the court records themselves, as they blend in with other offensive behaviour or vagrancy charges; therefore, we rely on what the press considered relevant to the public interest. It is also possible that other 'masquerades' simply did not result in arrest, if they were sufficiently read as entertainment, performance, or costume within acceptable parameters – or not detected at all. Whatever the case, the outcome was the same: male assumed gender nonconformity took up a relatively small portion of available records for the first two decades of the twentieth century. The themes discussed here relating to male assumed gender nonconformity will be expanded on in depth in the next chapter, as the narratives which were just beginning to creep into public discourse gradually became dominant in the 1920s-30s.

Sexual deviance is a broad concept which includes or excludes a lot of different sexual behaviours, dependent on society, period, subculture, and circumstances.[218] In this chapter and the next, when I talk about sexual deviance, it is specifically in relation to gender nonconformity and homosexuality. There were still a range of ways that female-assigned people could be viewed as sexually deviant: promiscuity, sexual knowledge outside of marriage, impropriety, interracial sexual activity.[219] The specific anxieties around homosexuality were gendered in such a way as rarely to include those perceived as women.

'The vagrant' as a concept by no means excluded men – but the associations of the archetype were different for men and women.[220] Vagrant individuals of all genders posed moral threats to public life, but the threats themselves were different. Vagrant women threatened the moral order of public life because they were unattached, out of the control of husbands or fathers, and threatened social order.[221] Vagrant men, however, posed a threat to industry and bourgeois society, as well as a more immediate physical threat in their potential for violence.[222] When women were criminal, their criminality ran counter to their nature. They became an 'other' in relation to their sex, failing to conform to their role as the nation's moral ideal for motherhood.[223] The gender deviation of the 'masquerade,' therefore, could be said to distance them further from their gendered ideal. Criminal men, however, were not a contradiction in the same way. A male 'masquerader' was not a vagrant, because the construct of a male vagrant was a man who failed to live up to his industrious, respectable ideal – whereas gender nonconformity ran counter to this ideal and therefore became a different offence: indecent, offensive behaviour.

[218] Christopher Hensley and Richard A. Tewksbury, *Sexual Deviance: A Reader* (Boulder: L. Rienner Publishers, 2003), 3-4.
[219] Bongiorno, *The Sex Lives of Australians: A History*, 59-87.
[220] Mary Anne Poutanen, "Regulating Public Space in Early-Nineteenth-Century Montreal: Vagrancy Laws and Gender in a Colonial Context," *Histoire Sociale/Social History* (2002): 35.
[221] Adler, "Streetwalkers, Degraded Outcasts, and Good-for-Nothing Huzzies: Women and the Dangerous Class in Antebellum St. Louis," 745.
[222] Poutanen, "Regulating Public Space in Early-Nineteenth-Century Montreal: Vagrancy Laws and Gender in a Colonial Context," 41.
[223] Straw, ""The Worst Female Character": Criminal Underclass Women in Perth and Fremantle, 1900-1939," 213.

The offensiveness of this behaviour had a decidedly sexual element; rebuking the sexual connotations of a 'masquerade' was the key for male assumed gender nonconforming people to protest the charges for their innocence. When the gender nonconformity could be read as comedic or as an innocent performance, it was more acceptable. When it was linked to sexual 'deviancy' more broadly, policing was harsher. Male sexual deviance as it related to either homosexual behaviour (e.g., sodomy) or identity (a concept which was still in development in this period), has historically been hyper visible: abjected, regulated, and provoking hostile public response. Female homosexual 'deviance' by contrast, has typically been relegated to the shadows. This is not to say that it was tolerated, but rather that public reference to female homosexuality in this period was typically vague, out of focus, or outright invisible.[224]

At the turn of the twentieth century tensions were developing between forms of gender impersonation used for popular entertainment, and public anxieties around homosexuality, sexual pathology, and feminism. In some respects, female impersonation for entertainment was a way to relieve these anxieties, as it was a way to enforce masculine authority over femininity.[225] Sharon Ullman has discussed this in relation to female impersonation in turn of the century America, arguing that as women began to advocate vocally for their rights, men grappled with their own understandings of gender and created new models of masculinity and gender performativity which responded to the threat to their cultural hegemony. This influenced the way female impersonation was sometimes perceived to be a 'better' performance of femininity than a woman was able to give, thereby reasserting masculine control over the performance of gender. As Ullman states: 'That female impersonators could be said to offer a more authentic representation of femininity indicates the degree to which illusion and performance had become paramount in the struggle over gender.'[226] Similar gender anxieties were present in Australia at the turn of the century, with

[224] Rebecca Jennings, *Unnamed Desires: A Sydney Lesbian History* (Clayton: Monash University Publishing, 2015), xv.
[225] Ullman, "'The Twentieth Century Way': Female Impersonation and Sexual Practice in Turn-of-the-Century America," 578-79.
[226] Ibid., 579.

the first wave feminist movement challenging traditional notions of gender relations and roles.[227]

It was also problematic when gender nonconformity raised questions about the sexuality of the performer.[228] The connection between public sexuality, male assumed gender nonconformity and possible homosexuality was an underlying threat,[229] and indecent behaviour laws could be used to police this threat when other charges (such as gross indecency) were ambiguous. These laws functioned off the assumption of violations against common understandings of moral behaviour, which makes homosexual activity vulnerable in a society which rejects it.[230] The possibility that gender nonconformity might invoke homosexual subtext could come either from the gender nonconforming person or the men encountering the gender nonconforming person, and this ambiguity challenged even 'safe' theatrical performances if the gender nonconforming presentation was 'too' convincing. If someone's gender nonconforming presentation were too effective, it raised concerns about homosexual attraction directed toward them. If the person were too invested in their own performance, if they enjoyed it too much, that raised other questions about the motivations behind their performance and the sexual or gender deviancy that might point toward.[231]

In 1916, *Truth* ran an article titled 'Sexual Perverts' in which the newspaper claimed that a 'sexual mania' had gripped Melbourne several years prior, during which a 'number of cases occurred in which male degenerates and perverts openly paraded the most central part of the city dressed in female attire.' The article was critical, however, of the freedom with which people were able to dress in public, stating:

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[227] Kay Saunders and Raymond Evans, *Gender Relations in Australia: Domination and Negotiation* (Sydney: Harcourt Brace Jovanovich, 1992), 525-49.
[228] Ullman, "'The Twentieth Century Way': Female Impersonation and Sexual Practice in Turn-of-the-Century America," 576 - 87.
[229] Derek Dalton, "Policing Outlawed Desire: 'Homocriminality' in Beat Spaces in Australia," *Law and Critique* 18, no. 3 (2007): 379.
[230] Paul Johnson, "'Offences against Morality' Law and Male Homosexual Public Sex in Australia," *Alternative Law Journal* 33, no. 3 (2008): 155.
[231] Ullman, "'The Twentieth Century Way': Female Impersonation and Sexual Practice in Turn-of-the-Century America," 582-83.

> There has been a recrudescence of the evil, without any further police action being taken, with the result that at the present time there can be seen on almost any night around the Block and the top end of Collins-street scenes which are sufficient to bring a sensation of physical nausea to any healthy-minded person. It is one of the greatest anomalies of the law that these foul creatures who parade the public thoroughfares with their faces painted and powdered cannot be arrested unless they commit some overt act which comes with the definition of "offensive behaviour" as generally accepted in police courts, and unless they do commit some such act the police are powerless.[232]

The central tension in this period was the question of what made a public performance of male assumed gender nonconformity 'offensive', 'foul' or 'indecent', and when was it simply a harmless amusement. In the early decades of the twentieth century, previous perceptions of 'masquerade' – as playful disguise or dishonest illusion – shared space in public perception with new interpretations that it was linked to potentially inappropriate gender or sexual behaviour.[233] To look at how this distinction might be navigated, a fitting example is the 1908 case of three young individuals; Douglas Ogilvie, Thomas Page, and Allan M'Kail. They were arrested for offensive behaviour following an appearance at the Vienna Café on Collins Street, Melbourne, dressed in female clothes.[234] The statements in this case from witnesses, police, the press, and the defendants all grappled with the differences and contradictions in how male assumed gender nonconforming people were perceived, making it an interesting one for deconstructing these discourses around gender nonconformity in the public sphere.

The incident occurred on a September evening, with the three individuals dressing up to attend a fancy-dress ball. They did not, however, gain entry to the party, and instead went to the theatre in their costumes – which they stated were Mother Goose, Merry Widow, and the Gibson Girl – and then the Vienna Café, where they began to drink and smoke.[235] From there, the situation escalated. A crowd gathered at the café, and by the time the young people were

[232] "Sexual Perverts," *Truth* (Melbourne), 22 January 1916.
[233] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 289.
[234] "A Theatrical Masquerade," *The Age* (Melbourne), 1 December 1908.
[235] "Three Silly Donkeys," *The Australian Star* (Sydney), 1 December 1908.

arrested, at least one of them had been roughly treated and his clothing had been torn. The prosecutor said that the young people were either 'sexual perverts or brainless young idiots.'[236] Determining which of the two options lay at the heart of determining the severity of the case. However, the danger that the 'masquerade' posed to public safety was contrasted in the depositions with a sense of amusement at the escapade, including laughter at the young men's feminine appearance and questions about whether the male witnesses noticed unfeminine details about them, such as the size of their feet.[237]

Lucy Chesser has discussed this case, specifically looking at the reporting in *Truth* and how the paper framed the case as ambiguously erotic, effeminate and homosexual.[238] The flavour of reporting in other newspapers, however, did not carry quite the same tone as that in *Truth*, which tended to lean sensationalist, playing into anxieties around growing social and moral vices and deviant behaviour.[239] While in *Truth* we can see the connections between gender nonconformity and homosexuality, other papers seemed more concerned with the danger the male assumed gender nonconforming people posed to women. Take, for example, this passage from Brisbane's *Truth*: 'They [Ogilvie, Page and M'Kail] visited a theatre, and made themselves conspicuous in the circle seats. They "made eyes" at surrounding susceptible males, who returned the compliment with interest.'[240] Contrast this with *The Age*, which stated (quoting the police prosecutor): 'Such conduct as theirs was a menace to every respectable woman, and not only a riot, but even murder, might take place if young men were permitted to carry on in that manner in a public café.' [241] Other papers, such as *The Argus,* were less specific about who was in danger, but stated that 'the safety of the community was at stake, and the sort of pranks these boys had indulged in should find no toleration.'[242]

[236] "A Theatrical Masquerade."
[237] "A Theatrical Masquerade."
[238] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 291-96.
[239] Alana Piper, "'A Growing Vice': The Truth About Brisbane Girls and Drunkenness in the Early Twentieth Century," *Journal of Australian Studies* 34, no. 4 (2010): 485-86.
[240] "Males Masquerade," *Truth* (Brisbane), 6 December 1908.
[241] "A Theatrical Masquerade."
[242] "Misguided Masqueraders," *The Argus* (Melbourne), 1 December 1908.

It was commonly suggested that the 'masquerade' which Ogilvie, Page and M'Kail engaged in *was* dangerous: however, what kind of danger it posed and to whom it was directed was less clear. For *Truth*, the danger was in the ability of the 'sex perversion hoax' to trick unwitting men into being seduced by the 'effeminate' 'queans.'[243] For others, including the prosecution (as cited in *The Age*), 'respectable women' were the potential victims. In some cases, one way this narrative could play out was the fear that 'masquerading' men could deceptively lure women into secluded situations and manipulate them through their disguise – a narrative which continues even today in debates over whether transgender women should have access to female bathrooms and other spaces.[244] Chesser gives an example of this type of anxiety in a 1909 case of a gender nonconforming person named Dolly, who was branded by *Truth* as a 'pervert' for their heterosexual 'dishonesty' of walking in female attire with women in secluded spaces of Albert Park, potentially deceiving the women as to their own sex.[245] These inconsistencies in how the danger the young men posed to society might manifest demonstrate some of the ways in which discourses around gendered presentation and improper sexuality were evolving during the period. The connotations of the gender nonconformity were not consistent, and neither was its potential to cause harm unanimously agreed upon.

Ogilvie, Page and M'Kail's legal defence was that their 'masquerade' posed no danger at all. Their defence lawyer stated that there was no evidence that they had 'behaved in an improper or indecent manner. Their disguise was obvious. If they could not go to a fancy dress ball in female costume, the University students in procession and characters in the Eight Hours Demonstration were also illegal.'[246] This referred back to the inconsistency between the interpretation of 'masquerades' within spaces commonly accepted to be for public amusements (the Eight Hours Demonstration fete was an event regularly attended by costumed university students dressed in female clothing),[247] and when they occurred in an

[243] "Males Masquerade."
[244] Sarah Nagy, "A Different Kind of Privacy: "Bathroom Bills" and the Rights of Transgender People in Public Spaces.(the New Horizon: Innovations in Law and Policy)," *Public Interest Law Reporter* 21, no. 2 (2016): 101.
[245] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 290.
[246] "A Theatrical Masquerade."
[247] "The Eight Hours Demonstration," *The Argus* (Melbourne), 22 April 1878.

unacceptable visible space. People could push the limits of acceptable public dress and behaviour at a fancy-dress ball with more freedom than elsewhere.[248] The prosecution responded to the defence's claim by stating that it was 'certainly offensive to any right-minded man' for young men to appear in public, especially the city, 'in drag.'[249] However, given that the gender nonconformity would have been acceptable if they had been admitted into the theatre, the hypocrisies the defence highlighted were easily apparent.

The back-and-forth of this case demonstrates the realignment and complexities of how male assumed gender nonconformity was perceived in these early years of the twentieth century, when new anxieties around gender nonconformity, homosexuality, and how this might be expressed through 'dangerous' public dress were evolving. Ogilvie, Page and M'Kail's case ended with a discharge. While the judge warned that they were 'treading on thin ice,' there was no law against an individual wearing clothing associated with another gender and they had not acted 'improperly' while in their female dress; therefore they could not be charged with any offence.[250]

The defence for the Ogilvie, Page and M'Kail case was stronger, as Chesser noted, than would usually be seen in a case like this, likely owing to at least one of the young men coming from a wealthy family and having the means for proper legal representation.[251] This was, of course, not always the case, and other examples of male assumed gender nonconformity were more sparsely and briefly reported on in the press, making it challenging to identify how often they in fact occurred. In one 1915 case, a young individual named Frank Johnson Ennis was arrested in Ballarat for going out 'smartly dressed in a coat and skirt, a fur necklet, a becoming hat and veil, and women's shoes' with their friends. The reporting made special note of how effortlessly Ennis was able to present themself as a woman, with observers being none the wiser. They moved around several shops and hotels without Ennis being identified, before Ennis revealed their identity in the second hotel they visited and was subsequently

[248] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 90.
[249] "A Theatrical Masquerade."
[250] Ibid.
[251] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 294.

arrested.[252] Interestingly, the charge under which Ennis was arrested was not identified in any of the reporting, with the press simply stating that they were arrested 'for having masqueraded as a woman.'[253] Their entry in the Petty Sessions Register, however, identifies the charge as offensive behaviour.[254] It appears that, at least in some instances, having been caught in female clothing was enough detail when distributing information of the arrest to the public, with the charge itself being superfluous or assumed. This implies an underlying assumption that, although there was no official law regarding wearing another gender's clothing, to do so was understood as being in some way criminal. Ennis was indeed fined £2 for the 'masquerade,' despite their defence that they had intended it as a joke at their friends' prompting.[255]

Another male assumed gender nonconforming person, William Bye, used a similar defence, that a 'masquerade' was 'a bit of fun' when they were arrested at Seddon station in Melbourne in 1919 and charged for offensive behaviour.[256] Bye's case was a little more ambiguous than either Ogilvie, Page and M'Kail or Ennis's cases, which occurred in the open in public. Bye was arrested at 10:30 p.m., 'hiding behind a shed with a bundle of feminine attire concealed beneath his overcoat.'[257] Bye's initial explanation was that they were trying to catch an offender who had molested their sister in the area, although they later retracted this statement in favour of the 'fun' defence. They were fined 20 shillings, demonstrating that again, their behaviour was considered innately criminal and offensive to public decency, despite the secluded location.[258]

The argument that a 'masquerade' was for fun or a joke was the primary defence in this period, as it brought gender nonconformity in line with other acceptable performances, such as those done in fancy-dress events or by performers. This separated the gender nonconformity from more 'dangerous' implications, such as the suggestion of sexual

[252] "Dressed as A Woman," *The Register* (Adelaide), 14 August 1915.
[253] Ibid.
[254] PROV, VA 745 Ballarat East Courts, VPRS 290 Court of Petty Sessions Cause List Books (1858-1888), Court of Petty Sessions Registers (1888-1921) P0000, Unit 68, Petty Sessions Registers.
[255] "Dressed as A Woman."
[256] "Masquerader Punished," *Independent* (VIC), 19 July 1919.
[257] Ibid.
[258] Ibid.

deviancy, gender non-normativity, or danger: either to women, who might be tricked into believing a 'masquerader' was one of them, or men, who might be fooled into being seduced by a male in female clothing. However, this defence could be a thin line, as we can see in the turbulent discourse around Ogilvie, Page and M'Kail's case. In other cases, such as Ennis's, the completeness of the disguise and their ability to convince those around them added a layer of additional tension. For Bye, the explanation that the gender nonconformity was 'for fun' was undermined by the lack of performativity around it, taking place in secret, late at night. Although the danger male assumed gender nonconformity posed had yet to be solidly defined, it was common knowledge that (outside of theatrical performance) it was deviant and criminal enough to warrant arrest.

TASMANIA

I have focused on Victoria thus far in this chapter because it is a good case study to examine policing of gender nonconformity in Australia. Most states had laws similar to Victoria's, and as a populous and well-documented state, there is a solid amount of press, court records, and discourse to analyse. However, there was one state – Tasmania – with notably different laws around public gender nonconformity to those in the rest of Australia. Provisions against male assumed people appearing in female apparel in public at night existed from at least the Tasmanian Police Act 1865 (No. 10), which stated 'any man found in any street or public place, by night, dressed in female apparel' would be 'deemed an idle and disorderly person.'[259] A similar clause likewise existed in Tasmania's *Police Act 1905*.[260] The prescribed penalty in the Act was a fine of ten pounds, or three months imprisonment. This law made Tasmania the only state or territory within Australia to have an explicit charge outlawing any kind of gender nonconforming expression or behaviour. This law existed in Tasmanian legislation in some form until the year 2000, when it was repealed.

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[259] The Police Act 1865 (29 Vic, No 10), S. 14. http://classic.austlii.edu.au/cgi-bin/sinodisp/au/legis/tas/num_act/tpa186529vn10163/tpa186529vn10163.html?stem=0&synonyms=0&query=female%20apparel

[260] The Police Act 1905 (TAS), S. 17. http://classic.austlii.edu.au/cgi-bin/sinodisp/au/legis/tas/num_act/tpa19055evn30198/tpa19055evn30198.html?stem=0&synonyms=0&query=female%20and%20apparel

Significantly, this law only impacted male assumed people presenting as female, supporting the general trend that male assumed gender nonconformity was viewed as more dangerous or offensive than female assumed gender nonconformity. In this thesis I have not conducted an in-depth analysis of whether this law resulted in markedly different rates or patterns of arrest than those seen in Victoria (although this would be a fascinating research project). However, press reporting from Tasmania seems to suggest that this difference in law had some impact on how cases of gender nonconformity were reported on. An example of this can be seen in one report titled 'A Woman in Male Attire' describing the discovery of a female assumed 'masquerader' who travelled by train from Launceston to Burnie in 1904. The article stated that the event 'did not escape the notice of the police, but no action could be taken.'[261] It concluded by stating:

> A policeman, it appears, has no authority to arrest a woman in male attire unless there is something else suspicious in her actions. A man, on the contrary, may be arrested and very severely punished for appearing in the garb of the "weaker" sex. Another injustice to mere man![262]

A letter to the editor in 1937 (a little later than the decades covered in this chapter, but pertinent to the chapter to follow) provided some explicit commentary on the discrepancy within this law, stating:

> It is a very one-sided law, because, while a man must not go before the public in his sister's skirts, his sister may go out in his trousers. In fact, she can go out in her baby brother's and flaunt her stupidity with impunity. If any of our young men are idiotic enough to parade the streets in a woman's clothes, what ridicule would be heaped upon them. The feeling most men have towards the girls who appear in men's clothing is one of pity mingled with contempt, but it is silent.[263]

[261] "A Woman in Male Attire," *The North Western Advocate and the Emu Bay Times* (TAS), 22 August 1904.
[262] Ibid.
[263] "You're Telling Us!" *Saturday Evening Express* (TAS), 13 March 1937.

Tasmania's difference in law may not have caused a significant difference in the practical day-to-day policing of these cases. Individual (brief) reports on male assumed people presenting as female in public may have stated that the person was arrested specifically for 'masquerading in female attire' – however, such descriptions were used as shorthand in other states as well, so this does not necessarily indicate harsher or more targeted policing (nor does it rule it out).[264] Likewise, reports on female assumed people presenting as male in public might be framed in terms such as 'the vagaries of a demented youth,' and presented as disruptive, but ultimately strange, interesting and 'no need for alarm.'[265] It appears, however, that the specific legal context did provide a unique narrative framing to these cases and moreover it enshrined the social differences in how male assumed and female assumed gender nonconformity were understood into law. Gender nonconformity in female assumed people was perhaps troublesome, but ultimately harmless – whereas gender nonconformity from male assumed people (at night, when it could not be written off in the guise of parade and play) was criminally dangerous.

CONCLUSION

Without any specific laws regarding gendered dress and presentation, arrests related to gender nonconformity functioned through other policing mechanisms: primarily vagrancy and offensive/indecent behaviour charges. Two archetypes characterised how the Australian criminal legal system policed female assumed gender nonconformity in the first two decades of the twentieth century: that of the vagrant, and that of the roguish heroine striking out in a man's world. Which archetype applied to a gender nonconforming person depended on factors such as their age, their social position, and how well they fit standards of respectability. These archetypes could strongly impact media coverage and how the courts treated them. Where they were read in line with the positive heroine ideal, charges tended to be dismissed and public perception was more likely to be positive, with the gender nonconformity presented as more benign. Where they fit closer to the vagrant archetype, however, outcomes were more likely to fit into the ongoing cycle of criminality and

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[264] "Tasmania," *Zeehan and Dundas Herald* (TAS), 3 January 1901.
[265] "A Woman's Masquerade 'Joke'," *Daily Post* (Hobart), 26 October 1911.

detainment which the vagrant character received, with the 'masquerade' element being one of spectacle.

Male assumed gender nonconforming people appeared less frequently, although when they did their cases tended to be more associated with spectacle and performance – and danger. That arrests for male 'masquerading' cases were usually made on offensive/indecent behaviour charges demonstrates the connotations they carried: they were a public display, something which had the potential to be deceptive, obscene, and sexually dangerous, whether through growing associations with homosexuality, or through the dangers a disguised male might pose to respectable women.

These early decades of the twentieth century marked a period of changing ideas around male and female gender nonconformity. As new ideas about sexology, homosexuality and gradually 'transvestism' made their way into the Australian mainstream discourse, the way these cases were identified, policed, and punished would change significantly. Within the coming decades, female masqueraders would slowly decline in prominence and their positive representations would phase out. The number of male masqueraders arrested, meanwhile, would significantly increase, as would the association between male 'masquerading' and deviant sexuality, which was just beginning to emerge in public discourse at this time. This shift marked a turning point in how gender diversity was understood and policed in the Australian criminal legal system.

CHAPTER 2

NEW FRAMEWORKS OF SEXUAL DEVIANCE

The 1920s and 1930s were a time of emerging discourses. There was not a clear-cut dominant framework or model to understand, police and report on gender nonconformity and sexuality. Concepts from sexology and psychology formed the basis of a lot of new ideas to understand homosexuality and sexual deviance. These ideas were already late in coming to Australia, having taken some time to enter mainstream circulation from Europe and Great Britain where they had influence from the latter half of the nineteenth century. However, as they were negotiated and renegotiated in Australian society, press and media, these discourses both constructed *and* gave voice for people to explain their gender nonconformity. Defendants and the press alike used these discourses to question whether charges such as offensive behaviour for gender nonconformity cases were appropriate, and even querying whether such behaviour was criminal. Depending on a range of factors – such as perceived respectability or sexual immorality, or the biases of individual magistrates – the courts responded to these defences in a variety of ways. Conversely, these discourses also gave police and the criminal legal system new lenses through which to target and prosecute gender nonconformity. What we see utilised most often during this period is the concept of sexual deviancy. Sexological and psychological discourses linked sexual deviancy with gender non-nonconformity; however, we rarely see courts or the media directly drawing on theories of sexology. Instead, what entered mainstream discourse was the idea of the sexual deviant as an archetype, characterised by homosexuality, sexual perversion, and gender nonconformity.

At times of social upheaval, societies often target 'deviance' as the source of social wrongs. While what 'deviance' *means* can vary, targeting it is a way for societies to work through anxieties by attempting to exert control over a perceived threat.[266] In 1920s-30s Australian 'masqueraders' – particularly male assumed people presenting as female – reflected ideas of

[266] Erich Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance*, Second Edition ed. (United Kingdom: Wiley-Blackwell, 2009), 117,28.

‘deviance’ and everything it entailed: gender nonconformity, homosexuality, subversion, and danger. But because this was a period of experimentation and upheaval, the ways police, courts, medical professionals, and defendants utilised these discourses and the outcomes of proceedings varied significantly. Australian society was aware there was *something* problematic regarding gender nonconformity but had yet to formulate a consistent response to it. Gender nonconformity intersected with other anxieties playing out at the same time around sex, race, sexuality, and gender. By bringing discussions of gender diversity and sexuality into daylight, the range of responses to them multiplied: sometimes by creating opportunity for freer expression, sometimes with legal responses restricting and exerting control over deviant behaviours.[267]

This chapter will primarily examine how this negotiation of discourses affected male assumed people presenting as female. In this period, cases of ‘male masqueraders’ increased in prominence: male assumed gender nonconforming people were more frequently arrested, and the sites and justifications for arrests gradually shifted to focus on anxieties around perceived links to sexual deviance and homosexuality. Whereas in previous decades much of the policing of gender nonconformity focused on issues of public morality and what expression/behaviour was acceptable in public spaces, by the 1920s and ‘30s this distinction of private versus public policing was blurring. Charges continued to focus on offensive behaviour and vagrancy – ostensibly concerned with regulating public spaces. However, there were also more cases of police arresting individuals for being gender nonconforming within private spaces, such as homes. This raises the question of what was truly being policed: the public disturbance, or the gender nonconformity itself. The increased discourse about the inherent pathology of gender nonconformity and its relationship with homosexuality and sexual deviance meant that regulating gender nonconformity was no longer a concern only within the public sphere: it was increasingly a private issue.

Cases of female assumed gender nonconformity were not immune to the changing discourses around sexology and gender deviance, although the way these ideas manifested tended to be

[267] Michel Foucault, *The History of Sexuality: An Introduction* (Vintage, 1990), 40.

different. While in the first two decades of the twentieth century female assumed people presenting as male largely avoided association with narratives of sexual deviance and criminal homosexuality, over the course of the 1920s and 1930s they increasingly were more likely to be framed within these paradigms.[268] The press also less frequently invoked the adventurous 'heroine' figure of the female masquerader. Essentially, this period marks a pendulum swing in the discourses around gender nonconformity: as male assumed gender nonconformity became associated with sexual deviance and homosexuality, it became more visible in the discourse. Meanwhile, the same narratives served to make female assumed gender nonconformity less visible, except in certain high-profile cases, due to prevailing assumptions that women were less likely to be sexually deviant.

The Medicalisation Of Gender Nonconformity

The idea of sexual deviance, and its relationship to gender nonconformity and homosexuality, developed within the fields of psychology and sexology and, from there, entered broader societal discourse. Social factors, narratives and discourses influence the development of medical knowledge by determining which new ideas become accepted mainstream understandings.[269] As Foucault has described, from the late nineteenth century the 'homosexual' became constructed as an identity – and as a category of person.[270] This was a shift from prior understandings of male same sex activity, which focused more closely around singular sexual acts.[271] As the medical field discursively defined the category of the 'homosexual,' the focus shifted away from individual forms of intercourse, such as sodomy, and instead came to encompass a whole map of a person, where the individual's sexuality influenced every aspect of their behaviour and psychology. Central to this was a kind of internal gender divergence: homosexuality, sexologists theorised, derived from an inversion of the masculine and feminine within an individual, which was expressed through sexual deviance and gender divergence. As this category of the homosexual was born in the 1870s,

[268] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 206.
[269] Ivan Dalley Crozier, "Taking Prisoners: Havelock Ellis, Sigmund Freud, and the Construction of Homosexuality, 1897–1951," *Social History of Medicine* 13, no. 3 (2000): 449.
[270] Foucault, *The History of Sexuality: An Introduction*, 43.
[271] Shirleene Robinson, *Homophobia: An Australian History* (Federation Press, 2008), 3.

nonconformist gender expression became encapsulated within this archetype of homosexuality.[272] Over the course of the twentieth century, this model of sexuality came to dominate social understandings of sexuality. However, this model did not spring up fully formed and, for a long time, was applied unevenly and inconsistently as societies – especially Western societies – sifted through these new ideas.[273]

By the late nineteenth century and into the twentieth, theorists were outlining concepts which would evolve over time into present-day Western understandings of trans and gender diverse identities. These ideas were closely linked to concepts of homosexuality. For instance, Edward Carpenter in 1908 explained Karl Heinrich Ulrich's description of 'Urnings' as 'people born … belonging distinctly to one sex as far as their bodies were concerned [that] may be said to belong mentally and emotionally to the other,' and 'that the doubleness of nature was to a great extent proved by the special direction of their love-sentiment.'[274] Carpenter was writing some thirty years after Ulrich and challenged his ideas. Not convinced by Ulrich's explanation of the 'crosswise connexion between "soul" and "body",' Carpenter did, however, continue to use Ulrich's terminology of 'Urnings' and 'Uranians' to refer to people who would come to be considered homosexual. [275] Carpenter described the 'extreme' types of male and female Urnings as being excessively feminine or masculine for their sex.[276] The connection between homosexuality and gender nonconformity characterised much of the discussion on these topics in the first half of the twentieth century (and, sometimes, through to the present). For this reason, it is essential to discuss them together. Frequently, the laws used to target gender nonconforming behaviour were also used to target homosexuality and were interchangeable in their utility.

Sexually 'deviant' bodies were increasingly categorised and pathologised within Australian discourses throughout the 1920s-30s, drawing primarily from the British and continental field

[272] Foucault, *The History of Sexuality: An Introduction*, 43.
[273] Alison Oram, *Her Husband Was a Woman!: Women's Gender-Crossing in Modern British Popular Culture* (London: Routledge, 2008), 2.
[274] Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (Project Gutenberg, 1908), 8.
[275] Ibid.
[276] Ibid., 13.

of sexology.[277] Thinkers such as Richard von Krafft-Ebing and Havelock Ellis applied scientific reasoning to sexual behaviour and disseminated the sexological categorisations of homosexuality and 'inversion' to the broader field of medicine. These ideas often overlapped with the field of psychology, which was also developing at the time. For the purposes of this chapter, where I refer to the 'medicalisation' of homosexuality and gender nonconformity, I am referring to the integration of these concepts into scientific, sexological and psychological frameworks. Although these ideas, as developed by Krafft-Ebing and Ellis, classed homosexuality as abnormal, they were also somewhat progressive in presenting it as a 'natural' deviation from the norm, and not a disease to be cured. However, it took time for these ideas (which were already themselves peripheral to dominant medical theories) to establish themselves in Australia.[278] While debates may have been fairly active abroad, in Australia it was not until later, when individuals such as Norman Haire (a Sydney-born sexologist who established himself in London in the 1920s) began to push for these ideas, that they became more significant in Australian discourse in the 1930s and '40s.[279]

The interplay between medical theories about homosexuality and gender nonconformity, including how the court system applied them, was neither neat nor seamless. Yorick Smaal describes 'the fractured modelling and composite theories layered over decades past' to discuss the relationship between homosexuality, psychology, and the criminal legal system.[280] Throughout this period, medical evidence, such as that from psychiatrists, was called upon more often in courts, but the outcomes were inconsistent.[281] Sometimes the way that homosexuality and gender nonconformity were discussed – by the press, courts, and medical system – could be relatively sympathetic. In 1927, an Australian newspaper described 'the majority of homosexual persons' as 'decent, self-restrained members of the community.' However, they contrasted with the 'flagrant inverts of the police-court', who

[277] Lisa Featherstone, *Let's Talk About Sex: Histories of Sexuality in Australia from Federation to the Pill* (Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2011), 175.
[278] Bongiorno, *The Sex Lives of Australians: A History*, 118-19.
[279] Ibid., 167-68.
[280] Yorick Smaal, "“It Is One of Those Things That Nobody Can Explain”: Medicine, Homosexuality, and the Australian Criminal Courts During World War II," *Journal of the History of Sexuality* 22, no. 3 (2013): 502.
[281] Featherstone, *Let's Talk About Sex: Histories of Sexuality in Australia from Federation to the Pill*, 175.

represented the dangerous side of homosexuality.[282] Often homosexuality was linked in the court system with 'perversion,' which encapsulated either moral deviance, or medical/mental failing, and included all sexual offenders.[283] This was the criminal side of gender and sexual nonconformity, where it was linked with deviant sexuality and social danger.

Through the 1930s, the medicalisation of homosexuals as 'deviants' found its way into sentencing and the courtrooms. In New South Wales in the 1910s, courts placed only one percent of defendants facing charges related to homosexual activity under medical observation after their time in court. By the 1930s, this had risen to 10 percent. Likewise, by the 1930s, policing of offences related to male homosexual activity had risen. However, the charges themselves were less serious: most arrests were under offensive or indecent behaviour, vagrancy, soliciting for immoral purposes, and indecent exposure, rather than sodomy or buggery which carried much more severe penalties.[284] This reflected the shift away from viewing male same sex activity within a frame of individual outlawed acts, and towards viewing male same sex activity as a characteristic of a whole (deviant, socially dangerous) person.

The relationship between sexology/psychology and the way that gender and sexual difference were constructed within these fields did not map directly to the criminal legal system. As noted, how Australian discourse negotiated these ideas was often scattered and inconsistent. What did begin to influence the policing and sentencing of gender nonconformity, however, was this construction of a homosexual 'type,' and the corollary associations with sexual deviance. When gender nonconformity became an indicator of deviancy, and as defendants adopted the language to describe and understand themselves, the mechanisms of policing also changed.

When the criminal legal system drew from medical discourses, they rarely referenced them directly. Rather, these discourses provided the basis for archetypes around deviancy, gender

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[282] Smaal, "“It Is One of Those Things That Nobody Can Explain”: Medicine, Homosexuality, and the Australian Criminal Courts During World War II," 512.
[283] Ibid., 513.
[284] Michael Gilding, *The Making and Breaking of the Australian Family* (Sydney: Allen & Unwin, 1991), 101.

nonconformity and homosexuality, and these archetypes found their way into criminal legal discourses and policing. Medical discourses constructed a deviant homosexual archetype. Society, the press, and the criminal legal system framed this archetype as morally and criminally dangerous. However, applied differently, the same discourses could be – and were – used to argue for sexual and gender nonconformity being 'natural' and an acceptable medical anomaly. I will expand on this later in the chapter, looking at how defendants used these discourses. Here, I examine a few cases which provide insight into how 'sexual deviance' factored into cases involving gender nonconformity, and how class, gender, and context shaped the perception of these cases.

In 1937, police arrested Paul Wynn and Roy Bellamy (both from North Melbourne) for wearing women's clothing on Flemington Road in Melbourne in two separate incidents.[285] On the surface, these two cases were very similar. Bellamy received the harsher sentence: Wynn went to prison for one month following their arrest, Bellamy for six.[286] Bellamy's harsher sentence reflected how the police and courts perceived them: as being sexually deviant and disreputable. Prior to this incident, Bellamy had some renown with law enforcement. Police considered them a 'reputed thief' who associated with other thieves and 'men who masqueraded as women' – the two groups lumped together in the newspaper reporting.[287] Police arrested Bellamy (aged in their 50s) wearing a black skirt and black shoes, an old fur coat, and white stockings, and the press emphasised that they were 'partly bald,' going by the name Minnie McKensie. The police arrested Bellamy/McKensie and charged them for vagrancy.[288] Their court record described them as 'an idle or disorderly person' and as having 'insufficient means of support.'[289]

The constable who arrested Bellamy/McKensie saw them talk to two men on Flemington Road, and one man 'accompanied him in the direction of the gardens.'[290] Gardens such as

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[285] "Man Dressed as Woman Gaoled," *The Herald* (Melbourne), 14 April 1937; "Six Months' Gaol for Masquerading as Woman," *Advocate* (Burnie) 1 September 1937.
[286] "In Women's Clothes," *The Mercury* (Hobart), 1 September 1937; "Man Dressed as Woman Gaoled."
[287] "In Women's Clothes."
[288] "In Women's Clothes."
[289] PROV, VA 3150 Carlton Courts, VPRS 8879/P1 Court of Petty Sessions Magistrates' Court Police/Arrest Register, Unit 60 28/01/1937 – 10/01/1938.
[290] "Six Months' Gaol for Masquerading as Woman."

these often served as beats (semi-public spaces where men could meet anonymously for sexual encounters) and were closely monitored by police. The constable also stated that he had previously warned Bellamy/McKensie about going out dressed in women's clothes.[291] When Bellamy/McKensie went to court, they went on the witness stand in their female attire, even though they had earlier asked the police to find them other clothes to wear. The police insisted that Bellamy/McKensie went to court dressed as they were. On the stand, Bellamy/McKensie attributed their gender nonconformity to 'the wine they were drinking that night.'[292] These compounding factors – the police insistence that they wear their feminine clothing to court, their prior reputation as a thief who associated with other 'masqueraders,' and the homosexual association of them accompanying a man to the gardens – all shaped Bellamy/McKensie's experience and ultimately their sentencing. Their financial situation was also a factor. Bellamy/McKensie worked as a cook and a seller of artificial flowers and earned £2 per week. They could not produce the money on hand necessary to show they had sufficient means of support and negate their vagrancy charge.[293]

Wynn's case, in contrast with Bellamy/McKensie's, seemed to have less focus on any 'deviant' associations with the charges. At twenty-six years old, Wynn was significantly younger when police approached, questioning why they were out at night dressed in women's clothes and going by the name Mary Bowen. Wynn/Bowen responded: 'Don't be stupid. I am going home.'[294] Police subsequently arrested them; Wynn/Bowen struggled violently with the police, kicking and head-butting them. The police charged Wynn/Bowen with offensive behaviour, two counts of assaulting police, and a vagrancy charge which the court dismissed.[295] In court, Wynn/Bowen stated that they had lost a bet to dress up as a woman to attend a party.[296] The dismissal of Wynn/Bowen's vagrancy charge showed that the court could not sustain that charge, unlike Bellamy/McKensie, who could not produce money as evidence that they had means of support. Wynn/Bowen was sentenced to one month in prison

[291] "The Police Courts," *The Age* (Melbourne), 1 September 1937.
[292] "In Women's Clothes."
[293] "The Police Courts."
[294] "Man Dressed as Woman Gaoled."
[295] "Man Dressed as Woman Gaoled."
[296] "Man Dressed as Woman Gaoled."

in contrast to Bellamy/McKensie's six, suggesting that the courts perceived their gender nonconformity as less dangerous to public norms. Both cases warranted prosecution in the eyes of the court, and the gender nonconformity was enough in both instances to warrant arrest and imprisonment. However, Wynn/Bowen did not have the same association with 'thieves' and 'men who masqueraded as women.' Bellamy/McKensie's association with criminal and deviant subcultures compounded their sentence and subjected them to increased scrutiny for their gender nonconformity.

An interesting example of the differences between narratives for male and female gender nonconforming behaviour appeared in Melbourne's *Truth*. Bellamy/McKensie's case was reported in the Saturday edition of *Truth*, on 4 September 1937. On the very same day, another article was also published, titled 'Astounding Story of Girl who Became Man,' about Peter Alexander, who had travelled to Australia from New Zealand with the intent to marry his Australian partner.[297] I will not go into much detail here about Alexander, as the case falls outside of the scope of this research as he was not arrested. However, as a point of contrast, it is worth noting the differences in how *Truth* wrote about Alexander versus Bellamy/McKensie. The paper described Alexander's story as 'one of the most amazing sex transformations on record,' noting that: 'complete changes of sex are of course, by no means unknown, and medical science has proved to the hilt that sex is not immutable.'[298] The cause of Alexander's 'sex transformation' was identified as being something innate and biological (possibly an intersex variation), rather than a matter of social construction of identity. Alexander recounted that he visited a doctor who informed him he was 'about to become a man' and that his 'heart leapt with joy' upon hearing the news.[299]

The report was sympathetic to Alexander's story, used male pronouns throughout the piece (except when discussing Alexander in his youth), and refused to publish Alexander's

[297] "Astounding story of girl who became man," *Truth* (Melbourne), 4 September 1937. ISSN 2201-8166, Newspapers Collection, State Library Victoria. Note: I am using he/him pronouns in Alexanders' case as he was explicit about his male identity.
[298] Ibid.
[299] Ibid.

previous name, despite other articles at the time doing so.[300] In contrast, *Truth's* report about Bellamy/McKensie focused intently on scrutinising Bellamy/McKensie's appearance for 'mannish' features, placed female pronouns in quotation marks to refer to Bellamy/McKensie ('"She" was no loose lady'), and posed the question of whether they were 'some freak from a sideshow.'[301] Bellamy/McKensie's sexual behaviour was a focus of the report, which stated: 'Roy, according to the police, has a queer little habit of disguising his thick-set masculine form in women's clothes, adopting a simpering walk, and strolling along Flemington Road at night, "pirating" [propositioning] men.'[302]

We can see here differences in both the discourses around different types of gender nonconformity and the criminal perception of them. There was no indication in the reporting on Alexander's case that he was doing anything unlawful by transitioning. There was debate regarding the legality of his proposed marriage to his female partner, but Alexander was not framed as criminal.[303] Bellamy/McKensie, however, was framed as deviant and criminal for their dress, and their sexual behaviour with men. These two articles were published only a couple of pages apart, by the same paper, on the same day. That Alexander's gender nonconformity was presented as natural and valid, while Bellamy/McKensie's was unnatural, 'freak'-ish and sexually dangerous, points to distinct differences in how understandings of gender nonconformity played out across different lines of class, respectability, gender and sexuality.

The medicalisation of sexual deviance in this period had the effect of creating a new set of discourses and frameworks through which 'deviant' behaviour could emerge. At its core, what these discourses did was define and give personhood to the sexual 'deviant' and formed a basis for their behaviours which was rooted in psychology and biology. In some cases, society could draw from these discourses to absolve or naturalise sexually deviant behaviour: for example, the press framed (non-criminal) Alexander's 'sex transformation' as a medical

[300] See for example: Ibid; "Clerics Refuse To Marry 'Peter Alexander'," *The Evening News* (Rockhampton), 24 December 1937; "I Would Have Married Peter Alexander!" *Smith's Weekly* (Sydney), 18 December 1937.
[301] "'She' was no loose lady," *Truth* (Melbourne), 4 September 1937. ISSN 2201-8166, Newspapers Collection, State Library Victoria.
[302] Ibid.
[303] "Clerics Refuse to Marry 'Peter Alexander'," *The Evening News* (Rockhampton), 24 December 1937.

(and therefore legitimate) event. In other cases, such as Bellamy/McKensie's renown as someone with a 'queer' habit who 'pirated' men while dressed in women's clothing, the way that medical discourses established the category of the gender nonconforming homosexual solidified their treatment as deviant and criminal. While both approaches shared a root cause – the understanding of sexual deviance as being evidence of a psychological 'type' – the ways that police, magistrates, and the press applied these discourses depended on a host of other factors and preconceptions.

While gender nonconformity and homosexuality were the focus of certain forms of regulation and policing, it is also important to note the other side of this coin: crimes or assaults perpetrated against gender nonconforming people which *were not* subject to policing. I refer here to events which would, within a modern framework, be considered homo/transphobic harassment or attacks. Law enforcement could overlook or even tacitly endorse these forms of assault, due to the cultural framing of gender nonconformity and homosexuality being innately dangerous and criminal. Such events, therefore, could be taken as 'defence' against a perceived threat.

The downplay of violence against gender nonconforming people was, in part, a side effect of the idea of 'sexual deviance' moving into the mainstream. Judith Butler has argued that some lives – marginalised groups, especially – are perceived as less deserving of public protection, respect and grief, and that the devaluation of these lives results in inaction and neglect from societal institutions, such as police or the media.[304] A recent inquiry conducted by the New South Wales Parliament into hate crimes against gay and transgender individuals found that, historically, police attitudes to gay and transgender people 'influenced the way in which victims of hate crime were treated and their cases investigated.'[305] Prejudice against homosexual and/or gender nonconforming people was enmeshed in public institutions, sanctioned by judicial systems, police and the press.[306] Kristen Davis discusses how this played out in Australia later in the twentieth century in relation to murders of gay men at beat

[304] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (New York: Verso, 2006), 33.
[305] Legislative Council, "Gay and Transgender Hate Crimes between 1970 and 2010: Interim Report," ed. Standing Committee on Social Issues (New South Wales Parliament, 2019), vii.
[306] Robinson, *Homophobia: An Australian History*, 87.

spaces. Davis argues that police were slow and reluctant to respond to these attacks, and that their failure to act in a protective role to all members of the community meant that, through their inaction, gay men were not afforded their citizenship or personhood.[307]

Gender nonconforming presentation could also mean police were less likely to prosecute members of the public who assaulted a gender nonconforming person. An example of this is Leslie Arnold, who was arrested for offensive behaviour in October 1925 due to their gender nonconforming presentation at the corner of Little Bourke and Exhibition Streets in Melbourne. Arnold approached a news vendor named Thomas Williams, who was in the city with several friends, and offered Williams money to accompany them home. Williams punched Arnold, knocking them over before they ran away. Williams and his friends pursued and caught Arnold near Bourke Street. The group restrained Arnold until police arrived.[308] The police arrested Arnold, who was fined five pounds and imprisoned for a month.[309] However, Williams' attack against Arnold appears to have been excused or even condoned. Williams was not arrested, and the press reports framed the attack as an appropriate response.[310]

If Arnold's approach were interpreted as a sexual proposition, then the violence could be interpreted as a homophobic reaction, which has historically been grounds to justify a violent response. The 'gay panic' defence refers to judicial defence strategies which are based on the idea that a criminal defendant has reduced culpability for violent actions taken in response to a homosexual advance or proposition. The concept has its roots in the kinds of psychological discourses which were becoming prevalent in this period, and the term 'homosexual panic' itself was coined in 1920 by a clinical psychiatrist, Dr. Edward Kempf.[311] In Australia, the 'gay panic' defence has never been formally enshrined into legislation, but has a history in case law, known as the 'homosexual panic defence' (HPD) or 'homosexual advance defence'

[307] Kristen Davis, "Bondi's Underbelly: The 'Gay Gang Murders'" (paper presented at the Queer Space: Centres and Peripheries, University of Technology, Sydney, 2007), 3-4.
[308] "Man In Woman's Clothes," *The Argus* (Melbourne), 10 October 1925.
[309] Ibid.
[310] Ibid; "'Out for A Lark,'" *The Daily News* (Perth), 10 October 1925.
[311] Gary D. Comstock, "Dismantling the Homosexual Panic Defense," *Law & Sexuality* 2 (1992): 475, 82.

(HAD), with defendants relying on self-defence and provocation defences to plead their cases.[312]

Arnold, like several other male assumed gender nonconforming people, attended court in their female attire, which newspapers reported 'treated [spectators] to an unusual sight'.[313] The reports emphasised that Arnold was a young, good looking, muscular person, who was 'attired in a fashionable spangled dress, his lips rouged, his eyes painted and his arms and shoulders bare.'[314] Similar to other cases, Arnold's defence was that they had been drinking that day, and that they were masquerading 'for a lark.'[315] The defence, however, was unsuccessful: the magistrate called Arnold sexually dangerous, and therefore implicitly characterised the violent response to their proposition as proportional and justified.

PUBLIC INDECENCY TO MORAL CONCERNS

In 1919, the Victorian parliament introduced new legislation which made actual or attempted 'gross indecency' punishable with prison terms – whether committed in public or in private. This was a break from prior decades, when the law focused on public acts of indecency.[316] This legislative change was prompted by a push to pass measures which would allow police to deal with several 'mental perverts' in Melbourne who could not be charged under existing legislation.[317] The offenders had paid three teenaged boys to 'consent to the commission upon them of unnatural offenses.'[318] The debates around this issue focused on whether imprisonment was a suitable punishment for these offenders, or whether they were 'mentally deficient' and if commitment to the asylum would be more suitable.[319] Either way, politicians

[312] Adrian Howe, "More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses-Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)," *Sydney Law Review* 19 (1997): 336-7.
[313] "In Woman's Garb," *The Mail* (Adelaide), 10 October 1925.
[314] "'Out for a Lark.'"
[315] "Man In Woman's Clothes."
[316] Wayne Murdoch, "'Phone Me up Sometime': Melbourne's Homosexual Subcultures in the Interwar Years," *The LaTrobe Journal*, no. 87 (2011): 21.
[317] Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August - 26 August 1919 (Vol. 152), 825-6.
[318] Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 23 October - 6 November 1919 (Vol. 153), 2181.
[319] Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 12 August - 26 August 1919 (Vol. 152), 826-31.

argued that the offences were 'serious against the individual' but 'more serious against the community,'[320] and that it was essential to make these acts an offence in private spaces as well as public.[321] This change signposted a shift from an old mode of policing to a new one which would develop over the 1920s-30s. The growing role of medicalisation influenced the increased regulation of private spheres.[322] Those arrested while presenting in gender nonconforming ways still were usually charged with offensive behaviour or vagrancy, but this change in the law indicated a related shift toward interpreting cases of sexual or gender 'deviance' within a framework based around a deviant 'type' of person – rather than based around public disturbance. When gender nonconformity indicated an all-encompassing archetype of a deviant individual, this person was no longer a threat only to decency and morality within public spaces, but also in their private activities, and could be policed accordingly.

The meaning and intention of charges against 'offensive behaviour' and similar offences influenced how police used the law to regulate public order.[323] The distinction between what is acceptable behaviour in public versus private is important here. There are numerous examples of conduct which has, to different degrees at different points in history, been considered acceptable within private spaces, but indecent when performed in public. Therefore, it is not always the act itself which is necessarily indecent or offensive, but the 'public knowledge and awareness of the existence of those acts.'[324] The decency of public behaviour has historically been tied to respectability: decency was respectable and civilised, and indecency was unrespectable and uncivilised. Determining which behaviours were indecent, therefore, was about public norms of behaviour and the regulation thereof – but

[320] Ibid, 828.
[321] Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 11 November - 19 November (Vol. 153), 2183.
[322] Ford, "Sexuality and 'Madness': Regulating Women's Gender 'Deviance' through the Asylum, the Orange Asylum in the 1930s," 110.
[323] David Dixon, "Book Review: In Search of Criminal Responsibility: Ideas, Interests and Institutions, Public Indecency in England 1857–1960, Criminalization: The Political Morality of the Criminal Law, Criminalisation and Criminal Responsibility in Australia and Criminal Laws," (London: SAGE Publications 2017), 779.
[324] David J Cox et al., *Public Indecency in England 1857-1960: 'A Serious and Growing Evil'* (London: Routledge, 2015), 1.

also about anxieties around which activities might do harm to the community when conducted in the private sphere. Rather than being confined to a specific set of actions or language, the policing of indecent behaviour could shift over time in response to changes in societal norms about what behaviours were considered respectable, acceptable or moral. Indecent or offensive behaviour was not just about the individuals involved; it was about the welfare of the whole community, and what behaviours could be morally harmful to society at large.[325]

Over the course of the nineteenth century and into the twentieth, concepts of freedom and liberty shifted how people interacted with public spaces. Autonomy and freedom in civil society meant that codes of 'civility, reason and orderliness' had to be established which would give people the tools to govern their own behaviour.[326] Establishing norms was central to building structures which would govern how individuals conducted their private affairs.[327] The relationship between criminal legal systems and private lives was, Nikolas Rose suggests, 'not a means of producing terrorised slaves without privacy, but self-managing citizens capable of conducting themselves in freedom, shaping their newly acquired "private lives" according to norms of civility.'[328] Freedom in private spaces required, for a healthy and civilised society, ways to shape the private conduct of individuals so that they were behaving in ways which contributed to this collective wellbeing. [329] By incentivising private adherence to norms, direct intervention in private spaces was only necessary when norms were being violated.[330]

Offensive behaviour, as a charge, was a tool for police to enforce societal norms when they were not explicitly written into the letter of the law. Nicola Lacey outlines a distinction between formal criminalisation and substantive criminalisation.[331] She defines formal

[325] Ibid., 4.
[326] Nikolas S. Rose, *Powers of Freedom Reframing Political Thought* (Cambridge: Cambridge University Press, 1999), 69.
[327] Ibid., 79.
[328] Ibid., 242.
[329] Ibid., 48-49.
[330] Carrington discussed this in the context of state intervention in Australian families. Kerry Carrington, "Policing Families and Controlling the Young," *Journal of Australian studies* 15, no. 31 (1991): 108-10.
[331] Lacey, "Historicising Criminalisation: Conceptual and Empirical Issues," 943.

criminalisation as acts outlawed within the letter of legislation, international treaties, and other formal justice mechanisms. By contrast, substantive criminalisation takes place in practice between the criminal legal system and the public and is therefore effectively (if not technically) criminalised. When police choose to target certain groups of people or behaviours, for example, this is an expression of how social norms and biases impact the enforcement of laws. Certain behaviours (such as wearing clothing assigned to another gender) may not be explicitly criminal: but when they consistently draw police attention, they become substantively criminalised.

The relationship between formal and substantive criminalisation is not always intuitive. In cases where decriminalisation occurs but police and society at large still view an act as going against public norms, innate biases may lead to police disproportionately targeting the decriminalised acts.[332] This is pertinent when looking at the policing of gender non-conformity in Victoria. The lack of formal criminalisation meant that most of the policing involved was informal – but substantive. Police generally charged gender nonconformity under public order offences and criminalised it based on its public disruption and moral harm. The question is, then: what harm was being caused when gender nonconformity occurred in private, and how did it continue to be offensive behaviour when there were no witnesses to see it?

A classical principle for criminalising acts is the idea of 'public wrongs' – acts which 'properly concern the public.'[333] It seems intuitive that for a behaviour to cause offence, other people need to witness it. However, arrests for gender nonconformity conducted in private suggest that this was not necessarily the case: police still considered these cases harmful enough to warrant a charge of offensive behaviour. This makes sense when we think of offensive behaviour charges as a means of regulating standards of behaviour and morality in society. Jaques Donzelot argues that the State ensures public order through a system of dependency between private and public sectors. Donzelot's focus is on the family unit, where

[332] Ibid., 947.
[333] Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007), 141.

the family – as a private, autonomous unit – can carry out the regulatory role of the state in managing private behaviour to reinforce social norms.[334] Governing, therefore, becomes possible in private through the shame individuals feel at violating the moral norms of their society.[335] Because of this kind of private regulation, public wrongs do not need to occur publicly. They can happen out of sight, but the wrong becomes a public concern because of the public interest in the behaviour.[336] The offence does not need to be caused directly, because it may still be dangerous to community well-being second-hand. If an act contravenes the accepted norms of behaviour, it can cause offence to the broader public even if no one directly witnesses it. When people learn that the 'offensive' act took place, whether they saw it or not, it carves out a discursive space where it can conceptually challenge the boundaries of what is acceptable within society. The knowledge alone that a transgressive act took place is enough to cause offence – and therefore, harm to social norms, values, and morality.

At the centre of this debate over the boundaries of public/private offensive or indecent behaviour is the underlying question of whether the state has the duty or role of determining whether its citizens should be protected from knowledge considered offensive. The Harm Principle – that society has 'good reason to criminalise conduct (only) if it is related to an identifiable harm' – remains a rationale for criminalisation of acts.[337] Joel Feinberg, in formulating the Harm Principle, argued that it is the legitimate business of the law and the state to prevent serious offence to its citizens.[338] He asserted that this offensiveness does not need to involve any material harm or injury, but needs to be distressing enough to warrant criminalisation. But 'harm' is tricky to define. As Andrew Simester and Andrew Von Hirsch argue, Feinberg lacked a consistent rationale for why offence, in and of itself, justifies criminalisation. When offensive behaviour *does* legitimately justify criminal censure, that offence is generally associated with *some* form of material harm – physically or

[334] Jacques Donzelot, *The Policing of Families* (Random House Incorporated, 1979).
[335] Rose, *Powers of Freedom Reframing Political Thought*, 73.
[336] Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, 142.
[337] Ibid., 123.
[338] Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (New York: Oxford University Press, 1985), 1.

psychologically. In practice, the boundaries of what is appropriate behaviour in public depend on social conventions at any given time or place, even within the same society. These social conventions act 'to delineate the boundaries between personal and public, something that necessarily involves limits on what kinds of access people may have to the lives of others.'[339]

When police targeted male assumed people presenting as female in spaces reasonably expected to be private, this blurred the line between offensive behaviour charges acting as a tool to enforce *public order*, and as a tool to enforce normative values. This disruption of the public and private and how it was policed is a common theme in this chapter. Beats brought activities one might expect usually to be private (sexual encounters) into an ambiguously public space. Meanwhile, while 'masquerades' were traditionally considered public spectacles and performances, the increased understanding of gender nonconformity within private or semi-private spaces also reframed these spaces as potential danger zones for gender subversive activity. As new subcultures and identities were discursively defined, so too did their boundaries and their legal position need to be defined and regulated in turn. I will explore case studies showing how this played out within the criminal legal system in the sections to follow.

Policing Of Gender Nonconformity As Homosexuality

Along with the increased regulation of gender nonconformity in private spaces, police were also more actively policing homosexuality within public or semi-public spaces during this period. Social shifts in the 1920s meant that homosexual and gender nonconforming subcultures and spaces were emerging, but (correspondingly) this period also saw marked social anxiety about sexual behaviour.[340] One of the primary ways in which 'deviant' sexuality was policed, particularly the activities of men who had sex with men, was through the monitoring of beats. Melbourne had an entrenched network of cruising areas by the 1920s

[339] Andrew P Simester and Andrew Von Hirsch, "Rethinking the Offense Principle," *Legal theory* 8, no. 3 (2002): 276-77.

[340] Yorick Smaal and Mark Finnane, "Flappers and Felons: Rethinking the Criminal Law and Homosex in Interwar Australia, 1920–1939," in *From Sodomy Laws to Same-Sex Marriage: International Perspectives since 1789*, ed. Sean Brady and Mark Seymour (London: Bloomsbury Publishing, 2019), 84.

and 1930s, spaces which situated queer sexual activity within a public, policeable space. These beats were generally public toilets, parks, city laneways or streets such as Bourke Street, Lonsdale Street, Princes Bridge – places where (typically) men could meet one another for sexual encounters.[341] Although there was always a criminal risk to utilising beats, people perceived as men had more opportunity to use public spaces in this manner than people perceived as women.[342] A beat also might serve as a social entry point, a way to make connections that would allow access to the more private camp scene.[343] These more clandestine gatherings were less likely than beats to attract police notice. However, some raids occurred: police raided one private party above an Elizabeth Street café in 1938, finding 'dozens of men, many dressed as women' and a bedroom 'littered with women's clothing and make-up.'[344]

Sometimes, police used the address books belonging to men who had committed homosexual offences and would raid the homes of others whom they suspected of homosexual behaviour.[345] Reports of this practice featured in exposés from the tabloid newspaper *Truth*. There were also some clubs operating by the 1930s in Melbourne which housed paid drag balls. Certain coffee lounges as well served as spaces of socialisation for the camp crowd.[346] Although beats themselves were mostly a male and male-presenting affair, the camp scene operating behind the scenes featured drag and gender nonconforming behaviour as a central element. Press attention highlighted this as a key anxiety when these spaces came under criminal notice. As well as targeting men in public spaces, police in the 1930s were setting up opportunities to catch homosexual offences 'in the act.'[347] Both the activities of the camp scene and the anxieties expressed in the press exposés defined a gender nonconforming homosexual subculture. The coalescence of these identities was not only being imposed by

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[341] Murdoch, "'Phone Me up Sometime': Melbourne's Homosexual Subcultures in the Interwar Years," 23.
[342] Graham Willett, Wayne Murdoch, and Daniel Marshall, *Secret Histories of Queer Melbourne* (Australian Lesbian and Gay Archives, 2011), 38.
[343] Ibid.
[344] Murdoch, "'Phone Me up Sometime': Melbourne's Homosexual Subcultures in the Interwar Years," 25.
[345] Ibid., 31.
[346] Graham Willett, *Living out Loud: A History of Gay and Lesbian Activism in Australia* (Allen & Unwin, 2000), 5.
[347] Gilding, *The Making and Breaking of the Australian Family*, 101 - 02.

the medical field or used by police to target deviance. It was also being integrated within the community to create, negotiate, and define an identity or set of identities. The increased attention to gender nonconformity and sexuality shows how this proliferation of discourses was both creating a climate of experimentation and encouraging stricter supervision from the law.[348]

Steven Maynard argues that the policing of male homosexuality was one factor which brought gay subcultures into existence. The increased urbanisation and creation of public spaces such as public toilets, parks and laneways also had the side effect of creating more readily available public areas where men could meet for sex. As police surveyed these spaces and arrested the people who engaged in sex in them, this subculture of public sex and awareness of homosexual activity spread to society at large. The act of policing these behaviours and bringing them to court, naming and charging them, meant that previously unspoken behaviours entered the discourse and became publicly known – facilitating a mode through which homosexual activity could be understood, practiced and engaged with.[349] The increased private policing of gender nonconformity and the increased public policing of homosexuality were both tied back to the growing understanding of the sexual 'deviant' as an archetype – and of homosexuality as a growing identity and subculture.

THE PUBLIC/PRIVATE DIVIDE

An example of policing which blurred the line of public and private is the arrest of Percy Douglas. In 1932, Douglas was 'found in bed' by police at 12:45 a.m., in their room at the Victoria Coffee Palace, Little Collins Street, Melbourne. Police arrested Douglas wearing woman's pyjamas to bed, and they had only female clothing and lingerie in their room.[350] They charged Douglas with offensive behaviour. According to reports, Douglas had not 'spoken to any person, man or woman, in Melbourne, except to give his order to a waitress for food' – at which point their voice 'betrayed' them. Douglas did not appear to intend their

[348] Foucault, *The History of Sexuality: An Introduction*, 40.
[349] Steven Maynard, "Through a Hole in the Lavatory Wall: Homosexual Subcultures, Police Surveillance, and the Dialectics of Discovery, Toronto, 1890-1930," *Journal of the History of Sexuality* 5, no. 2 (1994): 209-42.
[350] "Arrested In Bed," *The Herald* (Melbourne), 3 February 1932.

gender nonconformity to be a public spectacle. Douglas themself seemed to be a very isolated individual: as per their statement in court, they lived on a 300-acre farm outside of Bannockburn, Victoria, where they tended to the livestock and 'did not see any other human beings.' While on the farm they dressed in feminine attire, with their stated motivation being 'a silly crank,' and that they had 'obtained a few theatrical properties' putting on amateur theatre in England prior to moving to Australia.[351] Douglas explained that they wanted to see if they could maintain the masquerade while they visited Melbourne for the weekend, to entertain themselves.[352] Although there was clearly a public element to Douglas's gender nonconformity – enough for them to be identified and have the police called on them – most of their gender nonconformity was characterised by privacy and interiority. Their stated motivations were personal, in that they dressed primarily alone, in an isolated location. Their arrest took place in the privacy of their room and in the middle of the night, indicating that – at the time of the arrest – they were not creating any kind of public disturbance.

In court Douglas explained their gender nonconformity with the language of performance and amusement, but no audience, except Douglas themself, can be readily identified. Using the rationale of performance indicates that this remained a common line of defence, as it had been in prior decades, even in cases where it appeared counterintuitive. Their 'offensive behaviour' charge was less about any disruption or insult caused by their gender nonconformity and was much more focused on the offence innate in a male assumed person habitually dressing in female clothing. Some reporting identified the charge itself not as offensive behaviour, but as: 'being a male, he walked abroad in feminine attire', making it clear that the gender transgression was what was being policed.[353] Douglas's case was ultimately discharged within court with a warning.[354] The police and the court saw Douglas's private gender nonconformity as criminal enough to warrant arrest – although not so criminal as to necessitate time in prison or a fine (in contrast to cases discussed earlier, such as Bellamy/McKensie or Wynn/Bowen). Douglas's compliance with the court's stipulation that

[351] "Man Dressed as Woman," *The Herald* (Melbourne), 3 February 1932.
[352] "In Female Attire," *Daily Mercury* (Mackay), 9 February 1932.
[353] "Dressed As Woman," *Singleton Argus* (NSW), 5 February 1932.
[354] "Man Dressed as Woman."

they resume wearing masculine clothing may have factored into this,[355] as well as the lack of evidence that they engaged in other 'deviant' behaviour, whether criminal or sexual.

In other cases which crossed the public/private divide, the seclusion of the gender nonconforming behaviour could enhance the danger it posed. In 1929, Eric Brennan was arrested in bed in their room in West Coburg, Melbourne. In their bedroom, police found 'an extensive wardrobe of women's clothing, including stylish hats, silk underwear, and silk stockings.'[356] As with Percy Douglas, this arrest took place at night, in a private space, with the gender nonconforming person being apprehended while in bed. Unlike Douglas, Brennan, who was seventeen at the time, was arrested for housebreaking and stealing, and was accused of breaking into approximately thirty houses to steal women's underwear and clothing.[357] This meant that the discourses around the case were different to ones where the gender nonconformity was the primary trigger for arrest and the charge. Still, the focus of the press reports surrounding the crime remained on the gender nonconformity, and the anxieties being expressed pertained specifically to the dangers of the gender transgression and subterfuge.

Due to Brennan's age, the Children's Court heard the case. According to reports, Brennan used female attire to disguise themself and take residence at lodging houses, where they would then steal items of clothing. The danger this posed was two-fold: not only was Brennan using their gender nonconformity to commit theft, but they were also presented as a danger to the women with whom they lodged. In some cases, Brennan's 'deception was so complete that householders allowed him to share rooms with girls.' The 'completeness' of Brennan's gender nonconforming presentation was a core issue. They were described as having feminine features which allowed them to present themselves 'easily' as female.[358] As explored in Chapter 1, the danger that Brennan posed arose from their ability to move seamlessly through spaces reserved for women. In cases like Brennan's, the fact that the 'masquerade' took place in private only enhanced the danger of the act. The fact that Brennan was able to pass easily as female and reside in women's spaces meant that they represented

[355] "Man Dressed as Woman."
[356] "Masquerade Alleged," *Weekly Times* (Melbourne), 3 August 1929.
[357] "Female Impersonator," *Kalgoorlie Miner* (WA), 31 July 1929.
[358] "Female Impersonator."

an anxiety – which can still be seen in the present-day – about the potential 'harm' of gender nonconformity to those with whom Brennan interacted.

Defendants' Use Of Discourses

The increased proliferation of discourses around gender and sexuality in the 1920s-30s opened the regulation of gender performance to public debate. As these discourses were disseminated into the public, more people were able to lend their voice to the debates, including the press, members of the public, and in some cases defendants themselves. As Foucault discussed, discourses have the dual effect of producing power and control, but also making power visible and therefore, able to be challenged.[359]

By the 1920s and 1930s, Australian society was negotiating a series of anxieties about gender. Women were becoming increasingly active as public and political citizens, in the home and in the workforce.[360] The figure of the 'flapper' within Australian culture and media highlighted tensions about working-class women and sexuality. The flapper received backlash and criticism from middle-class outlooks for representing a threat to the image of the 'ideal' woman, and to standards of appropriate heterosexual marriage and gender roles. The erosion of barriers between masculine and feminine spaces (or the public and the home) led to anxieties about women's role in public places – especially young, single women.[361] Feminists, reformers and the public alike were anxious about race as well as gender. Flappers, and the sexual promiscuity they represented, were also threats to white women's role as 'mothers of the race', where they were expected to fulfil their civic duty as mothers to the next generation of white Australians.[362] This was tied up with fears for national security and the preservation of the white population in the years during and following the First World War.[363] However, these discourses also provided young, single, white women the language

[359] Foucault, *The History of Sexuality: An Introduction*, 101.
[360] Ellen Warne, *Agitate, Educate, Organise, Legislate: Protestant Women's Social Action in Post-Suffrage Australia* (Carlton: Melbourne University Press, 2017), 190.
[361] Rebecca Preston, "From 'Precocious Brat' to 'Fluffy Flapper': The Evolution of the Australian Flapper," *Lilith: A Feminist History Journal*, no. 21 (2015): 35-36.
[362] Judith Smart, "Feminists, Flappers and Miss Australia: Contesting the Meanings of Citizenship, Femininity and Nation in the 1920s," *Journal of Australian Studies* 25, no. 71 (2001): 1.
[363] Barbara Baird, "Maternity, Whiteness and National Identity: The Case of Abortion," *Australian Feminist Studies* 21, no. 50 (2006): 199.; Emily Wilson and Shirleene Robinson, "Preserving the Traditions of a 'Great

and representations to create new narratives and self-perceptions of their own identities and freedoms.[364] Stories of gender nonconformity cut to the core of a lot of these fears about race, security, gender roles, class, motherhood, and the changing roles of both men and women in society. In some ways, they were a literal manifestation of the concerns about what the breakdown of gendered social order could lead to, if left unchecked.

In 1935 the *Labor Daily* published a letter titled 'How Women Masquerade' which raised queries about the legality of gender nonconforming expression.[365] The letter writer was responding to an article previously published in the paper, in which a pastor criticised the dress and behaviour of 'the modern flapper,' stating: 'The present tendency in society, especially among our young women … is to consume as many cocktails as possible, smoke cigarettes, and to indulge in as many mannish manners as can be thought of.'[366] The pastor's statements sparked a significant amount of debate around the behaviour of young women and the appropriateness of their gendered behaviour, and drew 'a good deal of condemnation.'[367] The letter writer in the *Labor Daily*, however, agreed with the pastor's characterisation of the modern flapper, and added:

> What does concern me – and, yes, annoys me – is the week-end parade of would-be men in the form of alleged females, many of whom are surely old enough to know better, making the place hideous by reason of their atrocious garb. Not only slacks, either, as a few Sundays ago I saw an alleged woman getting around in riding strides, man's hat, and a coat as near to a man's as it is possible to get. … I wouldn't get 10 yards down Pitt Street, say, dressed as a female before six policemen would land me in the "cooler": well, that being so, why should females be allowed to make such utter goats of themselves in public?[368]

Race': Youth and National Character in Queensland, 1859-1918," *Journal of the Royal Australian Historical Society* 94, no. 2 (2008): 181.

[364] Catriona Elder, "'The Question of the Unmarried': Some Meanings of Being Single in Australia in the 1920s and 1930s," *Australian Feminist Studies* 8, no. 18 (1993): 169.

[365] "How Women Masquerade," *The Labor Daily* (Sydney), 3 June 1935.

[366] "Women Up in Arms at Pastor," *The Labor Daily* (Sydney), 21 May 1935.

[367] ""Telegraph" Misleading," *The Labor Daily* (Sydney), 22 May 1935.

[368] "How Women Masquerade."

The letter writer then called for amendments to the law to criminalise women wearing male attire in public, to 'save them from themselves.'[369]

It was not only the occasional press report but also the courts which questioned the validity of offensive behaviour charges. Police arrested Leonard Keith for offensive behaviour in 1923 at nineteen years old when a police officer caught them in female clothing at the intersection of Exhibition and Collins Streets in Melbourne.[370] Keith's appearance in court was a spectacle: they attended their hearing 'smartly dressed' in a black dress, a black hat, grey stockings and a royal blue scarf, prompting the magistrate to state: 'You pass very well – there is no doubt about that.'[371] Keith's explanation for their gender nonconformity was that they were rehearsing for a charity carnival in Brunswick, Melbourne, where anyone who identified them as male would win a prize.[372] Keith's gender nonconformity was an amusement and a spectacle, and (although it was questionable enough to result in an initial arrest) it was enough of a performance not to be deemed offensive behaviour.

The legitimacy of the charge was debated in court, and prosecutors raised concerns about the potential dangers of Keith's gender nonconformity. When the chairman asked how the arresting officer was intending to prove offensive behaviour, the officer replied that Keith 'spoke to a girl and endeavoured to pass himself off as a woman.'[373] The arresting officer also stated that Keith's 'conduct was offensive to the police' and that a complaint had been brought against them – although the officer did not identify a source of the complaint. This was not enough for the magistrate to sustain charges. The magistrate asked the officer: 'Have you any authority to show that it is an offense for a man dressed as a woman to parade in the streets?' He ultimately concluded that this case did not come under the remit of the offensive behaviour law.[374]

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[369] Ibid.
[370] "Tall Girl in Black," *Geraldton Guardian* (WA), 13 December 1923.
[371] ""You Pass Well!"" *The Sun* (Sydney), 30 November 1923.
[372] "Masquerading," *Singleton Argus* (NSW), 4 December 1923.
[373] "Tall Girl in Black."
[374] "Charity Stunt," *The Mercury* (Hobart), 3 December 1923.

On occasion, male assumed gender nonconforming people pushed back against their charges and questioned the discourses underlying them. In August 1935, Percival Douglas Baynes, a thirty-five-year-old investor from Elwood, Melbourne, appeared in court wearing women's clothing and make-up, and stated that they 'had no vicious purpose' in dressing the way they did. They argued that they had legally purchased the clothing and had not spoken to anyone while they were out, questioning the legitimacy of the offensive behaviour charge. Fortunately for Baynes, the magistrate overseeing their case was sympathetic to their arguments and brought up similar debates as those discussed above. The magistrate stated: 'I do not know why it should be more offensive for a man to dress in women's clothes. … This man was much more decently attired than many women who parade in men's clothes.' The magistrate argued that it was not offensive behaviour when women masqueraded as men, and that he did not see why there should be a double standard applied to the two cases. The magistrate dismissed the charge.[375]

This was not wholly accurate – female-assigned people *were* arrested for offensive behaviour while presenting as men, on occasion. However, the magistrate's statements speak to the fact that it was relatively uncommon for authorities to apply offensive behaviour laws to female assumed gender nonconforming people, and to the different ways that male and female gender nonconformity was perceived in a more general sense. This case demonstrates both Baynes and the magistrate negotiating these discourses to dispute the criminal association of Baynes' gender nonconforming presentation. When asked by a police officer why they decided to dress in female clothing, Baynes responded that they did not know, and that they 'must have a kink.'[376] Within medical discourses at the time, a 'kink' referred to a moral, psychological defect borne from social disruption or sexual deviance.[377] In drawing from this language, Baynes utilised the medical discourses around gender nonconformity to redirect their gender nonconformity away from a criminal act and towards a medicalised, internal trait. Baynes' case demonstrates that the various debates around whether gender

[375] "Women's Clothes and Rouged Cheeks," *The Courier-Mail* (Brisbane), 15 August 1935.
[376] "Man's Masquerade," *Daily Advertiser* (Wagga Wagga), 16 August 1935.
[377] Rebecca Hodes, "Kink and the Colony: Sexual Deviance in the Medical History of South Africa, C. 1893–1939," *Journal of Southern African Studies* 41, no. 4 (2015): 5.

nonconformity should be considered a criminal act did, on occasion, make their way into court and influenced the decisions.

In another case, police charged Patrick John Cowther with offensive behaviour and fined them £2 at the Prahran courts for their gender nonconforming presentation. They successfully appealed the decision because there was nothing legally offensive about their behaviour.[378] The appeal judge stated that 'although the behaviour … had been unusual, no member of the public or the police force could have inferred that it had been offensive in a legal sense.'[379] Cowther was firm from the beginning that there was nothing wrong with their presentation. They told police the night they were arrested that they 'wouldn't understand', that it was 'quite normal' and that they had 'done it all my life.' They also argued that there were hundreds in England who dressed the same.[380] The appeal Cowther made to the normality of their gender nonconformity in England (or at least in some subcultures), suggested an engagement with an international understanding of gender nonconformity. The Australian press frequently imported scandalous stories (including 'masquerading' cases) from overseas, such as places like Britain or the United States. In Britain, the press engaged with gender nonconformity on several levels – sometimes as masquerade stories, sometimes as embodied and medicalised changes of sex.[381]

In much the same way as international ideas entered the Australian medical and psychological discourses, gradually (noting that this case is at the tail-end of the period under examination in this chapter) those accused were also acquiring the language not only to defend themselves, but to find a sense of shared identity and commonality with others like them. Foucault has described how turning sexuality into discourse led to the dissemination of ways for people to describe their own sex and sexuality. The discourse on sexuality is both restrictive and productive: by giving people the language and tools to describe identities and

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[378] "No Offence to Dress as Woman," *The Sun* (Sydney), 6 December 1944.
[379] "Wore Female Attire," *Chronicle* (Adelaide), 14 December 1944.
[380] "Masquerade As Woman," *The Sun* (Sydney), 7 November 1944.
[381] Oram, *Her Husband Was a Woman!: Women's Gender-Crossing in Modern British Popular Culture*, 75.; Clare Tebbutt, "Popular and Medical Understandings of Sex Change in 1930s Britain," ed. Frank Mort and Laura Doan (ProQuest Dissertations Publishing, 2015), 90.; Peter Farrer, *Cross Dressing between the Wars: Selections from London Life* (Liverpool Karn Publications Garston, 2000).

experiences, this creates and affirms new modes of force and resistance within societal relations. People propagate this language throughout society at large, and as a result individuals can describe their experiences and identities, but it also constrains them within the boundaries of these discourses.[382] Cowther described dressing in female attire as 'an emotional relief.'[383] It also was apparent that Cowther was familiar with the narratives of sexual deviance which might colour how their gender nonconformity was perceived. They argued that they 'never accosted anyone' and neither did they derive 'any abnormal satisfaction' from dressing in female clothing.[384] Having language to describe their gender nonconforming behaviour in their own terms gave Cowther the tools necessary to frame their case in a way which both dispelled the narratives around sexual deviance, and also to take a strong defence of their gender nonconformity as something, as they stated, quite normal.[385]

Female Assumed Gender Nonconformity in the 1920s and 1930s

As noted earlier, female assumed gender nonconformity was not exempt from the discourses about sexual deviance. These new frameworks served to make male assumed gender nonconformity doubly scrutinised by the criminal legal system and the press. However, the common assumption that women were less likely to be (homo)sexually deviant resulted in female assumed gender nonconforming people becoming less visible in public discourse, as the narratives around female sexual deviance operated within a different paradigm that focused more on heterosexual fidelity and propriety. As Alison Oram has noted in the British context, reporting on cases of female assumed gender nonconformity retained a 'playful and humorous tone' further into the century than one might expect, considering the developing medicalising discourses around sexuality. This playful reporting flourished in the early decades of the century, although from the 1930s on this was in decline.[386]

This analysis applies to Australia as well. In the first two decades of the twentieth century, female assumed gender nonconforming people largely avoided association with narratives of

[382] Foucault, *The History of Sexuality: An Introduction*, 3-13.
[383] "Dressed As Woman for Years," *The Newcastle Sun* (NSW), 8 November 1944.
[384] "Inoffensive Pose," *Truth* (Sydney), 10 December 1944.
[385] "Dressed as Woman," *The Herald* (Melbourne), 7 November 1944.
[386] Oram, *Her Husband Was a Woman!: Women's Gender-Crossing in Modern British Popular Culture*, 4,11.

sexual deviance and criminal homosexuality. Over the course of the 1920s and 1930s, however, this would gradually shift.[387] Nonetheless, most female 'masquerading' cases were policed and sentenced roughly within the same mechanisms and frameworks as they had been in prior decades. Police continued to apply vagrancy charges to female assumed gender nonconforming people, who were (as before) often dressing in male clothing in order to travel safely or find work.[388] Cases where the defendant was not respectable, especially when associated with homelessness or poverty, were still usually convicted.[389] As explored in the previous chapter, age impacted these individuals' treatment in the criminal legal system, with older defendants more likely to get charged with offensive behaviour than vagrancy.[390]

New psychological narratives not only applied to male assumed gender nonconforming people, although the way these narratives applied to female assumed gender nonconforming people was often haphazard. An example of a female assumed gender nonconformity case which struck a chord in the Australian public discourse was the case of Harry Crawford. Crawford was arrested in Sydney in 1920 for the alleged murder of their wife, Annie Birkett, in 1917. The evidence for the murder itself was relatively inconclusive and circumstantial, but, as stated by Robin Eames: 'In the eyes of the public it barely mattered whether Crawford was actually guilty of murder, since he had already been deemed guilty of the social crime of gender transgression.'[391] This case has been discussed by a number of scholars, such as Ruth Ford, Suzanne Falkiner, Mark Tedeschi and Robin Eames.[392] I draw attention to it here to highlight the ways in which discourses around gender nonconformity for female-assigned individuals occasionally made their way into the court room and sentencing.

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[387] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 206.
[388] Example: "Girl in Male Attire," *The Age* (Melbourne), 20 March 1930.
[389] "Young Woman Gaoled," *The Age* (Melbourne), 20 December 1938.
[390] "Woman in Man's Clothing," *Advertiser* (Hurstbridge), 17 August 1934.
[391] Eames, "Problem Bodies and Queer Legacies: Rethinking Approaches to Trans History in the Case of Harry Crawford, Sydney, 1920," 54-55.
[392] Ford, "'The Man-Woman Murderer': Sex Fraud, Sexual Inversion and the Unmentionable 'Article' in 1920s Australia."; Suzanne Falkiner, *Eugenia: A Man*, Second ed. (Surry Hills: Brio Books, 2014).; Mark Tedeschi, *Eugenia: A True Story of Adversity, Tragedy, Crime and Courage* (Simon and Schuster, 2012).; Eames, "Problem Bodies and Queer Legacies: Rethinking Approaches to Trans History in the Case of Harry Crawford, Sydney, 1920," 50-62.

To outline the case briefly: Crawford had married their wife, Birkett, in 1913. Birkett disappeared in 1917, and three years after that, in 1920, Birkett's family members approached the police to investigate Harry Crawford, whom they knew to be a female-assigned person presenting as male.[393] Crawford had by this point remarried another woman and admitted to being female when arrested by police.[394] Police exhumed a previously recovered and unidentified female body found in October 1917 and investigated whether it may have been Birkett's body. The evidence was inconclusive: the coroner said that violence *may* have been the cause of death, and Birkett's dentists said that the teeth on the corpse may have been their work, although they were not able to state it definitively to be the case.[395] Police searched Crawford's home, finding an unlicensed gun and a dildo (which the press described only as an 'article'). It was after the discovery of the dildo that Crawford was taken into custody. It quickly became clear that what was central to the trial was not the details of the case per se, but Crawford's gender and sexual expression and – by association – their capacity for violent crime. The defence in the case drew, somewhat tentatively, from new – and still marginal – scientific and sexological discourses of sexual inversion to explain Crawford's presentation. The prosecution relied upon notions that Crawford's gender nonconformity was innately deceptive and fraudulent, and they were therefore criminal and untrustworthy.[396]

Crawford's gender nonconformity and perceived sexual deviance essentially formed the basis for their trial, with the 'deception' of their gender presentation supposedly indicating other deviant traits, including the capacity for murder. Crawford's dildo, a central piece of condemning evidence, underlined the way in which anxieties around gender nonconformity and lesbianism intermingled, and were used interchangeably and in a contradicting manner to determine Crawford's guilt.[397] *Truth* described Crawford as displaying suggestions of

[393] "Problem Bodies and Queer Legacies: Rethinking Approaches to Trans History in the Case of Harry Crawford, Sydney, 1920," 54.
[394] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 314.
[395] Eames, "Problem Bodies and Queer Legacies: Rethinking Approaches to Trans History in the Case of Harry Crawford, Sydney, 1920," 54.
[396] Chesser, *Parting with My Sex: Cross-Dressing, Inversion and Sexuality in Australian Cultural Life*, 315.
[397] Eames, "Problem Bodies and Queer Legacies: Rethinking Approaches to Trans History in the Case of Harry Crawford, Sydney, 1920," 55-56.

‘what the psychologist terms homo-sexuality.’[398] Australian discourses in the 1920s around the figure of the ‘man-woman’ and the relationships they might have with (cisgender) women tended to operate differently from the discourses on lesbianism. International sexologists’ theories categorised gender nonconformity in female-assigned individuals as part of the figure of the ‘mannish’ lesbian. As Ruth Ford notes, this demonstrates some of the complexities in how these ideas were imported into Australia, sometimes clashing with or contradicting established narratives, such as the playful adventuring female ‘masquerader.’[399] While medical discourses and connections to homosexuality and sexual deviance were sometimes present in cases of female assumed gender nonconformity, there was not necessarily a ‘set’ way that they were applied, and they intermingled with other preconceptions from earlier periods.

Ford has discussed how the eroding gender barriers between men and women in society meant that women’s ‘appropriate’ displays of femininity became a battleground for defining normal and abnormal gender expression.[400] Female assumed gender nonconforming people such as Crawford, who challenged these appropriate gender roles and behaviours, were criminalised in discourses and the criminal legal system. In Crawford’s case, the prosecution needed to prove that they were criminal, rather than insane, to sustain their charges – but those were the two categories under which a female assumed gender nonconforming person was likely to fall. If a ‘masquerader’ were insane, rather than criminal, they did not necessarily escape incarceration: rather, they may be imprisoned within medical or psychiatric institutions instead of prisons.[401] The medical system and the criminal legal system were able to work hand in hand to enforce boundaries of accepted behaviour and gender expression.

The narratives around female assumed gender nonconformity shifted across this period. Initially they remained consistent with those that came prior: the sensationalism and positive

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[398] Ford, "'The Man-Woman Murderer': Sex Fraud, Sexual Inversion and the Unmentionable 'Article' in 1920s Australia," 178.
[399] Ibid.
[400] Ford, "Sexuality and 'Madness': Regulating Women's Gender 'Deviance' through the Asylum, the Orange Asylum in the 1930s," 109.
[401] Ibid., 116-19.

reception of young, respectable, and unmarried women who masqueraded as men for work or adventure. However, as the medical and psychological discourses around gender deviance became more prominent in Australian circles, by the late 1930s there was increased pathologisation and disapproval of female assumed gender nonconforming people.[402] Although female assumed gender nonconforming people were not usually assumed to be physically or sexually dangerous by default, they were still suspicious. Crawford was found guilty of the charge and was sentenced to death, although this was later commuted to life imprisonment.[403]

Conclusion

The 1920s- 30s were a period of change in how Australians understood and policed gender nonconformity. Visibility of male assigned people dressed in female clothing increased drastically in the criminal legal setting. The reason for this was, at its core, a renegotiation of understandings of sexual deviance. Gender nonconformity came to be an aspect of the 'sexual deviant' – a character defined by their (homo)sexuality and gender expression. While this archetype had its roots in sexology and psychology, these ideas were applied inconsistently within the criminal legal system, as well as society at large. These medicalised theories were coming to Australia from abroad and as they were integrated into Australian discourses they clashed and merged with prior understandings of gender non-conformance and sexuality. This was a haphazard process and what we saw across this period was a negotiation as ideas were debated, integrated, exchanged, and dispersed. Over time the sexual deviant became a profile of a type of person, and this person needed to be policed – the question was *how*.

A key aspect of the policing of sexual deviance was the blurring of divides between public and private spaces. When gender non-conformity was primarily about public disruption, respectability, and morality, it could be policed using public order charges to regulate public spaces. However, when gender nonconformity became an element of a whole psychological profile of a 'deviant,' it became important to regulate this behaviour in private as well as

[402] Ibid., 110.
[403] Eames, "Problem Bodies and Queer Legacies: Rethinking Approaches to Trans History in the Case of Harry Crawford, Sydney, 1920," 55.

public spaces. When we see cases of people being arrested in their own beds while 'masquerading,' this demonstrates that what was being police was not public disruption or offence, but a whole person. The imperative to regulate public norms and morality led police not only to target private gender nonconformity, but also to regulate homosexuality in both public and private to a much greater degree.

The proliferation of discourses around gender nonconformity and how it characterised a 'type' of person also had the effect of creating spaces and opportunities for individuals to challenge the 'deviant' charges applied against them. In some cases, this was on a broad social level, with various press sources publishing articles and letters debating whether dressing in clothing associated with another gender should or should not be a crime. In other cases, these discourses gave voice to individuals to narrate their own experiences and defend themselves in court. In other instances, these debates could shape the opinions of individual judges and sentencing.

The outcomes of all the cases explored in this chapter were by no means consistent, nor were the discourses developing at this time applied to them in any unanimous fashion. Instead, discursive spaces were being carved out, new practices of policing were being established, and gender non-conformity was being defined as evidence of a psychological, deviant characteristic – especially for male-assigned individuals. Gender nonconforming people were developing from being spectacles and disruptive events, to being evidence of an internal psychological type: an idea which would continue to develop in the years to follow.

CHAPTER 3

A TIME OF TRANSITION

The content of this chapter bridges a gap between two relatively distinct periods of this thesis, both in terms of historical trends and methodological approach. The previous two chapters looked at the early twentieth century and examined how the criminal legal system managed cases of gender nonconforming presentation. Throughout that period, there was not really a social concept of what it meant to be trans or gender diverse. As a result, gender diversity was typically folded into ideas about 'sexual deviance', or other emerging concepts of sexual and gender diversity (such as Karl Heinrich Ulrich's conception of 'Urnings,' or sexologists developing the idea of sexual 'inversion'). In terms of methodology, researching that period required dealing with gender nonconformity in case studies, without having any way to state for certain whether we were looking at cases of trans or gender diverse people, or if individuals involved were presenting in a gender nonconforming way for other reasons. In the chapters to follow, we see a distinct shift: trans and gender diverse identities are named and defined (more on this to follow), and people begin openly, or somewhat openly, to live and identify as trans or gender diverse. This means that after a point, it is possible to be specific about the tangible and real experiences of trans and gender diverse people moving through the criminal legal system.

This chapter, however, sits on the cusp of these two periods and deals with elements of both eras. It examines the 1950s and '60s primarily and addresses a time consisting of significant contradictions and silences. It was in the 1950s and '60s when the concept of 'sex change operations' (as they were colloquially called) entered the public and press discourse in Australia via high-profile cases. These surgeries changed how gender nonconformity was framed and discussed, not only in the public sphere, but in the criminal legal system. Gender nonconformity gradually became medicalised and understood within a framework of psychological difference, hormonal treatments, and surgical interventions which might lead to a whole 'successful' binary transition.

The 1950s were also a period of heightened persecution, policing, and incarceration for gay men. Police raids on gay venues such as bars and 'camp' events were key sites of interactions between law enforcement and gender nonconformity. The question then – knowing that transfeminine gender expressions were historically associated with homosexuality – becomes: to what extent did this persecution extend to transgender individuals, particularly transgender women? This chapter explores a period where society began to conceptualise transgender women as a distinct group, as opposed to treating them as homosexual males, and what impact this had on how they were policed. I also discuss the incarceration of transgender women, with a particular focus on the efforts made during this period to create specific prisons for gay inmates. This included creating a 'homosexual prison' at Cooma Gaol, and this chapter explores the experiences of transgender women housed at such institutions.

The extreme policing of homosexuality during the 1950s created a hostile environment which forced LGBTIQ people to remain closeted and silent about their sexualities. The contradiction at the core of this chapter is the tension between this repression and silence, and the emergent concepts of transgender identity which were, often for the first time, being vocalised. One might assume that the experiences of transgender people throughout this period mirrored the experiences of other sexual minorities, but there were notable areas of difference. As well as looking at the ways these experiences overlapped, this chapter explores the ways in which transgender experiences were unique and separate, including the development of trans sex work communities and the medicalisation of trans experiences, and what these meant in the context of the different criminal legal systems across Australia's states and territories.

POLICING HOMOSEXUALITY IN THE 1950S

The 1950s were a period when Australian states began to exercise greater sanction and scrutiny of male homosexuality. In some cases, state governments changed laws to impose harsher penalties on people caught engaging in homosexual acts. Gay men began to be isolated and segregated in prisons – and concurrent with these legislative changes, gay men

found themselves at risk of increasing levels of violence and discrimination in the community.[404]

A number of scholars have examined this period and the effects it had on the policing of gay men. In *Creating a Nation*, Grimshaw et al state: 'The homosexual was identified in the 1950s as yet another threat to the wellbeing of the Australian way of life.' They argue that the portrayal of gay men as aggressive and predatory created a climate of police aggression and led to heightened medical and legal control over the lives of gay men.[405] Garry Wotherspoon discusses how, in spite of the heightened state and legal attention, 'the camp world not only survived, but thrived' during this period.[406] He argues that attention from the state had the unplanned side effect of giving visibility to gay culture, and this level of attention likely contributed to the formation of a real shared 'camp' identity within Australian gay communities – not to mention a new public discourse about homosexuality.

Graham Willett, in his article *The Darkest Decade: Homophobia in 1950s Australia*, pushes back somewhat against Wotherspoon's narrative. He argues that the repression and persecution of homosexuality in the 1950s, rather than generating discourses which created space for public discussion of homosexuality, in fact created an environment which actively prevented widespread discourse 'until well into the 1960s.'[407] Willett notes that, when it came to Australian parliamentary debates on homosexuality, 'the sum total of reports and debates generated over the course of this decade was less than a dozen.'[408] He emphasises that where these discussions occurred on a parliamentary stage, they were published in Hansards and Parliamentary Papers. Although they were publicly available, it is unlikely they were widely read or generated much public discourse.[409]

Regardless of how widespread public discussion of homosexuality was, the 1950s undoubtedly saw a marked shift in policing and convictions for homosexuality. The number

[404] Garry Wotherspoon, *Gay Sydney: A History*, ed. Ebscohost (Sydney: New South Publishing, 2016), 102-3.
[405] Patricia Grimshaw et al., *Creating a Nation*, Revised ed. (Perth: Australian Research Institute, 2006), 264.
[406] Wotherspoon, *Gay Sydney: A History*, 103.
[407] Willett, "The Darkest Decade: Homophobia in 1950s Australia," 121.
[408] Ibid.
[409] Ibid., 122.

of people charged with ‘unnatural offences’ in Australian courts rose sharply and police became more active in targeting homosexuality. Lisa Featherstone and Andy Kaladelfos describe the 1950s as the decade which saw ‘the most concentrated police attention in Australia's past to the perceived problem of homosexuality.’[410] New South Wales and Victorian police officers loitered around beat areas dressed in plain clothes to entice, entrap, and arrest suspected homosexuals.[411] Colin Delaney, the New South Wales Superintendent of Police, called homosexuality ‘the greatest social menace’ facing Australia.[412]

As an example of how states changed their laws, New South Wales introduced new legislation in 1955 which made male-to-male soliciting a criminal offence that carried a maximum sentence of twelve months imprisonment. Previously, these types of offences typically fell under the *Vagrancy Act 1902* and would generally not result in prison time or identification in the press. On the one hand, this change raised the bar in terms of evidence required by police to charge people for homosexual offences and gave accused persons the opportunity to defend themselves. On the other hand, the public exposure which came from a court case posed great social and employment risks for men accused of homosexual offences.[413]

When it came to prisons, authorities increasingly separated homosexual prisoners from the general population during the 1950s. The two main rationales for this were a) to protect the rest of the prison population from being ‘perverted’ into becoming homosexuals themselves, and b) that it was more humane to treat, study and ‘cure’ homosexual prisoners while incarcerated.[414] The management of homosexual prisoners became the domain of medical and psychiatric professionals. There was no consistent framework for how homosexual prisoners were treated, but techniques in some cases included hypnosis and psychotherapy,

[410] Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 187.
[411] Ibid., 163.
[412] Willett, "The Darkest Decade: Homophobia in 1950s Australia," 128.
[413] Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 168-71.
[414] Wotherspoon, *Gay Sydney: A History*, 115.

the administration of drugs or hormones to increase or decrease sexual desire (which sometimes amounted to chemical castration) and electroshock treatment.[415]

In New South Wales, authorities designated Cooma Gaol for the express purpose of housing homosexual prisoners so that they might be treated and 'cured.'[416] By the late 1950s most New South Wales prisoners incarcerated for crimes related to being gay were being housed at Cooma.[417] That said, reporting at the time also noted that prisoners may also be housed at Maitland or Parramatta gaols, and Long Bay Gaol housed those waiting to be moved to a permanent prison.[418] In some respects, the concentrated housing of gay prisoners could present some opportunities. Featherstone and Kaladelfos argue that 'much like the intensification of policing, the segregation of homosexual prisoners offered opportunities for those incarcerated to band together and to create a list of demands from the government about their rehabilitation and treatment.'[419]

The shift towards viewing homosexuality as a medical problem, something to be 'cured,' set the stage in the 1960s for a shift in approaches inside the medical and the prison environment. The idea of curing homosexuality was an intrinsic part of studies published in medical and psychological journals. One element of this medicalisation was that experts in the field were somewhat critical of the idea of policing and legislating against homosexuality. As stated by Robert Reynolds, 'For these doctors, it made more sense to cure or curb the sexual drive of the homosexual rather than imprison him after the sexual act.'[420] This was a different form of regulation, one which had been becoming more prominent in this period, which focused more on 'treatment' and conversion than with imprisonment and punishment under the law. There were other problems with imprisoning homosexual people as well. As the *Age* stated,

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[415] Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 177.
[416] Wotherspoon, *Gay Sydney: A History*, 115.
[417] Gary Nunn, "Cooma jail: Prison that was once 'world's only jail for gay men'," BBC News (Australia), 25 April 2022, https://www.bbc.com/news/world-australia-61006503.
[418] "Most Unhealthy Aspect," Sydney Morning Herald (NSW), 5 March 1958.
[419] Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 162.
[420] Robert Hugh Reynolds, *From Camp to Queer: Re-Making the Australian Homosexual* (Carlton South: Melbourne University Press, 2002), 15.

prisons were ‘hardly the most suitable place for treatment’ as they were themselves rife with homosexual activity.[421]

These themes present in the 1950s – heightened policing, medicalisation with a focus on ‘curing’ homosexuality, the segregation of gay prisoners to prevent them from ‘spreading’ homosexuality – created a context of extreme oppression and persecution for gay men. This context, however, shaped the experiences of all non-heterosexual, non-cisgender people during this period, creating a climate that was both oppressive and dangerous. Transgender women occupied a distinct position in this environment, due to the prevalent conflation of homosexuality with gender nonconformity from male-assigned people. How closely, then, did the experiences of transgender people – particularly transgender women – mirror the experiences of gay men during this period? And what were the points of difference?

WHERE DID TRANSGENDER PEOPLE FIT IN?

Transgender people occupied a space within the system of heightened regulation, policing and increasing medicalisation of queerness that emerged in the 1950s – even if they were not the intended targets. However, it would not be accurate to presume that the experiences of transgender women (in particular) mirrored exactly the experiences of homosexual men. ‘Transvestitism,’ as it was typically termed, was indeed often framed alongside homosexuality. In contrast to ‘transsexuality’ or ‘transsexualism,’ transvestitism usually describes the practice of an individual who dresses in clothing designated for a gender other than their own, without necessarily indicating that their own gender differs from their sex assigned at birth. As Harry Benjamin defined it in in his 1966 canonical book *The Transsexual Phenomenon*: ‘The term [transvestitism] is now well known in the sexological literature, indicating the desire of some individual – men much more often than women – to dress in the clothes of the opposite sex. It is, therefore, also described as “cross-dressing.”’[422] Particularly in the 1960s, accounts of gay events (usually disrupted by police) often emphasised the presence of ‘men’ in ‘women’s clothing’ as a staple. However, from the

[421] Ibid., 16.
[422] Harry Benjamin, *The Transsexual Phenomenon* (New York: Julian Press, 1966), 19.

1950s, there was at least *some* acknowledgement that gender diversity was something different from homosexuality – at least within certain psychology/psychiatry circles.

Australian newspapers reported regularly on the American veteran Christine Jorgensen, whose 1952 gender affirmation surgery made global headlines. Although reports framed her as a 'man-woman' or 'he-she,' many treated her gender affirmation as (cautiously) legitimate and used the correct name and pronouns when talking about her.[423] Newspaper and magazine articles throughout the decade discussed both Australian and international cases of people undergoing gender affirmation procedures – usually transgender women, but sometimes transgender men as well.[424] Where Australians sought surgical affirmation procedures, the people were reported to travel internationally to visit the few established surgeons, typically in Europe. While there were mixed opinions in reporting on the validity of 'sex changes' and there were differing opinions on how far gender affirmation went towards making someone a 'real' man or woman, reporting was generally consistent in framing gender affirmation as a phenomenon that was *distinct* from homosexuality. What was being reported in newspapers did not necessarily translate to how individual people experienced their gender diversity nor how other members of the public responded. Still, as a starting point it does indicate that homosexuality and gender diversity were not always seen as one and the same.

It was in this period that terms like 'transsexualism' and 'transvestitism' began to crop up with some frequency in academic writing, press records, and similar. The word 'transsexual' was occasionally used in the early twentieth century by Magnus Hirschfeld; however, it was uncommon in his writings and the meaning was somewhat different to its later usage. It was

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[423] For example: "I was a man," *Sunday Pictorial*, 15 March 1953, Papers of GR, Australian Queer Archives (AQUA); "He-She Plans a State Tour Here," *Mirror* (Perth), 13 November 1954, Papers of GR, AQUA; "Models Boycott Christine's Fashion Show," *Mirror* (Perth), 20 November 1954, Papers of GR, AQUA. Note: there were exceptions where newspapers refused to acknowledge the legitimacy of Jorgensen's gender and insisted on using male pronouns. For example: "Secrets of the Third Sex," *Weekend*, 21 April 1956, Papers of GR, AQUA.

[424] For example: "Ex-RAAF Sergeant Will Become a Woman," *Truth* (Adelaide), 3 September 1955, Papers of GR, AQUA; "Bridegroom was Born as 'Violet'," *Sunday Pictorial*, 24 October 1954, Papers of GR, AQUA; "Freak Show Will Pay for Sergeant's Sex Change," *Empire News and Sunday Chronicle*, 18 December, 1955, Papers of GR, AQUA; "Sydney Man Wants to Become a Woman," *Sunday Telegraph*, 12 February 1956, Papers of GR, AQUA; "School Ma'am Becomes a Mister," *Daily Mirror*, 31 March 1956, Papers of GR, AQUA.

not until around the 1950s that it came into use in its more common form. In 1949 Dr David Cauldwell published his article *Psychopathia Transexualis*, where he described and denounced gender affirmation surgeries for 'transsexual' patients.[425] Dr Harry Benjamin began to use transsexualism in the years following Jorgensen's gender affirmation to draw a distinction between those who wanted to alter their gendered presentation only by changing their clothes ('transvestites') versus those who wanted to alter their bodies surgically or medically ('transsexuals').[426] Even then, it was not really until the late 1960s that the term 'transsexual' became truly popularised. Harry Benjamin published *The Transsexual Phenomenon* in 1966, in which he outlined and described 'transsexuality,' codifying the terminology.[427]

Emily Skidmore writes about how the period between 1952 and 1966 was notable for introducing general audiences to the concept of transsexualism/transsexuality in the United States through the proliferation of press and the creation of popular narratives about transsexualism. These press narratives, Skidmore emphasises, constructed certain groups as 'good transsexuals' and others as 'sexual deviants.' Specifically, positive representation of transsexuality was limited to those who could perform acceptable middle-class white heterosexual womanhood, while the press sidelined racial, sexual and gender variant others.[428] Dave King's research on media reporting in the UK found that press narratives around 'sex changes' and 'transsexuals' were overall relatively neutral or accepting (with some variance) of transgender stories, when those cases fit into dominant social norms. When the press was openly condemnatory of trans and gender diversity, the stories typically contained some other social violation, such as sex work or violent crime.[429] In Australia, the press narratives around transsexuality followed similar patterns. Australian media reports on

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[425] Joanne Meyerowitz, "Sex Change and the Popular Press: Historical Notes on Transsexuality in the United States, 1930–1955," *GLQ: a Journal of Lesbian and Gay Studies* 4, no. 2 (1998): 168-9.
[426] Stryker, *Transgender History: The Roots of Today's Revolution*, 38.
[427] Barry Reay, "The Transsexual Phenomenon: A Counter-History," *Journal of Social History* 47, no. 4 (2014): 1044.
[428] Emily Skidmore, "Constructing the" Good Transsexual": Christine Jorgensen, Whiteness, and Heteronormativity in the Mid-Twentieth-Century Press," *Feminist Studies* 37, no. 2 (2011): 270-96.
[429] Dave King, *The Transvestite and the Transsexual: Public Categories and Private Identities* (Aldershot Avebury, 1993), 119-31.

Christine Jorgensen were notably different from reports on trans women – especially trans women of colour – who did not conform to Jorgensen's model of respectability and middle-class whiteness.[430]

Reports on Australian cases of gender diversity in relation to crime during the 1950s were scarce. They usually referred to the person's name assigned at birth, in part because there were no legal mechanisms to change one's gender. One example was the 1955 case of Martin Vernon Rounsevell, who was thirty-three years old and arrested for a series of nine housebreakings over a three-year period, and for stealing women's clothing valuing over £150.[431] They were dressed in women's clothing and a wig when they were arrested. Rounsevell reportedly first noticed a desire to dress in women's clothing after an air crash, and they 'felt the compulsion when tired and run down.'[432] However, in some reports, Rounsevell stated that they had wanted to dress as a woman since they were fifteen years old.[433] Rounsevell's dressing also reportedly led to the breakdown of their marriage: as noted in the Adelaide *Advertiser*, 'there were rows over his dressing in her clothes and she left him in 1952.'[434] According to some reports, Rounsevell was actively seeking gender affirmation surgery, which at that time would have entailed travelling to Europe. *Truth* quoted Rounsevell as stating: 'I have been to doctors and hope eventually to become a female.'[435] Police at the Adelaide police court called upon the expertise of a psychiatrist, Dr. W. A. Dibden, to explain Rounsevell's dressing. Dibden stated that they were 'suffering from transvestitism' which they called a 'compulsion neurosis,' that manifested as the desire to acquire and dress in women's clothing.[436] This medicalising language became increasingly prevalent throughout the 1950s and '60s.

[430] Noah Riseman, "Representing Transgender in the 1970s Australian Media," *Gender & History* 33, no. 1 (2021): 232.; Skidmore, "Constructing the" Good Transsexual": Christine Jorgensen, Whiteness, and Heteronormativity in the Mid-Twentieth-Century Press," 286-91.
[431] "Court Hears of Wartime Crash," *Truth* (Adelaide), 9 March 1955, Papers of GR, AQUA.
[432] "Man dressed in women's clothes," *The News,* 22 March 1955, Papers of GR, AQUA.
[433] "Always Dressed as a Woman," *Advertiser* (Adelaide), 12 February 1955, Papers of GR, AQUA.
[434] "Dressed as Woman," *Advertiser,* March 1955, Papers of GR, AQUA.
[435] "Adelaide Court Claim: 'Man Seeks Change of Sex'," *Truth*, 19 February 1955, Papers of GR, AQUA.
[436] "Man dressed in women's clothes," *The News,* 22 March 1955, Papers of GR, AQUA; "Dressed as Woman," *Advertiser,* March 1955, Papers of GR, AQUA.

In another example of reporting on crimes related to gender diversity in the 1950s, Cecil Herman Wirth, a fifty-eight-year-old senior resident medical officer at Parramatta District Hospital, was charged in 1958 with six counts of obtaining drugs by false representation and one count of failing to keep a register of dangerous drugs. This was a very different type of case compared to those examined so far, and one which was notably made possible by the growing body of knowledge around hormone replacement therapy (HRT) which was beginning to emerge. Police found that Wirth had prescribed drugs (stilboestrol, a 'female sex hormone'), which would 'grow breasts on a man if taken to excess,' to seventeen made-up patients and was taking the drugs themself.[437] According to police: 'There is an obvious physical change in process and Wirth says he is embarrassed by it.'[438] Police also found women's clothing in Wirth's bedroom, which Wirth stated belonged to a housekeeper that they had in East Berlin and they intended to send the clothing to her.

While these cases were brief and uncommon, what we can notice just from these examples was that this medicalised aspect of arrests relating to gender nonconformity was starting to appear, where it had not been present in reporting prior to the Second World War. Rounsevell expressed that they had visited a doctor to seek some form of gender affirmation, and Wirth was apparently self-prescribing HRT. While we cannot draw too many conclusions about these individuals or their experiences of gender diversity, we can see from this that the criminal legal system in this period might seek medical explanations for gender nonconformity – as evidenced by Adelaide police calling on the advice of a psychiatrist in Rounsevell's case. Moreover, press reporting on these incidents was not innately framing them as 'homosexual' incidents, but nor was it framing them within quite the same narratives as in the 1920s and '30s, with the focus on sexual deviance as disruption to public and private norms.

Although cases were sparse in the 1950s, these trends continued and grew more common during the 1960s. In 1964, John Richard Oliver was working in Sydney as a female clerk before being arrested by police and charged with vagrancy and offensive behaviour. Oliver

[437] "Queer Change Affects Doctor," *Truth* (Melbourne), 9 August 1958, Papers of GR, AQUA.
[438] Ibid.

attended court in female clothing, 'a chocolate-coloured women's winter suit, and high-crowned wide-brimmed black straw hat, nylon stockings and high heeled shoes.' Oliver's explanation of their gender nonconformity cited a kind of innate biological change: Oliver stated that doctors believed they were 'turning more womanly every day' and had recommended gender affirmation surgery (termed sex reassignment surgery). They said that they began dressing in female clothing because they were 'getting tired of everybody asking whether [they were] a boy or a girl.'[439] The magistrate accepted Oliver's explanation and dismissed the charge, indicating that these medical explanations of gender nonconformity were in certain instances being given some level of official legitimacy.

Reporting consistently noted when gender nonconforming arrests aligned with gender affirmation treatments, such as HRT or surgery. In 1967, police arrested Eugene Jeffers on Spencer Street in Melbourne and charged them with vagrancy for having gone out in female clothing. The press described Jeffers as a 'slim, flat-chested redhead' who 'wore a woman's white trench-coat,' and whose 'red hair was attractively cut in a fringe, and his dark thick-rimmed glasses were styled as for a woman.' When police interrogated Jeffers, they stated: 'I am a male, but now I am about halfway between a male and a female. … I take hormones, and The Pill. By The Pill I mean the oral contraceptive used by women.'[440] Jeffers had also reportedly been undergoing psychiatric treatment in Sydney for over a year, presumably related to their gender identity. In another case the following year in South Australia, police charged David Wain Treloar with having committed an unnatural offence with a 16-year-old male. In their defence, Treloar told the Supreme Court that they wished to undergo gender affirmation surgery. The court did remand Treloar for sentence, but the magistrate also recommended them for a psychiatric report to investigate their claims regarding their gender identity.[441]

Medical explanations of gender nonconformity did not override explanations grounded in sexual deviance or criminality – in fact, they could go hand in hand. A public perception

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[439] "Boy-Girl on Charges," *Advertiser*, 5 September 1964, Papers of GR, AQUA.
[440] "Man Who Took Woman's Name,' *Truth* (Melbourne), 16 September 1967, Papers of GR, AQUA.
[441] "Gaoled for Six Months," *Advertiser*, 26 November 1968, Papers of GR, AQUA; "Sex Change Wanted," *Advertiser*, 5 November 1968, Papers of GR, AQUA.

remained that dressing in clothing assigned for another gender was criminal on some level. An example of this can be seen in a letter to Melbourne's *Truth* where a member of the public asked the newspaper whether her brother, by wearing 'ladies' panties and vests,' was unlawful. The column writer responded: 'It is an offence for a male to wear female underclothing. It is likely that your brother is a transvestite. Suggest that he seek psychiatric advice.'[442] This short response demonstrates several things: it shows that terminology like 'transvestite' was becoming more common to describe gender nonconformity; it shows that gender nonconformity was being framed as a psychological issue, per the suggestion that the letter writer's brother seek psychiatric advice; and it shows that some people still perceived the act of a male person owning and wearing feminine clothing to be an offence.

POLICING GENDER NONCONFORMITY WITH HOMOSEXUALITY

While gender nonconformity was not always interpreted as being part-and-parcel with homosexuality, there was crossover between the policing of homosexuality and policing of gender nonconforming expression. Police during the 1960s were cracking down on gay events, such as bars and balls. Newspapers reported on these crackdowns, often painting pictures of queer parties where gender nonconforming expression was rife, alongside and intertwined with homosexual behaviour. The other major area of policing was sex work. Chapter 5 of this thesis will explore the policing of transgender sex work specifically in Sydney in the 1970s and 1980s. However, laws against 'soliciting for homosexual purposes' existed around Australia, and police arrested both gay/bisexual men and transgender women under these provisions.

In 1967, an article in Brisbane's *Truth* titled 'Cops Broke up the Queer Ball' described an event in a secluded hall in an outer Brisbane suburb where 'the boys wore svelte evening gowns and other female attire, and the girls wore trousers,' and 'out-of-town female impersonators mingled with the topsy-turvy dancers.' The article noted that 'everything was above board' with organisers obtaining liquor permits beforehand. Police, however, reportedly spent two hours taking names and addresses from attendees, numbering around

[442] "Letter from Muriel," *Truth* (Melbourne), 22 October 1966, Papers of GR, AQUA.

170 people, before shutting down the event. Police put guards on the doors of the hall so that attendees could not leave while they recorded everyone's details.[443]

The following year, another *Truth* article (this time from Melbourne) titled 'Cops to Crack Down on Men who Dress as Women' discussed many of the practices of police crackdowns and, specifically, described the social anxieties to which they were responding. The article focused on the dangers of bars and 'haunts' where female impersonators would perform, and the goals of the Vice Squad to monitor these areas closely. The primary danger of these bars was suggested to be their capacity for leading young people, 'some as young as 15,' into 'strange company.'[444] The article then detailed some investigative journalism on the part of a *Truth* reporter, who visited one of these 'big city hotels.' The reporter described being approached almost immediately by a man smelling 'strongly of perfume,' who asked the reporter to buy him a drink. The perfumed man then made an 'unprintable' suggestion, which the reporter rejected. The reporter described the bar as a place where propositions were 'made, accepted and rejected all around' and that 'money sometimes changed hands as male couples left the bar.' The next night the reporter visited a coffee lounge in South Yarra, Melbourne, where he stated, 'a rather pretty girl stood near the door' and he 'thought it would be a pleasant change to talk to someone normal. When she spoke, it was obvious that "she" was a man.' Inside the bar the reporter stated that multiple young people aged between fifteen and seventeen approached him. The reporter then visited another coffee lounge in Toorak, Melbourne, where he stated that a man with 'a most pronounced lisp' approached him, called him Ducky, and asked where he had been all his life.[445] The reporter depicted these spaces collectively as sites where 'vice' reigned; but the article presented vice as an intermingling of homosexuality, gender nonconformity, and sex work. Gender nonconformity was not always presented as being evidence of homosexuality, but representations of homosexual spaces were depicted as being sites which were full of gender nonconforming presentation.

[443] "Cops Broke up the Queer Ball," *Truth* (Brisbane), 19 November 1967, Papers of GR, AQUA.
[444] "Cops to Crack Down on Men who Dress as Women," *Truth* (Melbourne), 3 February 1968, Papers of GR, AQUA.
[445] "Cops to Crack Down on Men who Dress as Women," *Truth* (Melbourne), 3 February 1968, Papers of GR, AQUA.

This was part of their danger, especially where it meant men (particularly young men) might be tricked or seduced into a homosexual lifestyle by 'males' presenting as 'pretty girls.'

Social context played a significant role in determining the extent to which the press and the practices of police conflated gender nonconforming presentation and homosexuality. Within the context of a 'queer ball' or 'big city hotel' – spaces which were coded as being rife with homosexual activity – gender nonconformity was part of the game of tricking or seducing young men into gay lifestyles. This contrasted with the more individual cases of gender nonconformity, such as those described in the prior section, where discourses were more likely explicitly to suggest a medicalised, 'transsexual' explanation for the gender nonconformity.

PRISONS

The following chapters of this thesis focus quite extensively on the position of transgender people (particularly women) in Australian prisons and the challenges they faced while incarcerated from the 1970s onwards. During the 1950s and '60s, these questions had yet really to emerge on anyone's radar. Trans and gender diverse identities were too 'new' and not yet fully formed and defined as they would come to be in following decades. Where, then, did transgender people fit into the prison system?

One notable point about this period was the existence of Cooma Gaol. As noted earlier, Cooma Gaol in New South Wales was designated specifically for housing homosexual inmates.[446] In 1957, Robert Downing, New South Wales Minister for Justice, bragged that Cooma Gaol was the only homosexual prison in the world.[447] Cooma Gaol was one part of a wider policy to segregate homosexual prisoners from the general population. It is not known exactly when this policy emerged, but Garry Wotherspoon suggests that it was likely part of the process of 'modernising' the prison system which began in the late 1940s and early '50s.[448] Some individuals, such as Michael Hayes, son of Frank Hayes, a parole officer at the

[446] Wotherspoon, *Gay Sydney: A History*, 115.
[447] Kaladelfos and Smaal, "Sexual Violence and Male Prisons: An Australian Queer Genealogy," 355.
[448] Garry Wotherspoon, "The Greatest Menace Facing Australia: Homosexuality and the State in NSW During the Cold War," *Labour History*, no. 56 (1989): 22.

prison, understood Cooma Gaol to be a place where gay prisoners were protected from the mainstream population – however, it was also known to be a site for researching homosexuality and practising experimental conversion therapy 'treatments'.[449] Knowing that homosexuality and gender diversity were often (but not wholly) conflated during this period, Cooma Gaol presents an interesting case study for understanding the position of transgender women in Australia – and especially New South Wales – prisons at this time.

Until recently, there were relatively few accounts of transgender experiences in Cooma Gaol. In my own research, I found only scattered mentions of gender nonconforming people being sent to the Gaol. One example was a 1966 Melbourne *Truth* story about a twenty-year-old identified as Edward, who told their account of working as a female impersonator in Sydney and their time in Cooma Gaol. Edward had numerous encounters with police while dressed in women's clothing, before ultimately being sent to Cooma Gaol for four months. The article glosses over the exact details of why they were incarcerated (although it alludes to sex work, as I will discuss in more detail in the following section). However, the report did describe Edward's experience of arriving at the prison: 'The third time I was booked was five months ago and got four months. There was a riot when they took me to gaol. I was still in female clothing, and when they got me to change, they asked me to remove my black wig. They wouldn't believe it was my own hair. … The first day I started walking in the line the other prisoners whistled and the warder pulled me up and told me to walk like a man, or else.' Following the time in Cooma Gaol, Edward stated that they 'took hormones which developed me. They smoothed the skin on my face and stopped my beard growing. They also changed the pitch of my voice. What now? I'm going to hitch a ride to Sydney.'[450] The article gives little insight into the broader experiences of transgender women at Cooma Gaol beyond a key point: that they were (at least sometimes) being sent there. Likewise, in 1979, the Cooma Gaol medical officer denied hormone therapy to transgender prisoners, indicating that there

[449] Patrick Abboud and Simon Cunich, "Episode 4: The Cooma Files*," The Greatest Menace: Inside the Gay Prison Experiment* (podcast audio), 11 February 2022.
[450] "Girl Impersonator Gets Into Jail," *Truth* (Melbourne), 19 November 1966, Papers of GR, AQUA.

was a population of transgender prisoners housed there, although again the size of the group was unclear.[451]

In 2022 Patrick Abboud and Simon Cunich released a podcast titled *The Greatest Menace: Inside the Gay Prison Experiment*, which explored the history of Cooma Gaol in great depth and shed new light on trans and gender diverse experiences of the prison. In episode seven of the podcast, Abboud interviewed Jackie, a transgender woman and former inmate at Cooma Gaol. Jackie's story highlights and clarifies a lot of themes which can be inferred from the fragments of experiences in accounts such as Edward's. Jackie spoke about how the New South Wales Vice Squad policed both trans women and gay men, stating: 'We were all just lumped into the category of perverts.' Her account implies that, as far as police and the prison system were concerned, transgender women were to be housed with the other 'perverts' and homosexual offenders. Jackie was sent to Cooma in 1961 or 1962. She was in her late teens and served for a period of three months. She explains, 'They called it the cat's gaol, that was the terminology. So, Cooma was known as the prison where they put all the gays and sex offenders, paedophiles, and because you were in drag you were a sex offender.'[452] (While Jackie refers to 'drag' and 'drag queens,' in context she seems to be using the term broadly to include transgender women.)

Jackie was not the only transgender prisoner at Cooma Gaol. She states: 'We used to, of course, any of the drag queens, we used to use burnt matches to make eyeliner and bloody eyebrow pencil out of a burnt match and all this sort of stuff. So, we always tarted ourselves up as best we could.' This implies that there was a group of transgender inmates, suggesting that it was somewhat common practice to house transgender women at Cooma. Although she was in Cooma Gaol at the height of the New South Wales government's efforts to crack down on and study homosexual offenders, Jackie did not notice or recall any efforts to study prisoners. She stated: 'Maybe drag queens weren't part of the study.'[453]

[451] Jacqueline Morgan, "Transsexuals and the Criminal Justice System," *Legal Service Bulletin* 9, no. 1 (1984): 45.
[452] Patrick Abboud and Simon Cunich, "Episode 7: The Prisoner*," The Greatest Menace: Inside the Gay Prison Experiment* (podcast audio), 11 February 2022.
[453] Ibid.

In *The Greatest Menace*, Abboud and Cunich explain that not all prisoners were considered candidates for 'treatment': those who were ashamed of their homosexuality were considered most likely to be receptive to conversion practices. According to barrister David Buchanan, transgender women were typically not considered to be responsive to treatment because they tended to be more likely to be sure of themselves and stand up for themselves. Buchanan stated that transgender women often saw social stigma 'for what it was' and were more familiar with police tactics and persecution. As stated by Buchanan: 'They might get arrested time and time and time again, and it would just make them angrier. But not necessary suffering shame.'[454] Indeed, Jackie stated that she never felt shame for who she was. When asked what she thought would have happened if she were ever subjected to conversion practices in Cooma Gaol, she stated: 'I hate to think what I would have fucking done to them. I would have totally disrupted it. I would have disrupted every pre-conceived opinion they had.'[455]

Other Australian states and territories did not have a 'homosexual' prison like Cooma Gaol. Sometimes trans women might be housed in female prisons if they were read as female when arrested. An example of this was Toni Rohan in Victoria. Rohan, aged twenty-five, was arrested in St. Kilda, Melbourne, in 1967 for 'loitering for the purposes of prostitution' while presenting as female. Rohan was taken to St. Kilda Police Station and locked in a women's cell overnight. In the morning, she was taken to court and charged. She pleaded guilty and was fined twenty dollars (which she did not have) or four days in prison. Initially she was taken to Fairlea women's prison, however when she arrived, she stated she 'couldn't go on any longer. I had to tell the matron I was a boy.'[456] From there Rohan was transferred to the city watchhouse, where she was made to undress and change into men's clothing: 'They gave me a cardigan, men's pants, and a pair of great big army boots. They took me back to St. Kilda police station, and next day I went out to Pentridge.' She did not describe her experience as a negative one, and it appears there were some accommodations made due to

[454] Ibid.
[455] Ibid.
[456] "'She' Was A Telephonist: Man Sent To Jail As A Woman," *Truth* (Brisbane), 29 October 1967, Papers of GR, AQUA; "I Worked As A Switch Girl Says Man," *Truth* (Melbourne), 28 October 1967, Papers of GR, AQUA.

her gender. She stated that 'they were all very nice,' and that she was given an individual cell to herself.[457]

Unsurprisingly, there were not widespread discussions during this period about transgender people and the prison system. However, we can glimpse from the sparse examples we have of trans experiences in prison during these decades the hints of disruption they were already posing to the system. In the decades to come, we will see that trans and gender diverse people challenged the binary assumptions of a prison system rooted in dividing people up into men and women. Interestingly, we get hints of an additional disruption during this period. Transgender people also caused difficulty for administrators in this rare example of a system where prisons also divided inmates into two further categories: homosexual and heterosexual.

SEX WORK

As I explore in depth in Chapter 5, by the 1970s and 1980s there were very active communities of transgender sex workers around Australia, but especially in the Kings Cross and Darlinghurst areas of Sydney. It is challenging to identify when these communities began to form as they were always, by necessity, underground and marginalised based on both occupation and gender. However, it is likely that they had their roots in the 1950s and '60s. While adjacent sex work communities may have existed prior to the 1950s, specifically transgender (or 'transsexual') sex work communities would develop in response to changing discourses and gender affirmation options and opportunities which were gradually emerging in these decades (although by no means would many trans and gender diverse people have access to gender affirmation procedures).[458] Indeed, we can see some indications of these communities existing in reports from around the 1960s onwards. Gender nonconformity was more often being associated with sex work in newspaper reporting, both in Australia and in Australian reports of international cases.

[457] "I Worked As A Switch Girl Says Man," *Truth* (Melbourne), 28 October 1967, Papers of GR, AQUA.
[458] One trans sex worker from Sydney, Jacqueline Durvell Ward, found that no doctors in Sydney would give her gender affirmation surgery in the 1970s. She ended up travelling to London and then Cairo to undergo her procedure, costing her $4000. "A man who spent $4000 on a sex change operation three years ago is now working as a prostitute in Brisbane," *Unknown*, date unknown, Papers of GR, AQUA.

Examples of international cases showed that not only were trans and gender diverse issues gradually becoming part of discourse in other parts of the world, but these cases also exposed Australian readers to a range of responses to questions about trans policing and incarceration. For example, the Sydney *Sunday Mirror* reported in 1969 on the case of Rachel Gosling, whom London police arrested on a soliciting charge. She was incarcerated in a male prison. Although housed in a single cell, she was forced to wear male clothing, and a London solicitor, Victor Lissack, stated that he would 'fight the case of this unfortunate person with every weapon in the legal armory … She is in a pathetic and dreadful state and must be taken from Brixton immediately.'[459] This demonstrates that in some parts of the world, debates around appropriate housing of trans prisoners were already beginning to emerge and creep into Australian press reporting.

In New South Wales, one transgender woman interviewed by Roberta Perkins in 1983 stated that 'changes began in the early 1960s.'[460] She was not specifically talking about sex work, but about the 'drag queen scene' in Sydney. However, the changes she described, such as the rising popularity of Les Girls, showgirl Carlotta's visibility as a performer, and 'even the police' turning up to watch some of the girls strip, indicate an emerging subculture of visible trans nightlife in Sydney which would, over the decades, significantly overlap with the sex work scene.[461] Much of the police attention described regarding this night life would apply as much (if not more intensely) to trans sex workers. Those involved in this nightlife operated within a precarious space between police crackdown and police tolerance. As described by Carlotta: 'If they ever caught anyone dressed in drag, police retribution was swift: they'd hit you over the head with a telephone book, put clothes pegs on your nipples and shave your head. They might even threaten to put you in a mental institution. Sammy [Lee who owned Les Girls] had been paying the cops off for years, so Les Girls was never raided.'[462]

There was some indication of a trans sex worker community existing in Melbourne as well during the 1960s and '70s. Toni Rohan's case, discussed briefly in the last section, was an

[459] "Sex change woman in male goal," *Sunday Mirror* (Sydney), 30 March 1969, Papers of GR, AQUA.
[460] Perkins, *The 'Drag Queen' Scene: Transsexuals in Kings Cross*, 39-40.
[461] Ibid., 37-40.
[462] Prue MacSween, *Carlotta: I'm Not That Kind of Girl* (Sydney: Pan Macmillan, 2003), 121.

example of this. Rohan was a trans sex worker in St Kilda, which would continue to be a prominent area for trans sex work in Melbourne in decades to follow.[463] Rohan's stepsibling, Albert Erlich, was arrested with her on charges of loitering for immoral purposes and vagrancy. Like Rohan, Erlich was dressed in women's clothes at the time of arrest.[464] In 1969, Melbourne's *Truth* reported on a story of a trans sex worker, Vicki Mae Liddy, approaching a man, Dr. Ian James Lloyd, and offering sex in exchange for ten dollars and a lift to St. Kilda where 'she could "sell" herself.' While driving, Lloyd realised she was transgender. Liddy reportedly struck Lloyd across the face before escaping his car. Liddy stated to the police officer who arrested her that she had not been intending to engage in sex work and that 'the doctor took fright when Vicki's wig fell off, and Vicki took advantage of his shock to give him a "bloody good punch in the nose."' However, this was not Liddy's first time being arrested for sex work; she reportedly had 'convictions on sex charges dating back to 1965.'[465]

In another case in 1974, Danny Woolrich was arrested in St. Kilda while dressed in 'a black slack suit, a blond wig, high heeled shoes and heavy makeup' and pleaded guilty to loitering for homosexual purposes.[466] In 1977, Melbourne's *Truth* published an article titled 'Transvestite: 2000 sex acts,' which stated that a trans sex worker in St Kilda named Pamela Hickman (aged 22) had been working for two and a half years and had reportedly provided sex services to over two thousand men with none of them knowing she was transgender.[467] According to a 1994 report by trans activist and sociology researcher Roberta Perkins, the trans sex work scene in Melbourne was 'the most diffuse of all those visited by us.' She stated that there was 'some low-key street work done in the St. Kilda area, but the actual location varie[d].'[468] In spite of the later diffuseness of the Melbourne sex work scene, it appears from

[463] "'She' Was A Telephonist: Man Sent To Jail As A Woman," *Truth* (Brisbane), 29 October 1967, Papers of GR, AQUA; Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 14.
[464] "Man Dressed as Girl Arracks Cop," *Truth* (Melbourne), 4 November 1967, Papers of GR, AQUA.
[465] "She was He – Doc Fooled!" *Truth* (Melbourne), 24 May 1969, Papers of GR, AQUA.
[466] "Blonde in black is a boy," *Truth* (Melbourne), 14 July 1973, Papers of GR, AQUA.
[467] "Transvestite: 2000 Sex Acts," *Truth* (Melbourne), 22 October 1977, Papers of GR, AQUA.
[468] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 13-4.

scattered examples across the 1960s and '70s that the presence of trans sex workers in St. Kilda had a reasonably steady lineage.

Throughout the 1950s and especially '60s, newspaper reports on arrests of trans individuals began more frequently to involve a sex work component. Of course, it is hard to say whether this increased focus on sex work in reporting was a matter of trans sex work communities emerging and growing, or whether it was a matter of press and public interest in 'salacious' topics. In the British press media, as noted by King, the 1960s (and decades to follow) saw a fascination with 'the sexual underworld' and cases involving female impersonation and drag in the nightlife, debauchery, and titillating scenes such as sex dungeons, sex tourism in the 'exotic East', and erotic movies. As King states: 'In general features on this sexual underworld, the transvestite or transsexual character is a regular but relatively minor figure.'[469] Australian media was likewise interested in similar topics, and the increased reporting on trans sex work may reflect this. It was also likely a matter of the law: the increased policing throughout the 1950s of homosexuality related offences, such as those related to soliciting, and sex crimes in general (especially those against males), could mean more transgender women were being caught up in these cases.[470] In effect, we see a shift away from prior decades, where police arrested people for presenting in a gender nonconforming way, to a trend towards transgender people being arrested for other offences, such as those related to homosexuality or sex work (or both), and the focus of the press shifted accordingly.

In 1970, the University of Sydney produced a report on Male Sex Offences in Public Places. This report will be discussed in more detail in Chapter 5; however, for our purposes here it provides insights into the practices of policing male (and transgender) sex work in Sydney in the late 1960s from the perspective of criminology researchers and those working in the criminal legal field, such as magistrates and lawyers. The report examined the reasons why men were arrested for offensive behaviour, indecency, and obscene exposure charges and explored possible responses to these issues. The report noted that 'all but a few' male

[469] King, *The Transvestite and the Transsexual: Public Categories and Private Identities*, 123.
[470] Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, 7-8.

(assigned or assumed male, at least) sex workers wore female clothes at the time of arrest. The report therefore grouped ‘male prostitutes and transvestites’ into one category, where a ‘transvestite’ could be assumed to also be a sex worker for the report’s purposes.[471] Offences related to sex work occurred steadily throughout the week in the streets of Kings Cross and Darlinghurst, and the report noted that the number of arrests had rapidly increased in 1969 after previously being an offence ‘of little importance.’[472] This drastic increase in arrests implies increased police scrutiny, but it may also point towards something of a timeline or turning point in terms of when the street-based trans sex work scene in Sydney became distinctly established and prominent.

CONCLUSION

The 1950s and 1960s set the stage for drastic changes in how Australians understood and discussed trans and gender diversity – not just in the context of the criminal legal system, but in society at large. I will discuss many of the topics discussed in this chapter, such as trans and gender diversity in prison, trans sex work, and the medicalisation of gender diversity, in greater depth in the chapters to follow. They are important to raise here, however, because these issues took distinct forms during these decades. New ideas which were slowly emerging during the 1920s, 1930s and 1940s were solidifying and becoming distinct categories. In previous decades the idea of the ‘homosexual’ individual was only just coming together as a cohesive idea; by this period, the homosexual was, as described by Colin Delaney, 'the greatest social menace' facing Australia, and was being policed accordingly. [473] While transgender people had yet to form fully into a coherent and fully fleshed-out category, the roots of such constructions were emerging at this time terminology was developing, and distinctions were being drawn between, for example, ‘transvestites’ and ‘transsexuals.’ Importantly, such distinctions had an impact on policing. Gender diversity was subject to policing alongside the policing of homosexuality, but there was a line drawn between the homosexual transvestite (deviant, criminal) and the legitimate transsexual, who might be

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[471] "Male Sex Offences in Public Places," In *Proceedings of the Institute of Criminology*, edited by Gordon Hawkins (Sydney, NSW: The University of Sydney) 1970, 16.
[472] "Male Sex Offences in Public Places," 21.
[473] Willett, "The Darkest Decade: Homophobia in 1950s Australia," 128.

somewhat worthy of sympathy or support. Medical explanations of transsexuality particularly were given some legitimacy – although this did not mean they were not also potentially criminal.

The next two chapters will dive into two topics introduced in brief in this chapter: trans experiences in prison and trans sex work. In the 1980s especially, both issues would flourish into hot topics of debate and scrutiny. By that point, ‘the transsexual’ would become a fully formed category much like the ‘homosexual’ did during the 1950s. Like homosexuality, as the transsexual developed into a fully realised form, it would become increasingly the focus of scrutiny and discourse. During the 1950s and 1960s the groundwork was being laid. A shift was occurring away from the conceptualisations of the previous eras and the focus on public decency and order and towards a focus on the individual: and the danger and the challenges that individual might pose for society.

CHAPTER 4

TRANSGENDER PRISONERS IN THE 1980S

This chapter and the one to follow explore a period where trans and gender diversity became much more consistently recognised (and often vilified) and the criminal legal system started to respond to trans and gender diversity as deserving of attention and specific regulation. These two chapters, read in tandem, cover the 1970s to the 1990s (although this chapter focuses primarily on the 1980s), where transgender women especially were named, identified, and cast as an identifiable group – sometimes deserving of accommodation, but often deserving of scrutiny and policing. In the 1980s, several prominent Australian cases brought the question of how prisons should handle incarcerated trans and gender diverse people to public notice, and debates took place around questions of where prisons should house transgender inmates, what medical treatments they should be able to access, and what accommodations prisons should provide for them.

At the crux of these debates was an underlying negotiation around not only the validity of transgender identities and experiences, but to what extent those identities should be respected and validated within the carceral system while those individuals were being punished. Politicians and the media debated whether transgender prisoners had a right to express their gender identities, and levied criticism against prisons which supposedly over-accommodated trans prisoners at the public's financial expense. Reports were often titillating and charged with suggestions of eroticism, implying deviant motivations to the accommodations provided by some prisons. For many transgender prisoners, their status as 'transsexual' and as criminal were intertwined in the eyes of the public and the press: there was a common suggestion that their trans identity was part of an overall deviant character, often tied up with homoeroticism and/or child molestation. By providing transgender prisoners with accommodations – clothing, housing in women's prisons, access to hormones or surgery – the prison system could be viewed as encouraging those 'deviant' qualities. Because they were criminal,

transgender prisoners also could not be trusted to narrate their own gender identities, out of concern they might attempt to game the system.

This chapter examines some themes associated with trans women in prison during the 1980s. The legal status of transgender women was a key issue in determining where they should be housed in prison, as well as how they should be viewed in the eyes of the law. In the absence of legislation regarding recognition of affirmed gender, court cases across Australian states set precedents with outcomes that varied across the country for whether transgender women were viewed as legally male or female. The cases also established what factors the courts considered when making these determinations. For transgender women living in prison, these were important decisions affecting their physical and psychological safety.

According to transgender researcher and activist Roberta Perkins, in 1984 there were approximately twenty transgender people in New South Wales prisons, about 4% of the New South Wales transgender population.[474] For context, the general prison population in 1985 made up approximately 0.2% of the state population.[475] Two of those trans women were in female prisons, whereas the majority were trans women in male prisons. [476] Transgender people were speaking up throughout the 1980s, highlighting the challenges they faced in the carceral system and advocating for change. However, there was also a dominant cultural narrative which placed transgender people – especially transgender criminals – within a framework of abjection and monstrosity. These narratives were prevalent enough to shape the way politicians and the media conceptualised transgender people and, in turn, shaped how they were treated in the criminal legal system.

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[474] "13th Australian Transsexual Association (ATA) program," *Gaywaves,* 22nd March 1984, AQUA.

[475] "N.S.W. Department of Corrective Services Annual Report 1985," (Sydney: N.S.W Corrective Services, 1985).; Australian Bureau of Statistics (August, 2008) 'Australian Historical Population Statistics, 2008' [data set], Population by sex, states and territories, 31 December 1788 onwards https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012008?OpenDocument (accessed 04 February 2021).

[476] "13th Australian Transsexual Association (ATA) program."

TERMINOLOGY:

The primary term used throughout this period both by transgender women (and transgender men, although they were rarely discussed) and in the broader press/media was 'transsexual.' Although some people still self-identify as transsexual today, I will primarily be using 'transgender' here – not to exclude the use of transsexual by those who identify with it, but rather as a catch-all term for anyone of trans or gender diverse expression and experience.[477] Although much of the reporting from the 1980s used 'transsexual', it is also worth mentioning that a small number of activists were challenging the term at the time. Roberta Perkins stated in a 1983 interview on *Gaywaves,* a gay and lesbian radio program based in Sydney: 'As gender is the key to the transsexual condition, transgender is a more appropriate term or there is gender dysphoric used in medical practice.' She also noted that 'transsexual' had been adopted in popular language to such a degree that it was still valuable to use, regardless of whether it was the 'most appropriate' term.[478]

Internationally, by the 1980s, 'transgender' was coming into more common use as an umbrella term, although its usage and meaning varied significantly depending on who was using it.[479] In Australia, this shift began later, around the 1990s (despite occasional exceptions, such as Roberta Perkins' quote above). Terminology such as 'transvestite' was also used, sometimes by those outside the trans and gender diverse community, and sometimes by those within. Sydney's organisation Seahorse, for example, identified in the 1970s and '80s as a group for heterosexual male 'transvestites.' While there were distinctions between the terms 'transsexual' and 'transvestite' both at the time and in the present-day, when the media or politicians were using them to discuss transgender issues in prison, those distinctions were rarely clear. In other words, mainstream media often interchangeably used the terms to describe anyone who in present day parlance would come under the transgender umbrella.

[477] Stryker, *Transgender History: The Roots of Today's Revolution*, 1.
[478] "2nd Australian Transsexual Association (ATA) program", *Gaywaves*, 3rd May 1983, AQUA.
[479] Rawson and Williams, "Transgender*: The Rhetorical Landscape of a Term," 4.

Another key piece of terminology is the concept of 'passing,' as it relates to trans and gender diverse experiences. 'Passing' has been central to many discourses about the legitimacy of trans and gender diverse identities. Broadly, 'passing' refers to an individual shifting from inhabiting one identity group to another, most often moving from a marginalised to a non-marginalised position.[480] This could refer to a range of movements across social groups, including race, sexuality, class, or gender. For transgender people, 'passing' most often entails being read, continuously and without question, as the gender with which a person identifies, usually with the implicit assumption that they are cisgender.[481] For transgender people in the public eye, passing and the aesthetics of achieving a cisgender ideal of gender presentation are often central to how the public and news media frame and evaluate their gender. These days, 'passing' is a controversial term in the trans and gender diverse community. Although it is still commonly used, it seems to be going out of favour, mostly due to the cisnormative expectations it implies. In the context of this chapter, the idea of 'passing' is important for understanding why the criminal legal system was inconsistent in how it responded to different transgender people. In many ways, trans people who 'passed' were often more comprehensible to people operating in the criminal legal system, the press, or society more broadly. Binary trans people who 'passed' could fit more neatly into the sex-segregated prison system and into the cisgender, heteronormative, binary gendered assumptions held by the majority.

Legal Recognition for Trans Prisoners

Trans and gender diverse recognition in the context of criminal legal systems emerged alongside broader legal and legislative battles for transgender rights and recognition. These shifts were happening Australia wide and internationally – however the question of how these rights might apply in Australian prisons was prominent in a couple of states where significant cases occurred. New South Wales especially was at the centre of many of these

[480] Liora Moriel, "Passing and the Performance of Gender, Race, and Class Acts: A Theoretical Framework," *Women & Performance: a Journal of Feminist Theory* 15, no. 1 (2005): 167.
[481] Thomas J Billard, "“Passing” and the Politics of Deception: Transgender Bodies, Cisgender Aesthetics, and the Policing of Inconspicuous Marginal Identities," in *The Palgrave Handbook of Deceptive Communication* (Springer, 2019), 464.

conversations, as was South Australia – which in 1988 was the first Australian state to implement legislation to recognise a transgender person's affirmed gender.[482]

The question of legal recognition for transgender people was first raised federally in 1979 at the Standing Committee of Attorneys-General. A 'lobby of sexually reassigned' people approached Frank Walker, Attorney General of New South Wales. The lobby voiced their concerns about transgender marriage, sexual relationships and the criminal law. Walker stated: 'It is a big step in a person's life, and for these persons to be left in legal limbo I think is a terrible thing.'[483] The Standing Committee of Attorneys-General noted that the first step towards legal recognition should be amendment of birth certificates in order to 'avoid their sexual reassignment being recognised for some purposes and not for others.'[484] The Standing Committee of Attorneys-General spent several years deliberating: in 1983, they were conducting a general review of the legal status of people who had undergone gender affirmation surgery and believed it would be preferable that birth certificate legislation – which was a matter of state/territory law – be introduced consistently across Australia. As stated by the Minister Representing the New South Wales Attorney-General: 'There would no doubt be transsexual people living in New South Wales who were born elsewhere. Were New South Wales and not their state of origin, to legislate for New South Wales born transsexuals to obtain a revised birth certificate, a most anomalous situation would arise, not to mention the damaging psychological effects which might accrue to such people.'[485] (Indeed, in the absence of national legislation, such challenges did occur, and continue to this day.) Ultimately, the states could not agree on a national approach and eventually the

[482] Meanwhile, Victoria was by 1980 the 'major Australian centre' for gender affirmation surgeries. At the time there were approximately 110 transgender clients in the system undertaking assessment, and it was estimated at least half of those would be approved for surgery. Commonwealth, Standing Committee of Attorneys-General Officers' Meeting Documents, NAA A432, 1983/005019/01, 3 & 4 July 1980; Riseman, "A History of Trans Health Care in Australia: A Report for the Australian Professional Association for Trans Health (Auspath)," 26.
[483] Ibid.
[484] Commonwealth, Standing Committee of Attorneys-General Speaking and Briefing notes, NAA A432, 1983/005019/01, 4 May 1979.
[485] Parliament of New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 1983, 1831.

Committee dropped the topic from consideration around 1987. The issue was, from this point, left to each state to decide.[486]

In addition to prison issues, the Standing Committee of the Attorneys-General noted in 1980 that the legal recognition of transgender people would impact how certain crimes could be charged. There were numerous charges – such as rape, incest, carnal knowledge, prostitution, and acts of gross indecency between male persons – where the sex of the perpetrator was relevant to the offence.[487] What would happen in these cases where the sex or gender of a perpetrator was in doubt? These conditions and uncertainties set the stage for advocacy and debate across the decade.

Meanwhile, international court rulings were affecting the legal status and recognition of transgender people, with varying outcomes. In some instances, the decisions made in these cases would influence Australian cases as well, as judges drew from them for precedent. For example, in the United Kingdom, the 1970 *Corbett v. Corbett* ruling set a common law precedent that transgender people would remain legally classified as their sex assigned at birth for the purposes of marriage. The ruling also established a 'formula' for deciding the sex of individuals which drew from four criteria: chromosomes, gonads, genitals, and psychological identification – wherein chromosomes were ruled to be the decisive factor to determining an individual's legal gender. As well as having a range of impacts on transgender people in Britain (including establishing that trans women would be sent to men's' prisons), this common law precedent would guide Australian jurisdictions until states began to legislate about gender recognition in the 1990s and 2000s.[488]

Positive overseas developments to transgender recognition could also influence Australia: the Standing Committee of Attorneys-General noted that 'a number of countries including Italy, South Africa, Switzerland and Sweden,' as well as parts of the United States and Canada, had already revised legislation to allow transgender people to amend their birth

[486] South Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 1987, 2373.
[487] Commonwealth, Standing Committee of Attorneys-General Adelaide – Sexual Reassignment, 3 & 4 July 1980.
[488] Burns, *Trans Britain: Our Journey from the Shadows*, 125.

certificates post-gender affirmation surgery to reflect their affirmed gender.[489] Still, Australian courts in the early 1980s were primarily following the British common law for rulings on cases to do with legal recognition of transgender people. In 1979, an Australian Family Court ruling referenced *Corbett v Corbett* in determining a case involving a marriage between a cisgender woman and an intersex person who identified as male.[490] Because of the man's intersex variation, the marriage 'lacked a truly heterosexual character' under the *Corbett v Corbett* criteria. While the groom was raised, identified and appeared male, he had female chromosomes and ovaries, meaning that, under this ruling, he would be unable to marry a female.[491] In 1983 the Chief Stipendiary Magistrate ruled in line with the *Corbett* decision that 'if one has the appropriate chromosomes one is either male or female, no matter what operations may have occurred and no matter what attitudes were taken.'[492]

Following *Corbett v Corbett*, there were three key judicial approaches to determining when a transgender person was able to change their sex under law. These were, in summary: 1) legal sex is determined based solely on biological factors, 2) sex is determined based on a combination of biological and psychological factors, and 3) sex is determined primarily by psychology.[493] In the 1980s, no Australian state or territory (until South Australia in 1988) had legislation to determine transgender rights and recognition under law. As a result, individual judges were left to make determinations in their rulings, and the application of the above approaches was inconsistent.

The long-running case of Lee Harris and Phillis McGuinness (1982-88) was a landmark in Australia for deciding the status of transgender people under the law. Harris and McGuiness were both charged under the New South Wales *Crimes Act* for procuring a male person to commit an act of indecency. Harris was a transgender woman who had undergone gender

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[489] Commonwealth, Standing Committee of Attorneys-General Sydney – Birth Certificate Revision for the Sexually Reassigned, 4 May 1979.
[490] Commonwealth, Standing Committee of Attorneys-General Adelaide – Sexual Reassignment, 3 & 4 July 1980.
[491] H. A. Finlay, "Sexual Identity and the Law of Nullity", *Australian Law Journal*, Vol. 54., March (1980), 115-126.
[492] Commonwealth of Australia, *Parliamentary Debates*, Legislative Assembly, 27 September 1983, 1251.
[493] Laura Grenfell and Anne Hewitt, "Gender Regulation: Restrictive, Facilitative or Transformative Laws?," *Sydney Law Review* 34 (2012): 762.

affirmation surgery; McGuinness was a transgender woman who had not undergone gender affirmation surgery. The question at the heart of their case was whether Harris and McGuiness were legally male or female, as the *Crimes Act* made it illegal for males (but not females) to procure sexual acts with men.[494] It is worth noting that the laws which led to this decision were not necessarily consistent across all Australian states. South Australia had, by the 1980s, made the sex of those involved in many offences irrelevant, meaning that challenges in charging transgender people where the issues related to such matters were unlikely to arise.[495]

The Harris and McGuiness case was precisely the kind of case that the Standing Committee of Attorneys-General had raised concerns about occurring. The original ruling in 1982 drew on *Corbett* and concluded they were both legally male, the magistrate stating that 'There are only two categories of sex.' The judge stated that it was 'clear both defendants are persons with male bodies who live as females.'[496] He ruled that gender, in a legal sense, should be indicated by chromosomes, gonads and genitals – meaning that gender affirmation surgeries would not be considered as a basis for a legal change in sex.[497]

The discourse surrounding Harris and McGuiness's case demonstrated how the courts reasoned out these issues. In 1984, Bruce Miles, Harris and McGuiness's solicitor, urged the District Court of Appeals to decide on whether transgender women were legally male or female. He stated: 'No Australian Parliament has determined the outcome to this issue, so it is up to the court to make a decision.'[498] Roberta Perkins gave evidence at the appeal, stating that in several instances Harris had been to gaol for misdemeanours and had always been admitted to the Mulawa Women's Detention Centre, demonstrating that, at least in some

[494] H Finlay, "Transsexual Recognition in Australia," *Venereology* 10, no. 3 (1997): 190.
[495] Commonwealth, Standing Committee of Attorneys-General Adelaide – Sexual Reassignment, 3 & 4 July 1980.
[496] "Transsexuals are men: Court ruling," *Telegraph* (Sydney), 25 September 1982, John Hewson Collection, AQUA.
[497] "Encounters of Third Kind Pondered," *Sydney Morning Herald* (Sydney, NSW), 5 March 1988, John Hewson Collection, AQUA.
[498] Paola Totaro, "Courts Must Decide on Transsexuals: SM," *Sydney Morning Herald*, 14 February 14th, 1984.

instances, her gender was being recognised in practice.[499] The final ruling by the Supreme Court of New South Wales was not reached until 1988, and the case fuelled debates in the press as politicians and judges attempted to negotiate the legal status of transgender people.[500] The ultimate verdict was that Harris was legally female, on the basis that she had undergone 'full sexual reassignment surgery' – classified, as A.N. Sharpe described it when discussing the case, as the 'capacity for (hetero) sexual intercourse.'[501] Because McGuinness had not had such surgery, she, by contrast, was not judged to be legally female.

This final ruling was a landmark decision, as it departed from the *Corbett* precedent which had shaped Australian legal determinations up to this point – where chromosomes were the decisive arbiter of sex.[502] The Justice argued that the *Corbett* decision had been open to question for some time, and that recognising that there were ways a person should be able to legally change their sex was part of a 'more compassionate, tolerant attitude' emerging 'amongst the civilised nations of the world.'[503] He stated: 'The time, then, has come when we must, for the purposes of the criminal law, give proper legal effect to successful reassignment surgery undertaken by transsexuals.'[504] Based off Harris and McGuiness's case, New South Wales courts now had a test for gender recognition based on psychological self-identification, considered alongside biological factors. Self-identification alone was not deemed to be sufficient for legal recognition of sex; however, it became part of the legal considerations.[505]

[499] Ibid.
[500] Finlay, "Transsexual Recognition in Australia," 190.
[501] A N Sharpe, "From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence," in *The Transgender Studies Reader*, ed. Susan Stryker and Stephen Whittle (Routledge, 2006), 622.
[502] Pauline Turner, "Court backs women who were men," *Sydney Morning Herald,* 1 November 1988, John Hewson Collection, AQUA.
[503] Ibid.
[504] Jennifer Falvey, "NSW court awards transsexuals the status of women," The Australian, 1 November 1988, John Hewson Collection, AQUA.
[505] Ashleigh Bagshaw, "Exploring the Implications of Gender Identification for Transgender People under Australian Law," *UniSA Student Law Review* 1 (2015): 171.

HOUSING TRANS PRISONERS

Legal recognition for transgender people impacted on their interactions with the criminal legal system in significant ways. The issues facing transgender prisoners were diverse, ranging from where they should be housed, to the abuse and sexual assault they could face while incarcerated, and the health care they should receive in prison. The question of appropriate housing for transgender prisoners was debated in courts and in the press across the 1980s. Roberta Perkins wrote the earliest study on Australian trans prisoners in 1991, where she surveyed transgender women living in Sydney and found that nearly a third of those she spoke to had spent time in prison – usually male prisons – and that while incarcerated they had experienced many challenges, including abuse from prison officers and other inmates, and having the means to express their gender identity removed.[506] Research has consistently shown that transgender inmates face higher than average levels of sexual assault and rape in prison environments.[507] A number of cases gained media attention during the 1980s, grappling with whether male or female prisons were the appropriate places to house transgender people, and what accommodations prisons should make for them.

At the beginning of the 1980s, there was some debate over whether the New South Wales Corrective Services should establish a gaol specifically for transgender prisoners on humanitarian grounds, as it was 'difficult sometimes to determine whether the prisoner should be in a jail for males or females.'[508] No such facility was ever implemented. In some cases, authorities placed transgender prisoners in protection for their safety. However, this meant that they were grouped with others who required protection from the general prison population, such as people who had committed sexual assaults, crimes against children, or informants/snitches. By being grouped with these categories of prisoner, transgender people faced further stigmatisation within the prison system, or could be at risk of sexual assault

[506] Wilson et al., "'You're a Woman, a Convenience, a Cat, a Poof, a Thing, an Idiot': Transgender Women Negotiating Sexual Experiences in Men's Prisons in Australia," 385.; Perkins, "Transsexuals in Prison," 97-100.
[507] Wilson et al., "'You're a Woman, a Convenience, a Cat, a Poof, a Thing, an Idiot': Transgender Women Negotiating Sexual Experiences in Men's Prisons in Australia," 384-5.
[508] Richard Macey, "Trans-sexuals may get separate jail," *Sydney Morning Herald* (Sydney), 22 April 1980, John Hewson Collection, AQUA.

themselves.[509] Housing could also be complicated when prisoners were living with HIV or AIDS. Two transgender prisoners in 1985 were housed in the AIDS Clinic at Long Bay Gaol, causing one of the prisoners to lodge a complaint with the Anti-Discrimination Board, on the basis that the highly isolated nature of the clinic was not humane to the inmates.[510] Although no transgender specific prison was ever established, as noted in the previous chapter, from the 1950s authorities identified and separated some homosexual inmates from the general population in New South Wales prisons and Cooma Gaol had been repurposed specifically to house homosexual prisoners. Segregation of homosexual prisoners continued in Australian prisons into the 1970s.[511]

Prior to legal recognition of transgender people's genders, trans and gender diverse inmates were typically housed in prison on an ad-hoc basis. An example of this is the 1977 case of Paul Hilary, a transgender man (one of very few who received public notice) who was sentenced to a seven-year term at the Fairlea Women's Prison in Victoria after robbing the Commonwealth Bank on Swanston Street. However, Hilary successfully appealed: a psychiatrist told the court that Hilary was more vulnerable than most in prison, and that he would be at high risk of completing suicide. The court released Hilary on the condition that he become a voluntary patient at Larundel psychiatric hospital.[512] Interestingly, the psychiatrist argued that 'with proper treatment [he] could reach a sufficiently stable mental and physical condition to have a sex change operation.'[513] In Hilary's case he was successfully able to advocate that he did not belong inside a women's prison – however, the system had no clear alternative for where to place him, instead resorting to a medicalised framework which classified his gender identity as a psychological disorder.

The ways that state differences in legal recognition of trans people could impact their experiences in prison can be seen in the example of Simone Rothschild, whose case coincided with proposed changes to South Australian law. In September 1987 Rothschild escaped from

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[509] "37th Australian Transsexual Association (ATA) program," *Gaywaves,* 5 June 1986, AQUA.
[510] "Female AIDS prisoner moved to isolation unit in Long Bay," *Sydney Morning Herald* (Sydney), 20 October 1985, John Hewson Collection, AQUA.
[511] Kaladelfos and Smaal, "Sexual Violence and Male Prisons: An Australian Queer Genealogy," 355.
[512] "Court frees he-she bandit", *Sun* (Melbourne), 6 August 1977, Melbourne eScholarship Research Centre.
[513] Ibid.

Emu Plains Training Centre, a correctional institution in New South Wales which (at the time) housed male prisoners.[514] She fled to South Australia, where she was arrested and remanded inside a women's correctional institution. The discourse around this case focused on whether she should remain in South Australia, where she was housed as a woman, or return to New South Wales, which legally recognised her only as male.[515] Rothschild stated that the sexual abuse she had received at the New South Wales prison was such that her only options had been either to take her own life or escape, and if she were forced to return to the men's prison, she would die by suicide.[516] At the same time, draft legislation was going to the South Australian Parliament that would allow transgender people who had 'undergone a reassignment procedure' (as sworn by a medical practitioner) to apply for a recognition certificate of their affirmed gender.[517] Some advocates for transgender law reform drew upon Rothschild's case as evidence of the kinds of injustice and mistreatment transgender people faced in the absence of law reform.[518] Rothschild ultimately won her case, with the magistrate ruling that it was 'inhumane' and 'scandalous' that she would be housed in a male prison.[519] Rothschild reappeared in court shortly after, charged with unlawful possession of a car, and was sentenced to another nine months in gaol in South Australia.[520] (She was, however, deported to New Zealand, where she was born, later in 1988.) Rothschild's evidently feminine appearance was frequently brought up in the ruling, along with the fact she used to

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[514] "Key moments in Penal Culture in NSW 1970 – present," *The Australian Prisons Project*, The University of New South Wales, 2010, https://web.archive.org/web/20130409150217/http://www.app.unsw.edu.au/section-3-prisons-4 (accessed 11 November 2022)

[515] Matthew Warren, "Woman to Fight Her Forced Return To Men's Prison," *The Australian,* 1 December 1987, John Hewson Collection, AQUA.

[516] Eugene St John, "Sex-swap model: I'll die in Jail," *The News,* 1 December 1987, Melbourne eScholarship Research Centre.

[517] Regulations Under the Sexual Reassignment Act 1988 (SA), https://www.legislation.sa.gov.au/__legislation/lz/c/r/sexual%20reassignment%20regulations%201988/1998.06.30_(1988.11.15)/1988.231.pdf (accessed 11 November 2022).

[518] "Transsexuals: finding new life but losing identity," *The Advertiser*, 2 December 1987, John Hewson Collection, AQUA.

[519] "Sex-swap Simone wins 'deport' battle," *The News,* 13 January 1988, John Hewson Collection, AQUA.

[520] "This is the person they put into a men's jail in NSW," Sydney Morning Herald, 17 January 1988, John Hewson Collection, AQUA.

model for Gucci in Italy.[521] The discrepancy between how she looked and where she had been housed in prison served as a powerful tool for advocating her case.

To return to the idea of 'passing' and how it shaped Rothschild's case, Billard has argued that journalists use passing as a metric of a transgender person's 'success' at achieving their gender identity, which 'sustains the assumption that cisgender identity is normatively "better," and that all other gender identities are mere facsimiles of the "natural" genders of cisgender men and women.'[522] The ability to perform femininity in a way which aligned with white, heterosexual, middle-class ideals of womanhood, in particular, constructed the boundaries of which transgender women were seen as legitimate.[523] The press did this in Rothschild's case, with her ability to pass seamlessly functioning as evidence of the legitimacy of her gender identity and a reason why she should not be housed with men. But passing is a complicated issue. Where in some cases it might be seen to legitimise a transgender person's identity, this also often serves to delegitimise those who do not 'pass,' as they are often viewed as not trying hard enough to conform and are therefore perhaps insincere in their gender identity. Passing could also be viewed as deceptive or dangerous, and exposed some of the 'unreliability of visual regimes of identification' through which mainstream society determined sex and gender.[524]

In addition to Rothschild's case making headlines, other cases involving trans prisoners caught some media attention in the 1980s, focusing again on the dangers and discrimination these women faced while incarcerated. Transgender prisoners who spoke out argued that they would be unsafe in men's prisons, at risk of physical and sexual assault.[525] Kerry Wilson, a transgender woman jailed for six months in Pentridge Prison in Victoria, pleaded that the male prisons would put her in danger of assault. However, the magistrate sentenced her to

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[521] Ibid.
[522] Billard, ""Passing" and the Politics of Deception: Transgender Bodies, Cisgender Aesthetics, and the Policing of Inconspicuous Marginal Identities," 468.
[523] Skidmore, "Constructing the" Good Transsexual": Christine Jorgensen, Whiteness, and Heteronormativity in the Mid-Twentieth-Century Press," 271.
[524] Catherine Squires and Daniel Brouwer, "In/Discernible Bodies: The Politics of Passing in Dominant and Marginal Media," *Critical Studies in Media Communication* 19, no. 3 (2002): 286.
[525] Alex Messina, "Trans-sexual gets jail despite plea," *News Express,* 15 May 1987, John Hewson Collection, AQUA.; "Sex-swap woman in jail battle," *The News,* 30 November 1987, John Hewson Collection, AQUA.

serve her term at Pentridge, stating that it would be a 'deterrent to others.'[526] This shows how trans and gender diverse people could be harmed by the attitudes and biases of individual judges. In this case, Wilson's wellbeing was disregarded and, instead, the judge expressly put her in a situation which would increase her risk of harm as a punitive and 'deterring' measure – specifically to deter other transgender people.

However, not all interactions between transgender women and men in prisons included sexual assault. It was not uncommon for transgender women in prison to seek out relationships with men, and in some cases preferred to be housed in male prisons because 'there they can at least meet boyfriends and have what they see as relationships whereas they find it more difficult on the other side to form relationships because of their transsexuality.'[527] In some cases, relationships with male prisoners could afford transgender inmates a degree of protection. Relationships with other prisoners could be a source of comfort, or a survival mechanism. As one prisoner stated on the *Gaywaves* radio program: 'What I did was look for the biggest, strongest man and stick as close to him as possible, otherwise you can't survive.'[528] Having protection from an influential boyfriend could protect transgender women in prison from sexual assault and other attacks.[529]

At the Cessnock low security prison in New South Wales, cells were not locked until 10pm and a 'considerable amount of sexual activity' was known to take place 'between the transsexuals and the other prisoners,' which was described as a 'safety valve' to reduce the risk of sexual assault.[530] One letter writer to the *Sydney Morning Herald* explained why many transgender women in male prisons developed romantic relationships with other prisoners. She stated that as they were women in a male prison, the relationships were heterosexual, and that transgender women who did not have relationships were subjected to 'constant sexual abuse.' She argued that the 'obvious solution' to the issues that transgender prisoners

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526 "Trans-sexual gets jail despite plea."
527 "37th Australian Transsexual Association (ATA) program."
528 "12th Australian Transsexual Association (ATA) program," *Gaywaves*, 2nd February 1984, AQUA.
529 "13th Australian Transsexual Association (ATA) program."
530 Morgan, "Transsexuals and the Criminal Justice System," 45.

faced from prison guards and other prisoners would be to place all transgender prisoners in female jails. [531]

When Roberta Perkins raised the issues of housing with Corrective Services New South Wales, she recounted their interaction: 'I've said, "Look, why are you causing this division? You're sending some to female jails and you've all this resistance against these others that haven't had the operation", and the answer [from Corrective Services] was very simple. They said, "We can't have a vagina in a man's jail" and conversely of course in the case of the pre-operative transsexuals, they can't have a penis in a woman's jail, and there it is. There's the crux of the whole matter.'[532] This was a pivotal period: as expressed in this statement, while the criminal legal system operated on a fundamentally binary and sex-segregated system, trans and gender diverse people would be a disruption to the way the system operated. This disturbance shone a light on the cisnormative, gender essentialist and binarist assumptions built into these processes. Despite the work of activists such as Perkins, transgender people in prison around Australia were housed essentially on an ad-hoc basis, with no consistent framework overseeing their treatment. Because of this, transgender activists and some politicians saw legislation to recognise transgender people as essential to creating cohesive and consistent systems. But as attempts to institute these reforms at a national level fell apart, these changes failed to be implemented and instead, individual court cases and legal decisions shaped the criminal legal responses to trans prisoners slowly and inconsistently.

WHO WAS THE 'DEVIANT TRANSSEXUAL'?

Thus far this chapter has discussed issues faced by trans and gender diverse people in relation to prisons where they related to questions of legislation, legal recognition, and housing – generally the issues which transgender advocates and groups brought to public attention. But there was another side to the conversation. The idea of trans people as sexually deviant and dangerous had, by the 1970s and '80s, enmeshed itself in a range of media and in public (mis)perceptions. This imagined deviant and criminal 'transsexual' – while essentially a fictional construct – influenced how real trans and gender diverse people were perceived and

[531] "Not Freaks," *Sydney Morning Herald* (Sydney), 28 January 1988, John Hewson Collection, AQUA.
[532] "8th Australian Transsexual Association (ATA) program."

could influence the way the press and politicians handled trans criminal legal issues. In this section I will briefly discuss these representations of trans people, primarily in the media, what anxieties they represented, and how they might be used to characterise and shape responses to real trans and gender diverse people. In the sections to follow, I will look at some of the ways this played out in the prison system and in the broader discussions when it came to questions of gender reassignment in prison, provision of hormones (as well as chemical castration), and the political 'scandals' at the Long Bay Gaol in New South Wales.

By the 1980s, there was an archetype of a criminal 'transsexual,' who was often characterised as a deviant, dangerous, autogynephilic male – someone who could easily be criminally dangerous on account of their 'male' sex and disturbed nature. This image came from a range of sources and political leanings. In 1979, Janice Raymond published *The Transsexual Empire*, a book that Susan Stryker and Stephen Whittle describe as doing 'more to justify and perpetuate [anti-trans prejudice] than perhaps any other book ever written'.[533] The book characterises transgender women as deviant men who, in Raymond's words, 'rape women's bodies by reducing the real female form to an artefact, appropriating this body for themselves.'[534] The ideas expressed in Raymond's work would remain in the public discourse right up to the present day, primarily through the Trans-Exclusionary Radical Feminist (TERF), or so-called Gender Critical movement.

Meanwhile, in popular media, representations of transgender characters in the later twentieth century fell broadly into two categories: the first were comedic representations of heterosexual men cross-dressing to 'gain access to privileges, material goods or relationships that they otherwise lack'; the second was horrific gender revelations, where the transgender character is revealed to be 'a monstrous gender- and sexual-deviant.' Buffalo Bill in *Silence of the Lambs* (1991) (as well as Thomas Harris' 1988 book of the same title) and Norman Bates in *Psycho* (1960) are probably two of the most famous examples of the latter trope. However, numerous B-movies from the 1970s and '80s also utilised this trope to represent

[533] Susan Stryker and Stephen Whittle, *The Transgender Studies Reader* (New York: Routledge, 2006), 131.
[534] Janice G Raymond, "Sappho by Sugery: The Transsexually Constructed Lesbian-Feminist," in *The Transgender Studies Reader*, ed. Susan Stryker and Stephen Whittle (New York: Routledge, 2006), 134.

monstrous and gender variant killers.[535] Film representations of monstrous trans and gender diverse people can provide us with insight into the anxieties of the societies which produced them. These representations not only reflected public fears; they also codified them.

The 1980s saw an increased fixation in horror media on 'human' monsters, such as serial killers, who were monstrous not for supernatural reasons, but for psychological ones.[536] Television and movies began to tackle transgender themes more frequently across the 1970s and '80s. Several sitcoms in these decades introduced gender diverse, transgender or 'cross-dressing' characters. Across media, a prominent theme has been a disproportionate focus on the 'salacious personal details' of trans people's lives, such as the ins and outs of gender affirmation surgeries and trans sex lives, as opposed to the broader systems of discrimination and civil rights issues facing trans and gender diverse people. Transgender people in the media were (and are) routinely objectified, rather than fleshed out as truly human and realised subjects.[537] While transgender representation has been visible on screen, the stereotypes and limited types of representations have influenced how they are understood both on-screen and off.[538]

Joelle Ruby Ryan has discussed several common transgender archetypes in film and media, however the one most relevant to this thesis is that of the 'transgender killer', as she names it. Transgender identity in film has been frequently tied to 'criminality, sociopathic behaviour and delinquency. … If trans people are not tragic victims or the butt of jokes, then frequently they are cast as vicious killers.'[539] Particularly in the horror and slasher genres, transgender people are depicted as abject, monstrous, and dangerous. Ryan notes that although there are of course real transgender murderers, this is, for the most part, an inverse image of reality, where trans people are themselves disproportionately victims of violent crime, rather than perpetrators. Trans people often suffer excessively violent deaths, and the most common

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[535] KE Sullivan, "Ed Gein and the Figure of the Transgendered Serial Killer," *Jump Cut* 43 (2000): 38-40.
[536] Philip Jenkins, "Catch Me before I Kill More: Seriality as Modern Monstrosity," *Cultural Analysis* 3, no. 2 (2002): 1-3.
[537] Noah Riseman, "Representing Transgender in the 1970s Australian Media," *Gender & History* (2020): 228.
[538] Joelle Ruby Ryan, "Reel Gender: Examining the Politics of Trans Images in Film and Media," Doctoral Thesis (Bowling Green State University, 2009), 16-44.
[539] Ibid., 53.

perpetrators of these crimes against them are cisgender, heterosexual men. Ryan recounts instances where people have reacted with visible fear or disgust upon encountering her in public spaces, and reflects: 'such fear does not spring forth spontaneously; rather, it is embedded in people's psyches through repeated cultural conditioning.'[540] She posits that socio-cultural and political conditions, including the 'spectre' of homosexuality and the predominance of psychoanalytical lenses for viewing people who sat outside the dominant white, heteronormative ideal of the 1950s, created a climate which produced the media 'monster' as gender nonconforming and deviant. Where traditional monsters might have been fantastical creatures such as werewolves or vampires, the transgender monster became embedded in a cultural climate where it represented anxieties and threats to established norms – the threat of someone dangerous who could be right under their noses. These transgender monsters of the screen would, as a rule, find their gender deviance result in a break where they would start killing, usually attacking cisgender women. These murders were linked, intrinsically, with the perpetrators' transgender nature.[541]

That trans people are presented as violent killers in the media is a form of scapegoating: displacing anxieties which are intrinsic to the binary gender order onto a demonised other to reinforce the hegemonic order.[542] The media construction of transgender people as monstrous is not confined to the screen: it impacts how transgender people are perceived in the real world as well, which can have material consequences. Politicians, the press, and the public have often drawn upon these stereotypes to reinforce hysteria against transgender existence. Significant, also, are the 'old stereotypes of transsexuals as predators or pedophiles' which serve as a way for those who oppose transgender rights to argue against them to protect children.[543] Like the transgender killer, the transgender predator is largely a creation – an archetype born out of cisgender society's gender anxieties – but can have a real impact when it influences societal opinion and policy.

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[540] Ibid., 178.
[541] Ibid., 53-54, 180-90.
[542] Ibid., 191.
[543] Oren Gozlan, "Stalled on the Stall: Reflections on a Strained Discourse," *TSQ: Transgender Studies Quarterly* 4, no. 3-4 (2017): 452.

The idea of the 'transsexual killer' in media and the popular imagination shaped discourses around trans people on several levels. On the one hand, when trans people did commit predatory and/or violent crimes, it provided a lens through which they could be interpreted and reinforced these perceptions. It could also influence which cases received public attention, with cases which fit this narrative becoming particularly newsworthy. This could in turn shape the experience of all transgender people in prison. The following sections examine some of the ways these narratives around transgender people played out in practice: prompting moral outrages from politicians and the media as transgender prisoners pushed for better treatment in prisons.

Long Bay Gaol

In October 1980 the press reported a scandal around how the Department of Corrective Services was accommodating 'transvestite' prisoners at Long Bay Gaol.[544] According to the articles, around twenty 'transvestite' prisoners at the gaol were being provided with 'french-type' female underwear and makeup in an effort to 'reduce tensions' within the prison. The prison administration had also allegedly paid for 'female impersonators to go to the jail to instruct prisoners in dress and make-up,' although the then-Minister for Corrective Services, Bill Haigh of the Labor Party, denied this. This was a point of contention between the Minister and the Liberal Opposition spokesman, Dick Healey, who raised the allegation and also claimed that 'prisoners at Long Bay also sunbaked in bikinis.'[545] Most of these concerns focused on the idea that the prisoners at Long Bay (or, as one article termed the prison, 'Long Gay,' indicating the continued conflation of transgender identities with homosexuality) were being pandered to 'at the taxpayers' expense.'[546] The conflation of trans and gender diversity, homosexuality and sexual assault of children was one which had dangerous implications for transgender prisoners inside the system as well as in society more broadly. Long Bay was considered a place where 'child killers or molesters would not be safe.' Healey argued that

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[544] "Clothes for Transvestite prisoners," *Morning Herald* (Sydney), 16 October 1980, John Hewson Collection, AQUA; "Strange Affair of the Long Gay Jail," *Telegraph* (Sydney), 16 October 1980, Melbourne eScholarship Research Centre.
[545] "Transvestite Prisoners Allowed Makeup," *Times* (Canberra), 16 October 1980, John Hewson Collection, AQUA.
[546] "Strange Affair of the Long Gay Jail."

some of the prisoners were child sex offenders and implied that providing them with female clothing was providing them with more fuel for their 'personal activities' which had gotten them convicted in the first place – drawing an explicit link between cross-dressing and child sexual assault.[547]

Haigh argued that authorities were taking steps to meet the needs of their gender nonconforming prisoners by allowing them accommodations in their dress. The tension here was between whether these accommodations were reasonable and necessary or whether they were, as Healey claimed, actions which offended society.[548] It is unclear from the reporting how much truth there was to these allegations overall, but they demonstrate an anxiety which was present in society at the time, regarding how gender diverse prisoners were to be treated. Was their gender identity a factor in their crime? Was it dangerous or offensive to provide accommodations for their gender expression? And could prisons themselves be complicit in encouraging gender diversity and/or 'deviant' sexual behaviour?

Haigh stated that although he was unaware of any female impersonators being paid to visit the Long Bay Gaol, there had been measures taken to work with transgender women in the prison population. The trans prison population would likely have been small, but not so small as to be insignificant. For reference, Perkins stated that in June to July of 1983 there were twenty-three transgender people in Long Bay.[549] The numbers of trans prisoners could fluctuate depending on the time and the prison – another transgender women interviewed by Perkins recounted two instances when she had been in prison, one time with fourteen other transgender prisoners, and another time with only three.[550] Haigh said that a discussion group had been formed, consisting of prison officers, doctors, and transgender prisoners, and he argued that 'the programmes [were] a method of obtaining a broader understanding of prisoners' difficulties. The result is that some tensions that existed previously in the gaol have now been relieved.'[551] In 1979, Tony Vison, then Chairman of the Corrective Services

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[547] Ibid.
[548] Ibid.
[549] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 69.
[550] *The 'Drag Queen' Scene: Transsexuals in Kings Cross*, 94.
[551] New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 October 1980, 1648.

Commission, held a seminar in Sydney to discuss prison conditions for transgender inmates. Reportedly, 'An extraordinary degree of sympathy was shown by the prison staff who attended, and a special program was designed by Mr. Eric Quarmby, the then Superintendent of the Metropolitan Reception Prison at Long Bay.' However, the program was not successful due to opposition from the Prison Officers' Union and, apparently, some of the transgender prisoners themselves. The union 'also objected to some provisions related to the distribution of clothing to the transsexual prisoners,' and – at least by 1984 – these programs were no longer operating.[552]

These scandals at the Long Bay Gaol were positioned within a broader climate of prison review and reform in New South Wales. The *Report of the Royal Commission into NSW [New South Wales] Prisons* (commonly known as the Nagle Report) was released in 1978 and marked a turning point in New South Wales prison reform – and prison reform nationwide. The Nagle Report shed light on incidents of prison brutality and cover-ups which cast the prison system as incompetent and corrupt. Reforms targeted a range of issues around prisoner welfare, prison conditions, sentencing lengths, and prisoner civil rights.[553] The report and the political and public responses to its contents shaped much of the periods to follow – both as a period of reform in the late 1970s and early '80s, and as a period of backlash and hardening of prison conditions under the Liberal Corrective Services Minister Michael Yabsley in 1988.[554] Michael Yabsley became Corrective Services Minister after a by-election and following the election of the Liberal Party/National Party coalition in New South Wales in 1988. Under his oversight, the state saw an increase in the prison population and the introduction of numerous 'law and order' approaches, including reintroducing prison sentences for summary offences and increased penalties.[555]

The background to the Nagle Report began in the early 1970s with prisoner riots, action groups and ongoing grievances at the Bathurst prison which culminated in a major riot that

[552] Morgan, "Transsexuals and the Criminal Justice System," 45.
[553] David Brown, "The Nagle Royal Commission 25 Years On: Gaining Perspective on Two and a Half Decades of NSW Prison Reform," *Alternative Law Journal* 29, no. 3 (2004): 135.
[554] Ibid.
[555] David Brown, "Putting the Value Back in Punishment," *Legal service bulletin* 15, no. 6 (1990): 239.

left many prisoners injured. The obfuscation of details and denials from the prison administration led to press investigations and, ultimately, the Nagle Royal Commission commencing in 1976.[556] The Royal Commission found a culture of systemic brutality against prisoners, prisoner-on-prisoner assault, collective punishment and lock-downs, and other overarching issues with how prisons operated in the state.[557] The findings of the report and the systemic problems they brought to light caused 'public opinion [to be] temporarily wooed away from the punitive mood' and towards a shift for reform and accountability. However, even from the earliest days of the report when outrage was strongest against the descriptions of brutality within the prison system, there was also a feeling in the press and the public that wanted to avoid 'going soft' on prisoners. [558] These events and shifts characterised the mood around law and prison reform in this period. However, critics of reform were also present. Tony Vinson, reflecting on the implementation of recommendations of the Nagle Royal Commission, stated: 'When the state acts in ways that can be interpreted as sympathetic to [prisoners], punitive counter inclinations are rapidly triggered.'[559]

The accusations that Long Bay Gaol was being too accommodating of trans prisoners came amid calls within a tense political climate and calls that Minister Haigh be removed from office. John Mason, Liberal Party Member for Dubbo, called for the Minister to be dismissed 'on the grounds of his gross incompetence and the serious doubts cast on his credibility by the Penning affair.'[560] Prisoners had given evidence against the then-Deputy Superintendent of the Long Bay Gaol, Allan Penning, claiming that officers had been physically beating prisoners upon arrival and as punishment for breaking rules.[561] Mason spoke at length about the failings of the New South Wales prison system, describing 'violence and bloodshed' as 'the order of the day.' In addition to these criticisms, he added: 'The Minister has allowed

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[556] "The Nagle Royal Commission 25 Years On: Gaining Perspective on Two and a Half Decades of NSW Prison Reform," 135-36.
[557] Ibid., 137-40.
[558] Tony Vinson et al., "The Nagle Report—25 Years on Symposium," *Current Issues in Criminal Justice* 16, no. 1 (2004): 94.
[559] Ibid.
[560] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 1980, 2156.
[561] New South Wales and John Flood Nagle, *Report of the Royal Commission into New South Wales Prisons: Volumes 1, 2 and 3* (Government Printer, 1978), 16.

madness to masquerade as rehabilitation; he has encouraged transvestites, and flying lessons for prisoners.'[562] Critics of the Minister's administration of the prison system continuously brought up these concessions to transgender prisoners. Actions taken by the prison administration and Corrective Services Minister to address the needs of transgender prisoners were presented – amidst a climate of wider accusations about how the prisons were run – as evidence of the corruption, incompetence, and skewed priorities of the leadership. Tony Vinson stated that he believed Haigh to be 'blocking numerous reforms.'[563] Haigh lost his position as Minister following the 1981 state election and resigned from Parliament in 1983.[564]

In 1981, one transgender prisoner at Long Bay Gaol, Shalene-Billie Holmes, wrote to the *Sydney Morning Herald* and argued that the media was painting an unfair image of trans prisoners. She stated: 'It is unfair to create an image that we are tantalizing the males in this jail by running around half-naked in bikinis and French underwear. We wear the same clothing as the males, unfortunately, and in most cases more than the males. … But this is really a minor issue. The major issue is that I am getting tired, as are the rest of the girls, of being referred to as child molesters.' She stated that in her three years at Long Bay, she had not met any transgender inmates who were imprisoned for molesting a child, and that the image that the media (and the statements from Healey) were perpetuating was harmful, and that she was 'not a criminal for being transsexual.'[565]

Accounts from transgender prisoners who were incarcerated at Long Bay Gaol tell quite a different story from the picture painted in the press of a prison pandering to its gender diverse population. One transgender prisoner described life in Long Bay as 'pure hell' in a 1982 letter to the *Gaywaves* radio program.[566] Another stated that transgender prisoners were denied many of the rights afforded to other members of the prison population. She claimed that they were not allowed to talk to other prisoners and had to stay within their own cells, nor were

[562] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 1980, 2158.
[563] "Long Bay 'Brutal' for Minor Offenders," *Sydney Morning Herald* (Sydney), 6 October 1981.
[564] "The Voting," *Sydney Morning Herald* (Sydney), 1 October 1981.
[565] "Transvestite Prisoners Allowed Makeup," *Times* (Canberra), 16 October 1980, John Hewson Collection, AQUA.
[566] "Letter from Jean, a transsexual at Long Bay Gaol," *Gaywaves*, 21st January 1982, AQUA.

they allowed to take a job like the male prisoners, meaning they were deprived of money and the means to buy anything. She said that prison staff 'just don't want to know us.' In contrast to the stories of prisoners being supplied women's clothing and makeup, she said: 'we were told to put on men's clothes and everything which we sewed up and turned into a little sash if you like, Long Bay Fashion. And still we got charged with destruction of government property and we were made to wear men's clothes. We had to roll the jeans up, tie the shirts up, cut off the T-shirts and sort of sew them down the middle and put straps on.'[567] Roberta Perkins, discussing visiting the prisons, reinforced this, stating:

> [The officers at Long Bay] try to do everything to 'make men of them'. I mean they give them male clothing; they expect them to wear male clothing, but they roll up the trousers and they undo the buttons. … Then they take makeup away from them or they say, 'You can't wear any makeup, you can get this on the buy ups and things out there', so what they do they use chalk and charcoal and red ink or whatever.

Perkins made recommendations to the Long Bay Gaol that they issue clothing to the transgender prisoners from the stock of clothing for Mulawa (the female prison) instead of the male stock. She stated that the Corrective Services staff, 'threw their hands up in horror. They said, "No we can't give them any dresses".'[568]

In another incident in 1989, a Kings Cross 'all-male revue' of 'scantily-clad dancers' from Les Girls performed at Long Bay Gaol. The show was apparently 'bawdy' and 'very well received' by the inmates, several of whom went on stage at the climax of the show to perform the Can-Can with the entertainers. This incident sparked renewed outrage from critics, who called for an investigation into the running of the prison, and the fact that the prison paid for the show.[569] Debates erupted about whom to punish for this event: should the Corrective Services Minister (by this point Michael Yabsley of the Liberal Party) hand in his resignation, or would it be scapegoated to junior officers?[570] This particular example did not deal directly

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567 "2nd Australian Transsexual Association (ATA) program."
568 "8th Australian Transsexual Association (ATA) program," *Gaywaves*, 6th October 1983, AQUA.
569 "Les Girls in Long Bay," *Sun Herald* (Sydney), 11 June 1989, John Hewson Collection, AQUA.
570 "Jail Papers on Les Girls go Missing," *Sun Herald* (Sydney), 18 June 1989, John Hewson Collection, AQUA.

with trans prisoners, but it still pointed to a perceived encouragement on the part of the Long Bay prison administration for gender deviant expression and sexuality.

ACCESS TO HORMONES/GENDER AFFIRMATION IN PRISON

In 1989, Nicole Louise Pearce (her present-day name) began gender affirming HRT in Maitland Gaol, New South Wales. This caused a stir in the media. Pearce (along with Robin Reid) had been convicted and sentenced to life imprisonment in 1982 for the murder of a thirteen-year-old boy, Peter Aston, and the sexual assault of Aston's friend, Terry Ryan. Pearce was seventeen at the time of the murder (Reid was thirty-two), and twenty-five when she sought hormone treatment in prison. The media was critical of the decision to allow Pearce to undergo 'a drug-induced sex change' at the expense of taxpayers. One article in the *Mirror* stated: 'There will undoubtedly be a deep community sense of outrage at the news.'[571] The cost of Pearce's treatment was $2.33 per month.[572] Pearce spoke in an interview about her transition, expressing that if she were to stop hormones, life for her would not be worth living. She also stated: 'If people are that upset, I will pay for it myself. I can pay and I will.'[573]

Pearce was not the only prisoner commencing HRT during their sentence. According to the *Daily Mirror*, there were twelve prisoners in New South Wales at the time who were receiving transition related care while incarcerated, two of them having started their treatments post-sentencing. The New South Wales Corrective Services Minister claimed that these gender affirmations (called 'sex reassignments,' in the terminology of the era) would make it harder to control the prisoners, due to housing issues.[574] There was also a claim that two transgender inmates had previously received surgery while incarcerated – however, the Corrective Services Minister, Michael Yabsley, emphasised that these operations were not

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[571] "Outrage at prisoner's sex change," *Daily Mirror* (Sydney), 19 September 1989, John Hewson Collection, AQUA.
[572] "Killer may lose his bid for sex change," *Daily Telegraph,* 20 September 1989, John Hewson Collection, AQUA.
[573] "Why I want to be a woman," *Daily Mirror* (Sydney), 21 September 1989, John Hewson Collection, AQUA.
[574] "12 on list for gender swap," *Daily Mirror* (Sydney), 20 September 1989, John Hewson Collection, AQUA.

performed as gender affirmations, but for unrelated medical reasons.[575] Pearce's case prompted a more general review of the gender affirmation in prison, with Yabsley wanting to impose regulation and oversight on the process.[576] The Minister slammed the previous Labor government for the 'abhorrent program' allowing these gender transitions.[577]

There was a common theme throughout reports linking the degree to which a crime was considered horrific, to whether trans prisoners 'should' be allowed to transition. The press would often cite paedophilia and crimes against children. There seemed to be a common perception that transition was a luxury that people lost when they went to prison. Minister Yabsley said he was 'appalled' that Pearce was being allowed to transition in prison 'while being punished for such a horrendous crime.'[578] He added: 'We are not in the business of making the NSW prisons system a place where hormone treatment starts.'[579] The revision of the procedures for hormone treatment in state prisons which Pearce's case prompted determined that surgery 'for cosmetic reasons' would not be allowed, and that the Prison Medical Service would be required to seek advice from a panel of psychologists and find an 'identified medical reason' in any case where a psychiatrist recommended that an inmate start HRT.[580]

In 1998, Pearce became eligible for parole. Again, this sparked questions about her transition, the crimes she was convicted for, and the prison system's response. Reverend Fred John Nile – a longstanding social conservative elected to the New South Wales upper house – raised the matter in Parliament in April 1998, asking whether it was true that Pearce had been 'allowed day release to go shopping for dresses.' He asked: 'Was the alleged sex-change surgery and subsequent hormone therapy for this prisoner approved by the Government and paid for by the taxpayers of New South Wales?' In his question, Nile described Pearce's

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[575] "Prisoner sex change outrage," *Daily Mirror* (Sydney), 22 September 1989, John Hewson Collection, AQUA.
[576] Justin Coober, "Jail sex changes prompt review," *Sun News Pictorial* (Melbourne), 21 September 1989, John Hewson Collection, AQUA.
[577] "Scandal of the Long Bay 'Girls'," *Daily Telegraph* (Sydney), 21 September 1989, John Hewson Collection, AQUA.
[578] "Killer may lose his bid for sex change."
[579] "Jails 'not the place' for sex changes," *The Canberra Times* (ACT), 20 September 1989.
[580] "Jails 'not the place' for sex changes."

convictions, emphasising the young age of the victims, the brutality of the death, and sadistic nature of the acts.[581] The response from the Corrective Services Minister, Labor politician Bob Debus, in May 1998 clearly noted that although Pearce had been allowed to commence hormone treatment while in a New South Wales prison, this was no longer permitted within the system under the revised protocols, and that there were submissions in process to refuse Pearce's application for parole.[582]

What is important to discuss regarding the debates around Pearce's transition in prison is that she, specifically, was at the centre of these discourses. As noted in the press, Pearce was not the only prisoner seeking gender affirmation within the New South Wales prison system. However, she became the 'face' of the issue, on account of the particularly shocking nature of her case. Pearce could, in many respects, be represented as this archetypical 'transgender killer.' She was gender variant, her case involved sexual assault and violence against children, and many of the details lined up neatly with the worst ideas of what a transgender killer was capable of – right down to allegations of Satanic worship.[583] It was shocking to people that the prison system would allow someone who had been convicted for these acts to undergo transition while in custody, and could be easily framed within those cultural narratives which expressed the most extreme ideas of what gender variance could lead to, if left unchecked. However, it is important to note the relative lack of attention paid to most transgender prisoners who were seeking treatment alongside Pearce. Their stories were significantly less shocking or narratively convenient, and therefore, they were cast as background numbers to Pearce's story – which itself directly led to the review of treatment for transgender prisoners in 1989 and the subsequent tightening of procedures for trans prisoners to receive treatments.[584]

Another angle on the debate claimed that gender transitions could be beneficial for prisoners who had been charged with sex crimes, as they may be safely released back into the

[581] New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 April 1998.
[582] New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 May 1998.
[583] "Uproar at no-cost jail sex change for 'devil worship' murderer," *The Herald* (Sydney), 19 September 1989, John Hewson Collection, AQUA.
[584] "Jails 'not the place' for sex changes," *The Canberra Times* (ACT), 20 September 1989.

community, which would be cheaper on the taxpayer in the long run.[585] The use of hormonal treatment to target and reduce sex crimes was not a new idea in Australia. From its proponents, the aim of castration (chemical and otherwise) is to reduce testosterone to a level that will 'suppress sexually deviant thinking and behaviour.'[586] In 1992 Brian Ashworth sued the Victorian Government because he was administered female hormones while in custody at Turana Youth Training Centre in 1968 to reduce his sex drive.[587] Such approaches were still being considered into the 1990s, and – at least in New South Wales – as recently as 2017.[588] The Cooma Correctional Centre (previously the Cooma Gaol – no longer operating as a 'homosexual prison') at the time of writing still offers antiandrogenic medication to certain sex offenders on an informed consent model, as a sex drive management strategy.[589] Corrections Minister Mal Sandon argued in 1990 that while 'the best results come from surgical castration[,] obviously that operation is not available, but drug treatments which reduce the sex drive are.'[590] In the Northern Territory in 1992, the Labor Opposition called for chemical castration via Depo-Provera or similar hormonal treatments for repeat sex offenders, stating that 'sometimes jails are not sufficient deterrent.'[591] What is significant about drawing in these discourses around chemical castration is that, at least in the instances where these practices were condoned, they were framed as possible solutions to future sex offences. For example, in 1989 Clive Begg, Queensland Prisoner and Family Support Association Director, claimed that hormone treatment and 'sex-change operations' would be more cost-efficient than long prison terms.[592] This implied that trans women in prison were a danger based on their sexual characteristics and were predisposed towards sex crimes.

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[585] "Sex change for convicts urged," *Courtier Mail* (Brisbane), 22 September 1989, John Hewson Collection, AQUA.
[586] Thomas Douglas et al., "Coercion, Incarceration, and Chemical Castration: An Argument from Autonomy," *Journal of Bioethical Inquiry* 10, no. 3 (2013): 393.
[587] "Prisoner can sue for drug-induced breasts," *The Canberra Times* (ACT), 11 May 1992.
[588] "NSW flags chemical castration of child sex offenders," *SBS News*, 9th May 2017 https://www.sbs.com.au/news/nsw-flags-chemical-castration-of-child-sex-offenders (accessed 3 November 2022).
[589] Freda Briggs, *From Victim to Offender: How Child Sexual Abuse Victims Become Offenders* (New York: Routledge, 2020).
[590] "Chemical castration mooted for sex offenders," *The Canberra Times* (ACT), 27 April 1990.
[591] "Chemical castration needed for some offenders," *The Canberra Times* (ACT), 2 October 1992.
[592] "Sex change for convicts urged," *Courtier Mail* (Brisbane), 22 September 1989, John Hewson Collection, AQUA.

There was a tension between feminising hormonal treatment being advocated as a tool for combating sex crime while being opposed to on the basis that it might encourage deviance in trans women.

For some prisoners, access to gender affirmation surgery was an imperative to make their experience in prison tolerable.[593] Access to mental health services, such as psychologists, could be sporadic. While prisoners reported that the psychologists were supportive, they had a large workload and were unable to work with individuals as much as necessary, making assessments for gender related services challenging.[594] Opposition to transgender medical treatment in prison condemned the deviance of their prior convictions (especially if those convictions were related to rape or paedophilia) and cautioned against allowing trans and gender diverse prisoners to transition for fear of rewarding or encouraging them. That the support for transition in prison could also call upon the same narratives – that trans people were innately deviant, perverse, or dangerous – speaks to how ingrained these frameworks were for understanding gender diversity and how little room there was for consideration of these issues outside of that narrative. In the decades to come state corrections departments would gradually introduce transition policies to prisons, prompting these debates to reoccur as each new change was implemented.

Conclusion

The defining characteristic of the 1980s for transgender people and the prison system was the interaction between advocacy movements and legislative changes for transgender rights and the broader ways that transgender people were characterised and represented, as deviant and sexually dangerous. I say, 'transgender people,' but realistically these narratives and the discussions around them pertained almost exclusively to trans women, who bore the brunt of these discourses and debates. Trans women were relatively visible by the 1980s, when most of these discourses were taking place, and were increasingly advocating for their rights and for recognition of their gender. Trans activists vocally promoted the necessity of addressing

[593] "Letter from Jean, a transsexual at Long Bay Gaol."
[594] "37th Australian Transsexual Association (ATA) program."

the issues facing trans women in male prisons, such as sexual assault and rape, violence, and refusal of their identity.

In some instances, state prison systems took steps to address these issues. However, such actions were inconsistent and contentious. South Australia, for example, by the late 1980s, began to house trans women who had had gender affirmation surgery in female prisons. The Long Bay Gaol in New South Wales made at least some efforts to consult with trans prisoners and provide accommodations for them, through discussion groups and panels. However, such efforts clearly demonstrated the kinds of political pushback these steps could have, if it were politically convenient for those who opposed them.

What is most significant about the political response to the Long Bay scandals particularly was how transgender women in prison were drawn into the conversation that was not, fundamentally, about them, but rather about prison administration and brutality. They were convenient props to demonstrate the excess and mismanagement of the prison system, an ominous figure that could be drawn upon and characterised in such a way as to paint individuals or systems seen to be 'encouraging' them, in a negative light. The common representation of the transgender prisoner was, at her core, someone who was sexually deviant and dangerous: a child molester, pervert, sex offender. Her gender expression was part of that archetype, a paraphilia or fetish that went hand in hand with the sexual danger she posed to society at large. If then, prisons were to accommodate her by providing her with clothes, access to women's prisons where she might prey on cisgender women, or even hormones and taxpayer funded surgery – did this make the prisons themselves party to her deviant activities? These debates were characterised by a push and pull between the advocacy trans women were engaging in to promote and protect their rights, and the pathologising, criminal image of them constructed by society and the media.

CHAPTER 5

TRANS SEX WORK

Transgender sex workers from the 1970s-90s faced challenges distinct from their cisgender peers – both male and female. In Roberta Perkins' words, trans sex workers were 'enigmatic, not because of the participants' cross-gender identification, but because it [was] difficult to place in relation to other forms of prostitution.'[595] Often, transgender women sex workers operated in the same spaces as cisgender women sex workers – sometimes blended in with them, and sometimes as a connected but distinct group. Some worked in gay male brothels. Some were sought out by clients because they were transgender, whereas some 'passed' to clients as cisgender women. There were also geographical and cultural differences between cities and regions around Australia. Trans sex workers occupied a fluid and elastic space and existed at the intersections of a range of vulnerabilities which left them especially stigmatised and disproportionately policed. The law often treated trans sex workers as homosexual men, and so they could be charged under provisions against sex work, homosexual acts, or offensive public behaviour, as well as a range of other charges.

Despite – or likely, because of – the significant legal challenges facing trans sex workers, throughout the 1970s and '80s they formed distinct subcultures in cities around Australia. This chapter focuses especially on Sydney's history which, largely due to the work of people like Roberta Perkins – herself a trans woman and sex work rights activist – has been much better documented than any other Australian city. Sydney was also the first state in Australia partially to decriminalise sex work by repealing the *Summary Offences Act* in 1979. This was a significant change: for many sex workers it meant greater freedom to conduct their business. However, these freedoms largely did not extend to transgender sex workers who were, in many cases, instead subjected to increased police attention as they became more visible and easier to target and prosecute than their cisgender peers.

[595] Roberta Perkins, *Sex Work and Sex Workers in Australia* (Kensington: UNSW Press, 1994).

In this chapter, I examine the ways that this community operated and interacted with police and the criminal legal institutions of New South Wales, as well as the ways that the law targeted and charged trans sex workers disproportionately, the reasons for the specific attention to them, and how the laws changed across the decades. Additionally, this chapter examines how the laws were different across the states in Australia, and what this meant for trans sex workers working outside of New South Wales, and, finally, what changed moving into the 1990s and beyond. This was a period of significant upheaval for how sex work – especially in New South Wales – was policed and legislated. While these changes were improvements for many sex workers, trans sex workers, who were doubly marginalised based on both their gender identity and their profession, found themselves more visible and vulnerable as they moved on the margins of the law.

KINGS CROSS AND DARLINGHURST

Much of the discourse around trans sex work (and sex work more generally) from the 1970s-90s focused on the Kings Cross, Darlinghurst, and Woolloomooloo areas of Sydney.[596] The nightlife in these areas was active. As Perkins described Kings Cross in 1983: 'The streetwalkers are now quadrupled, strip clubs have packed houses, and the sex shops have people filing in and out, some in a buying mood, others simply curious. The whole area is as bright as day, with well-lit streetlamps, shop window lighting and neon signs. The visitors soak up the sights, and if they are lucky they will spot a 'drag queen' rushing by to do a show.'[597] The nightlife of Kings Cross could be very attractive for transgender people, as the space catered to people who did not fit into society's expectations. Chantell Martin, a trans woman who worked as a sex worker in Kings Cross in the mid-late 1980s, described moving to the area as follows:

[596] The area known colloquially as 'Tranny Lane' encompassed many blocks around Kings Cross/Darlinghurst/Woolloomooloo – however, for the purposes of this chapter I will primarily be referring to Kings Cross/Darlinghurst as much of the discourse on trans sex work in these areas focused on these suburbs. It is important to remember that, while the centre of these discourses, trans sex work did not solely take place in these areas—however, they are the best recorded and most well-known. Refer to: Phlan-Michelle Purss (Walking Tour), interview by Noah Riseman, recorded in Sydney, 15 April 2021. Shared with permission.

[597] Perkins, *The 'Drag Queen' Scene: Transsexuals in Kings Cross*, 16-17.

> I started to see different people in Kings Cross. Like, oh my God, you name it, everything under the sun was there. Gay, lesbian, whoever you wanted to be. The Cross was a place that you could put your knickers on your bloody head and walk through the Cross with your knickers on your head, no one would look at you differently … I guess in some way that made it a lot more comfortable for me to come out at that time.[598]

Perkins said that sex work was an important feature of the Sydney transgender community, with 'a number of transgender-specific brothels and parlours in the inner city, while in the suburbs, a number of women who have undergone surgery work in female brothels.'[599] Roberta Perkins' research and writings provide highly valuable perspectives on the lives of sex workers in Kings Cross and Darlinghurst – both transgender and cisgender – because, as she herself noted, if it were not for her own publications on the sex workers' side of the story, any historian looking back at the 'war' on sex work in the 1980s in Darlinghurst would have a very skewed perception of the period. The typical documents used by historians, such as police records and media reports, slanted heavily against sex work, and on the few occasions the media reported sex workers' voices, they were presented within the dominant narrative around sex work as criminal behaviour. Due to Perkins' work, there are detailed accounts of this period and these regions which present the sex workers' side of the narrative. However, the amount of detail Perkins recorded for these areas of Sydney also serves to highlight just how little material has been recorded from sex workers in other areas around Australia. Perkins warned against the 'distorted history of the future' which will undoubtedly be created if historians rely only on biased (and sometimes wholly untrue) media reporting.[600]

Roberta Perkins' analysis of the trans community in Kings Cross and Darlinghurst reported the girls in the area as being 'divisible into four subgroups: the showgirls, the strippers, the prostitutes and the girls who pick up men in bars.'[601] These groups had significant overlap,

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[598] Chantell Martin, interview by Noah Riseman, recorded on Zoom, 12 September 2021. Shared with permission.
[599] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 12.
[600] *Talking Deviance History: Sydney Sex Workers of the Past* (Oral History Australia, 1993), 61.
[601] Richard Ekins and David King, *Blending Genders: Social Aspects of Cross-Dressing and Sex Changing* (London: Routledge, 1995), 53.

with members sometimes crossing over or belonging to several or all four communities. Still, each group had distinct spaces and activities in which they operated. The requirements that Perkins described to be 'one of the girls' included being 'reasonably "passable" as a girl', heterosexual, fashionable, and willing to spend leisure time with the other girls. Although social ties were integral to group membership, often the relationships themselves could be fleeting; Perkins stated that the sex workers were less likely, particularly, to develop close ties with one another.[602] This urban group was also distinct, Perkins noted, from suburban transgender women, who were more likely to be working in female oriented professions (clerks, hairdressers, etc.) and who were significantly less likely to be involved in sex work. Additionally, some gay male brothels also operated as 'trannie parlours,' which was another avenue via which transgender women might find work.[603]

There was a tension between the acceptance of gender nonconformity (as well as other types of social nonconformity) in Kings Cross, and an undercurrent of exploitation, where those who were nonconforming were ultimately cornered into low-paying, socially shunned types of work to survive. Transgender women could be forced to accept lower wages than other workers because narrow employment options and discrimination made it unlikely they would find work elsewhere.[604] Transgender people were and are especially vulnerable to homelessness, meaning their employment and housing situations were particularly precarious.[605] Transgender women especially face challenges when it comes to retaining stable housing and safety, particularly when they have other intersecting lines of marginalisation (e.g., if they come from working class, migrant, Pasifika, or Aboriginal and Torres Strait Islander backgrounds).[606]

Transgender people as a group faced a significant reduction in employment pre- and post-coming out. Perkins' research on transgender lifestyles and HIV/AIDS risk factors found a

[602] Ibid., 54.
[603] Ibid, 187
[604] Ekins and King, *Blending Genders: Social Aspects of Cross-Dressing and Sex Changing*, 60-61.
[605] Ada S Cheung et al., "Sociodemographic and Clinical Characteristics of Transgender Adults in Australia," *Transgender Health* 3, no. 1 (2018): 299.
[606] Raewyn Connell, "Transsexual Women and Feminist Thought: Toward New Understanding and New Politics," *Signs: Journal of Women in Culture and Society* 37, no. 4 (2012): 874.

decline of between a quarter and half of participants experiencing a loss of employment following transition. The only line of employment where this was not the case was sex work, which meant that transgender women facing unemployment elsewhere could be pushed into sex work for a lack of viable alternatives.[607] Some of the reasons transgender people might become involved in sex work included economic survival, social and legal discrimination, and the transgender specific social networks they may be able to access.[608] In 1994, two former trans sex workers wrote of their experiences working in the Kings Cross and Darlinghurst scenes during the 1980s, and both cited the need for financial security as their reason for getting into sex work.[609] As Perkins stated: 'Reliance on sex work is, for many transgenders, a fact of life and one that is unlikely to change without a concerted effort to reintegrate transgenders into mainstream society.'[610]

About half of the transgender women Perkins surveyed remained working in the sex industry for at least five years, while there was also a continuous rate of new transgender women entering the industry. This suggests that while there was a high turnover, there was also a significant portion of trans women who stayed in the industry long term. However, for those who found employment in sex work, there were still financial challenges. Some sex workers could aim for self-employment; however, this would often mean continuous harassment from police, fines, and potentially time in prison. Working in a bar or brothel could provide some protection from these elements but could lead to exploitation with little room for recourse or advocacy.[611] As Perkins said: 'At her slightest whimper of complaint, she [the sex worker] is met by a barrage of voices: "Well, she's only a drag queen" and in this context the term means "non-person".'[612]

Other challenges included possible exposure to STIs and HIV (from the 1980s onwards), abuse from clients or the public, exposure to high-risk drugs, and mental health and self-esteem issues. Perkins found that among transgender people, sex workers were significantly

[607] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 25.
[608] Ibid., 40.
[609] Michelle and Georgina, "Good Girls do it Too", *Polare* 5 (November 1994).
[610] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 42.
[611] Ibid., 35.
[612] Perkins, *The 'Drag Queen' Scene: Transsexuals in Kings Cross*, 27-28.

more likely to have had an experience of sexual assault than non-sex workers, and street workers were more likely to have experienced sexual assault than non-street workers.[613] Despite the opportunities which were available in Kings Cross, transgender sex workers were particularly vulnerable still to exploitation due to job insecurity and social stigma. Perkins described the Kings Cross nightlife area as being a 'site of virtually systematic abuse and violence against women workers, which the police seem either unable or unwilling to prevent. Police intervention instead focuses on enforcing often draconian prostitution laws.'[614]

The culture within Kings Cross had also changed over time: one Les Girls showgirl described Kings Cross as becoming very different following the Vietnam War and the influx of Americans to the area, so by the 1980s it was significantly more expensive than it had been prior:

> While prices have stayed up, the quality of service generally has gone down, whereas once it was first class. You had good shows, the mums and dads from the suburbs could afford it, even the strip clubs were properly choreographed. Once you had Whiskey a Go-Go, the Silver Spade, and many clubs, now Les Girls is the only legitimate club left. The Cross has deteriorated – there are drugs now that weren't around, but I think the drugs are a by-product. When you lower the standard, you lower the people who come into it. It's not drugs or prostitution that have changed the Cross, it's the people who made their money and lowered the standard.[615]

Anecdotal discussions from trans sex workers in Kings Cross often spoke about the Les Girls club, and, while not a sex work venue, it was a central feature of the Kings Cross scene for many years. In 1962, Sammy Lee opened Les Girls and marketed it as the first professional drag show club in Australia.[616] Les Girls was an 'all male revue,' but many of the performers

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[613] *Transgender Lifestyles and HIV/AIDS Risk*, 35,39.
[614] Ibid., 12.
[615] Perkins, *The 'Drag Queen' Scene: Transsexuals in Kings Cross*, 45.
[616] Garry Wotherspoon, "From Sub-Culture to Mainstream Culture: Some Impacts of Homosexual and Gay Sub-Cultures in Australia," *Journal of Australian Studies* 15, no. 28 (1991): 58-9.

were transgender women.[617] The venue was positioned in the commercial end of Darlinghurst Road, among the 'strip clubs, sex shops and street girls' which Perkins called the 'most conspicuous elements' of the Kings Cross area.[618] Perkins described Les Girls in her work: 'The show includes individual acts and large-scale production numbers, ranging from bawdy comedy, to serious impersonations, to a grand finale. It is the traditional "girlie" kind of show with an extravaganza of colour, glitter, feathers and tits. … Of all the drag shows, Les Girls is the most famous both at home and abroad and is a major drawcard in Sydney's tourist industry.'[619] Perkins said that Les Girls 'represents one kind of drag show that caters to a "straight" audience', with its table service, cocktail bar, restaurant, and professional operation.[620] Garry Wotherspoon described the culture that developed around Les Girls as one which, after a few years of the club operating, came 'to be seen as a heterosexual territory … where [among others] groups of young heterosexual men cram in to whistle and blow kisses at essentially other young men (who happen to be wearing frocks).' [621] He stated:

> Thus while wearing drag – something that is still clearly associated in the popular perception with homosexuality – is now in full/public display on the stage at Les Girls, this does not necessarily represent any changed attitudes on the part of those who flock to the shows. Indeed, the shows are seen as entertainment (albeit now a very popular entertainment) and their participants are still regarded as freaks, as people outside the mainstream. But this case does illustrate how an aspect of sub-cultural life – the drag show – has come to be co-opted into popular mainstream culture, and clearly on the mainstream culture's terms.[622]

Perkins described Les Girls as a 'perennial part of the scene' and there was notable crossover between trans women who performed in Les Girls and trans sex workers.[623] According to

[617] Rosslyn Prosser, "Vonni Diva: Showgirl," in *Drag Histories, Herstories and Hairstories: Drag in a Changing Scene Volume 2*, ed. Mark Edward and Stephen Farrie (London: Methuen drama, 2021), 99.
[618] Perkins, *The 'Drag Queen' Scene: Transsexuals in Kings Cross*, 28.
[619] Ibid., 35.
[620] Ibid., 33-34.
[621] Wotherspoon, "From Sub-Culture to Mainstream Culture: Some Impacts of Homosexual and Gay Sub-Cultures in Australia," 59.
[622] Ibid.
[623] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 13.

Karen, one of the women Perkins interviewed for *the 'Drag Queen' Scene,* police blitzes reduced with the opening of Les Girls: 'Even the police used to bring people in to watch Electra strip.'[624]

In 1976, Barry Kay published a collection of photograph portraits of transgender women from around Sydney. Kay believed there was an 'increasing acceptance' of transsexualism in Sydney in the 1970s. He claimed that the 'glamour' of transsexuality was encouraging young people to experiment with hormones which they could acquire over the counter at pharmacies, so that they could emulate the entertainers in Sydney revues and strip clubs.[625] He attributed this to the popularity of all-male revues – such as Les Girls – and transgender strip club performers, which had both, in his estimation, overtaken cisgender female performances in popularity with men. 'It is a curious comment,' he stated, 'on the country's social mores that its audiences will respond not to the original but to the synthetic copy.'[626] While Kay's ideas as to why people were transitioning and were active in these spaces were speculative at best, his musings do point to the growing visibility of trans women in Sydney and to the increasing popularity of all-male revues and similar performances. This 'glamour' that he referred to demonstrates the growing mainstream popularity of these revues and the increasing diversity and visibility of trans expression within the city.

Despite the relative levels of visibility and community found in the Kings Cross and Darlinghurst areas, many transgender sex workers (within and outside those areas) reported frequent attention and harassment from the public. Chrissie, one transgender women, said 'we get families coming up having a good gawk and it's sort of like a sideshow alley sometimes, you get all sorts of people.'[627] The flipside of the relative acceptance of alternative lifestyles found in the Kings Cross area was an increased visibility and, in some cases, gawking from those passing through – whether it meant cisgender women being mistaken as being transgender, or transgender women being identified as such and potentially humiliated: 'If in fact the victim is a transsexual, she shudders when the words 'drag queen'

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[624] *The 'Drag Queen' Scene: Transsexuals in Kings Cross*, 39-40.
[625] Barry Kay, *The Other Women* (London: Mathews Miller Dunbar Ltd, 1976), 5.
[626] Ibid.
[627] "2nd Australian Transsexual Association (ATA) program."

are yelled at her, for, in being 'sprung' in her efforts to appear to be a normal everyday girl, her very image of herself is shattered. An insensitive remark or deed, forgotten in a moment by the passer-by, may leave the victim deeply upset for days, affected for a lifetime.'[628] One transgender woman spoke of her experiences with harassment on the *Gaywaves* radio show in 1983, stating: 'in those days it, as I said, when the girls did start going to, like, Les Girls and places like that, that you could not walk on the street. The girls were being hassled so much that they could only get driven to a place, and then race straight upstairs and work and come out, and get in the car. There isn't what the kids have got today, which is being able to say, "Well, I am transsexual."'[629]

Trans sex workers were particularly vulnerable to abuse from their clients: according to Roberta Perkins (as per her 1994 study) 45% self-reported as victims of assault and 34% reported being raped.[630] While these statistics are from the 1990s, these risks were prevalent in the preceding decades. Phlan-Michelle Purss, a transgender former sex worker, recounted her experiences: 'I've had knives pulled on me. I've been robbed. I've been bashed. I've been raped. I've had my nose broken. I got stabbed in the right kidney. Stabbed here. Baseball batted shoulder. That was broken. That was broken.'[631] Some clients were potentially more likely to seek out transgender sex workers specifically because they had fewer avenues to report or fight back against abuse. Perkins stated: 'These clients do not appear to regard trannies like other female workers, nor is there the fairly "civilised" and mutually accepting interaction found in male prostitution; sometimes trannies are even treated as "freaks".' [632] Sometimes clients would specifically seek out and target transgender sex workers to assault.[633] Sex workers had ways of communicating to one another which clients to avoid – by the 1990s this was somewhat codified in the 'Ugly Mugs' list, which was updated and distributed frequently amongst the community to warn against particular clients.[634] The list

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[628] Perkins, *The 'Drag Queen' Scene: Transsexuals in Kings Cross*, ix.
[629] "9th Australian Transsexual Association (ATA) program," *Gaywaves*, 10 November 1983, AQUA.
[630] Perkins, *Sex Work and Sex Workers in Australia*, 178-9.
[631] Phlan-Michelle Purss, interview by Noah Risema, recorded in Sydney, 11 May 2021. Shared with permission.
[632] Perkins, *Sex Work and Sex Workers in Australia*, 186.
[633] Phlan-Michelle Purss, interview.
[634] Norrie, interview by Noah Riseman, recorded in Sydney, 10 September 2019. Shared with permission.

would record car license plates of dangerous clients and would be distributed amongst sex workers as a way to protect future workers from going with that client.[635] The stigma that trans sex workers lived with impacted their lives off the clock as well. Some doctors in Sydney would not approve gender affirmation surgeries for transgender patients who had worked in the sex industry, who had been previously imprisoned, or who had a history of drug use. Such doctors claimed that those trans people were incapable of making decisions which would impact their future so significantly.[636]

In spite (or because) of the significant legal, social, and economic challenges transgender sex workers experienced in New South Wales, the subculture and community within Sydney flourished throughout the period. The Kings Cross and Darlinghurst scene was particularly notorious and well established, and today remains the best recorded (and, due to the legal changes around sex work, most changed) of all cities in Australia.

SEX WORK LAW IN NEW SOUTH WALES

Roberta Perkins described Sydney as the 'Transgender "capital" of Australia.' In 1994 she believed as many as half of Australia's transgender population lived and worked in Sydney.[637] She attributed this to transgender people from around the country gravitating there, having been alienated within their own regions, due to the relative anonymity and acceptance in the busy city known for its relative freedom of sexual expression and diversity. She also noted that Sydney's 'large entertainment and sex industries' played a factor in creating this environment.[638] Studies undertaken in Sydney health clinics in the 1980s and 1990s found that transgender people were disproportionately likely to be involved in sex work.[639] Of the 146 transgender people who responded to Roberta Perkins' study in 1994,

[635] Phlan-Michelle Purss, interview.
[636] "Transsexuality: A Treadmill from Which Jail is an Escape," *The Age* (Canberra), 9 September 1985, John Hewson Collection, AQUA.
[637] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 19.
[638] Ibid., 11.
[639] A study on the health needs of transgender attendees of a Sydney clinic between 1990 and 2006 found that close to half (43%) of the patients had a history of sex work. A previous study, published in 1990, also looking at transgender patients at a Sydney HIV/HCV screening clinic, found that 83% of those included in the sample had a history of sex work. Due to the demographic sampled in that study it is likely that the sample is somewhat biased, however, these two (small) studies both suggest a fairly high proportion of the transgender community being involved in sex work. D Alan, J Gold, and J Guinan, "Transsexuality and HIV

45% had at some point been employed in sex work. As stated by Perkins: 'This level of participation and sex work is probably unparalleled among minority groups, sexual or otherwise.'[640] According to Norrie, who worked as a support worker with the Gender Centre and the Sex Workers Outreach Project in Sydney in the 1990s, sex work at the time 'seemed to be a typical part of the transsexual experience' – at least in the inner city of Sydney.[641]

In New South Wales, the 1970s and '80s saw significant changes to the state legislation around sex work. Trans sex workers faced an additional element of stigma under the law, which in most states generally treated them as homosexual males and charged them under state laws against male homosexual acts. Rates of arrests for trans sex workers had spiked dramatically.[642] The other charges which were used to prosecute them included 'procuring indecent acts' and 'soliciting or inciting offensive acts' – both charges which built the presumed (male) sex of the offender into the letter of the law. Other possible charges included: soliciting in a residential area, serious alarming, affronting people, and obstructing traffic.[643]

Throughout most of the 1970s the *Summary Offences Act* (1970) was in place, which criminalised sex work (for all genders) in several forms, including soliciting in public spaces. This Act was a continuation of the laws which had existed throughout the twentieth century up to this point, built from the preceding *Vagrancy Act* (1902) and *Police Offences Act* (1901). The *Summary Offences Act* also outlawed some forms of sex work adjacent activity, such as running premises which were known to be frequented by 'reputed prostitutes,' as well as 'habitually consorting' with sex workers or living off the earnings of someone who engaged in sex work.[644] Additionally, the Act had sections which outlawed vagrancy, which

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Antibody Seroprevalence: A Study of Risk Factors within a Transsexual Population," *Venereology* 3 (1990): 100-2.; Victoria L Hounsfield et al., "Transgender People Attending a Sydney Sexual Health Service over a 16-Year Period," *Sexual Health* 4, no. 3 (2007): 189.

[640] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 34.

[641] Norrie, interview.

[642] "Male Sex Offences in Public Places," in *Proceedings of the Institute of Criminology*, ed. Gordon Hawkins (Sydney: The University of Sydney, 1970), 16,21.

[643] "9th Australian Transsexual Association (ATA) program."

[644] *Summary Offences Act No. 96 1970* (NSW), http://www.austlii.edu.au/au/legis/nsw/num_act/soa1970n96216.pdf (accessed 11 November 2022).

(as addressed in previous chapters) police often used – along with other laws around public conduct – as a flexible tool to target a range of behaviours and perceived offences, including sex work, especially against minority groups.

In May 1979, the New South Wales Parliament repealed the *Summary Offences Ac*t. This effectively decriminalised many forms of sex work in New South Wales – although it was still illegal under the *Police Offences Act* for males to solicit other males.[645] The repeal of the Act was a significant break from Australian legislative practice and, as stated by Raelene Frances and Alicia Gray in 2007, 'New South Wales remains the only Australian jurisdiction to allow at least some forms of legal soliciting in public places.'[646] This was not a full decriminalisation: laws remained against living off the earnings of sex work, engaging in sex work in certain locations, and so forth. Street-based sex work was, however, by and large decriminalised following the repeal.[647]

There were several factors which led to the repeal of the *Summary Offences Act*. Harcourt et al argue that sex work law reform in the latter quarter of the twentieth century was responding to 'widespread police corruption, the adverse impacts of street prostitution in regenerating inner-city localities, and community concern with the discriminatory impact of the law on sex workers.'[648] Sex workers were also advocating for their own rights: the New South Wales Prostitutes Law Repeal Association published a newsletter titled 'Quills and Quims' about their dissatisfaction with the state of the law in early 1978.[649] As stated by Barbara Sullivan, 'Prostitution was starting to be conceptualised in terms of a private sexual activity between

[645] *Police Offences (Amendment) Act No. 12 1908* (NSW), http://classic.austlii.edu.au/au/legis/nsw/num_act/poa1908n12247/ (accessed 11 November 2022).
[646] Raelene Frances and Alicia Gray, "'Unsatisfactory, Discriminatory, Unjust and Inviting Corruption' Feminists and the Decriminalisation of Street Prostitution in New South Wales," *Australian Feminist Studies* 22, no. 53 (2007): 308. At the time of writing, Victoria has announced that it will move to decriminalise sex work from 2022, making it the second jurisdiction to do so, following New South Wales.
[647] Roberta Perkins et al., *Sex Work and Sex Workers in Australia* (Sydney: University of New South Wales Press Ltd, 1994), 78.
[648] Christine Harcourt, Sandra Egger, and Basil Donovan, "Sex Work and the Law," *Sexual Health* 2, no. 3 (2005): 121.
[649] Frances and Gray, "'Unsatisfactory, Discriminatory, Unjust and Inviting Corruption' Feminists and the Decriminalisation of Street Prostitution in New South Wales," 307.

consenting adults.'[650] Australia in the 1970s underwent a cultural shift towards shedding light on topics and lifestyles which previously were kept private. This was particularly evident in the women's liberation and gay rights movements, with the maxim of 'the personal is political' creating 'a destabilising and strange political formulation' which 'created ruptures' in the established political and social fabric of the nation.[651]

Jack Hallam (ALP), then-Minister Assisting the Premier, advocated for the repeal of the Act in Parliament in April 1979. He argued that the Act was 'the culmination' of the law-and-order campaign of the prior Askin Liberal Government. Hallam's position was that many of the offences in the Act (such as vagrancy, drunkenness, and begging) were social problems and should not be regarded as crimes: 'Certain other offences are unsuitable because of the dragnet terms in which they are cast, such as offensive behaviour and unseemly words.' This was part of a broader push to examine parts of the law which targeted crimes which were seen as social 'failings.' In February 1977 the New South Wales Government conducted a three-day long seminar on victimless crimes, such as inebriation, vagrancy, and sex work.[652] The seminar attracted significant attendance of hundreds of people from across the community and was followed with interest by the newspapers at the time.[653] As stated by Hallam: 'If the crime of vagrancy is analysed, it means no more than calling someone a criminal because he or she is poor.'[654] Following the Victimless Crime seminar, the Wran government's Women's Advisory Council (est. 1976) unanimously endorsed a 1978 Position Paper calling for the repeal of 'discriminatory and hypocritical' clauses in the *Summary Offences Act*. This position paper also highlighted that, by collecting fines from sex workers

[650] Barbara Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia since 1945* (New York: Cambridge University Press, 1997), 181.
[651] Michelle Arrow, *The Seventies: The Personal, the Political, and the Making of Modern Australia* (Sydney: NewSouth Publishing, 2019), 47.
[652] New South Wales, *Parliamentary Debates*, Legislative Council, 23rd April 1979, 4827.
[653] Frances and Gray, "'Unsatisfactory, Discriminatory, Unjust and Inviting Corruption' Feminists and the Decriminalisation of Street Prostitution in New South Wales," 310.
[654] New South Wales, *Parliamentary Debates*, Legislative Council, 23rd April 1979, 4827.

in enforcing the Act, the State itself could be accused of 'living off the proceeds of prostitution.'[655]

The repeal of the Act was also intended to address the injustices within the policing of sex work, such as the fact that they charged the sex worker but not the client, or charges which specifically discriminated against sex workers, such as it being an offence to be a sex worker on premises used for sex work.[656] As Dorothy Isaksen (ALP) argued in the 1979 parliamentary debate, these moves to reduce discrimination against sex workers were not necessarily giving approval to sex work as an industry. Rather, they were focused on laws which were seen to be 'unjust and inviting corruption,' and took the pragmatic view that sex work existed, would continue to exist regardless of legislation, and that voluntarily consensual acts between adults, where they did not infringe upon other people, ought not to be a matter of law.[657]

The changes to the law also drew lines between which spaces could be used for sex work and which could not. While the repeal of the *Summary Offences Act* meant that street-based sex work was decriminalised, the introduction of the *Prostitution Act* 1979 still regulated some forms of sex work. Specifically, it was illegal for sex workers to solicit within massage parlours, saunas, bathhouses, gyms, and similar spaces.[658] This created a legal dichotomy between public, street-based sex work, and semi-private, indoor sex work. This dichotomy was noted at the time for its lack of consistency. Liberal member Max Willis, for instance, called it an 'incredibly inconsistent and illogical approach.'[659]

Opponents of the repeal of the *Summary Offences Act* argued that the decriminalisation of street-based sex work would create a climate of highly visible sex work that would be socially inappropriate. As stated by Liberal MP Timothy Moore:

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[655] Frances and Gray, "'Unsatisfactory, Discriminatory, Unjust and Inviting Corruption' Feminists and the Decriminalisation of Street Prostitution in New South Wales," 317.
[656] New South Wales, *Parliamentary Debates*, Legislative Council, 23rd April 1979, 4830.
[657] Ibid, 4848.
[658] *Prostitution Act No. 71 1979* (NSW), S.6, http://classic.austlii.edu.au/au/legis/nsw/num_act/pa1979n71232/ (accessed 11 November 2022).
[659] New South Wales, *Parliamentary Debates*, Legislative Council, 24th April 1979, 4827, 4990.

> In the next month or so honourable members will be attending in Darlinghurst celebrations for Israel's national day, at what one might describe as the commercial heart of prostitution activities in East Sydney. Those celebrations will take place in a street where women, and transsexuals, of the night, day or almost any time at all, will run out between parked cars, throw themselves on the bonnets of vehicles driven by passing motorists and make suggestions as to services and prices for what might be available at that place or in adjacent streets. That is unacceptable public conduct.[660]

Police maintained the public image of the city by undertaking ongoing 'clean-ups' of sex workers off the streets. These clean-ups might occur particularly when dignitaries and the like visited Sydney. As Purss stated: 'Some big hobnob wanted to go up to the Cross, they [the police would] clear as much as they could out, so it doesn't look as disgusting as it does for us.'[661]

Despite the effective decriminalisation of many forms of sex work, transgender sex workers from 1979 onwards were still liable to face charges. Legislators replaced the *Summary Offences Act* with the *Offences in Public Places Act*, the *Intoxicated Persons Act*, the *Prostitution Act*, and other pieces of legislation which could still be used to charge transgender and other sex workers. New South Wales Police reportedly used the *Intoxicated Persons Act* to target minority groups, including 'transexuals, transvestites or gays in the Cross or Taylor Square area … Some of them never having had a drink in their life.'[662] Common charges for trans sex workers included 'being in possession of drugs' and 'obstructing traffic,' the latter of which came under Section 7 of the *Offences in Public Places Act*. This charge was used normally when sex workers would approach the windows of clients' cars.[663]

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[660] New South Wales, *Parliamentary Debates*, Legislative Assembly, 17th March 1983, 4774.
[661] Phlan-Michelle Purss, interview.
[662] "Street Offences," in *Proceedings of the Institute of Criminology* (Sydney, NSW: University of Sydney, 1983), 54-8.
[663] Roberta Perkins, *Being a Prostitute: Prostitute Women and Prostitute Men*, ed. Garry Bennett (Sydney: Allen & Unwin, 1985), 247-8.

However, a major law which was used against transgender sex workers in particular was Section 81 of the *Crimes Act* (1900), which made it illegal for a male person to procure any 'act of indecency with another male person.'[664] As Purss argued, transgender sex workers continued to be targeted for arrest for charges which had otherwise been decriminalised, such as sex work and sodomy: they were decriminalised 'for gay people, yes. For hookers, yes. We're transgender people. We were still being charged at that time.'[665] Because transgender women were not seen as female under the law, the *Crimes Act* could be used to prosecute them for engaging in the same acts as were decriminalised for their cisgender peers.[666]

In the eyes of the law, transgender women and gay men were typically treated as one group throughout the period, at least until some transgender women began to push for their legal recognition (the Harris and McGuiness case throughout the 1980s is an example of this, explored in more detail in Chapter 4). The conflation of these two groups defined how the law framed and policed them. In 1970, researchers at the University of Sydney produced a report on Male Sex Offences in Public Places. This report was in response to concerns police officers and magistrates raised in prior years about the number of men being brought in on charges of offensive behaviour, indecency, and wilful and obscene exposure. Many of those arrested were referred to the Institute of Criminology at the University of Sydney to understand the reasons for their offences and to investigate possible solutions. As the Institute gathered more information about the policing practices, their focus shifted away from analysing the reasons why people offended and instead towards how these charges were policed and legislated, and how this could skew the sampling of offenders.[667] People charged with offensive behaviour under the 1902 *Vagrancy Act*, according to the report, fell into three main groups: people who masturbated in public, 'peeping Toms,' and finally, 'male prostitutes and transvestites.' This final group was the second largest (after public masturbators) and had spiked in 1970, apparently tripling in numbers of arrests over a six-

[664] *Crimes Act No. 40 1900* (NSW), https://legislation.nsw.gov.au/view/html/inforce/current/act-1900-040 (accessed 11 November 2022).
[665] Phlan-Michelle Purss, interview.
[666] New South Wales, *Parliamentary Debates*, Legislative Council, 18th February 1982, 2134.
[667] "Male Sex Offences in Public Places," 1.

month period.[668] 'All but a few' of the male sex workers were wearing feminine clothing at the time of arrest, and only one person arrested in the period under review for offensive behaviour while wearing female clothing was not engaged in sex work. (This person 'was arrested for dancing in the street at Kings Cross dressed in female attire and kicking up his skirt to show his panties; he explained to the arresting officer that he was celebrating his 21st birthday.')[669]

Almost all arrests related to street-based sex work were in the Kings Cross and Darlinghurst areas. The offenders – according to the speaker – were also relatively young, mostly in their late teens or early twenties.[670] However, in contrast to this, Perkins described the demographic of transgender sex workers as tending slightly older. She stated that they were 'considerably older' than their cisgender peers and were usually aged over 30 years old. [671] It is hard to speculate on the exact reasons behind these two conflicting reports. One possibility is that the younger workers were more likely to be arrested (at least in the context of the sample of offenders used by the Sydney Institute of Criminology) because they may have been less likely to have protection within their community. There were spoken and unspoken rules both within the trans sex worker community – in terms of, for example, who could work where – and between sex workers and the police.[672] Having friendly relationships with other sex workers would build trust and improve one's reputation, which meant a safer experience: sex workers would look out for one another against police and dangerous clients.[673] On the other hand, sex workers who were ousted from their communities for breaking rules or upsetting the wrong people were left without protection and with limited areas where they could work, restricted to certain blocks.[674] While not all the younger sex workers who were arrested in the Institute of Criminology's sample were necessarily completely alienated from the community in this way, it may have been that they had not yet established the necessary networks and connections. As one former trans sex worker from

[668] Ibid., 16, 21.
[669] Ibid., 16.
[670] Ibid., 21.
[671] Perkins, *Sex Work and Sex Workers in Australia*, 102.
[672] Phlan-Michelle Purss (Walking Tour), interview.
[673] Phlan-Michelle Purss, interview.
[674] Phlan-Michelle Purss (Walking Tour), interview.

Sydney explained, it could be difficult to break into the scene when you were starting out. Describing her experiences, she said: ‘I was also about to receive an incredibly hostile response from the other girls because of being a new girl on the street.’[675] Older sex workers who were not represented in the sample were possibly those who had the ability to navigate the networks and systems to avoid arrest.

In 1983, the University of Sydney Institute of Criminology undertook another seminar, this time on street offences, which again included trans sex workers. The seminar was prompted by the repeal of the *Summary Offences Act* (1970) and introduction of the *Offences in Public Places Act* (1979).[676] Street offences covered a broad range of crimes, ranging from setting off fireworks, to public inebriation and indecent exposure. However, the focus of the controversy was on the effective decriminalisation of street-based sex work, which had allegedly resulted in an ‘explosion of street prostitution.’[677] According to Roberta Perkins’ study, transgender sex workers were especially reliant on street-based sex work, compared to cisgender women who were sex workers. Where around 10% of cisgender sex workers engaged in street-based work, 70% of transgender sex workers engaged in street-based work (as opposed to other forms of sex work).[678]

New South Wales laws changed again with amendments to the *Prostitution Act* and the *Offences in Public Places Act* in 1983, and the introduction of a new *Summary Offences Act* in 1988.[679] Additionally, in 1984, the *Crimes Act* was amended to remove the provisions which specifically targeted homosexual soliciting.[680] Finally, in 1995, sex work was further decriminalised in the state, although remains subject to government/council regulation, especially regarding the management of brothels.[681]

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[675] Anonymous, ‘Whispers from William Street,’ *Polare* 6 (February 1995).
[676] "Street Offences," 9.
[677] Ibid.
[678] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 34.
[679] Perkins et al., *Sex Work and Sex Workers in Australia*, 79-80.
[680] *Crimes Act 1900 No. 4. 1984* (NSW), https://legacy.legislation.nsw.gov.au/~/pdf/view/act/1900/40/effective1984-06-08/whole (accessed 11 November 2022).
[681] Chris Rissel et al., "Decriminalization of Sex Work Is Not Associated with More Men Paying for Sex: Results from the Second Australian Study of Health and Relationships," *Sexuality Research and Social Policy*

Particularly in the period between the partial decriminalisation of sex work in 1979 and the removal of laws targeting homosexual soliciting in 1984, the changing laws around sex work in New South Wales created a unique system for trans sex workers in Australia. Partial decriminalisation may have meant many sex workers were able to work with more freedom. However, trans sex workers had to grapple with laws which still criminalised them effectively based on their sex and gender identity. As one trans sex worker stated: 'Back then, for me, it was … I could be transgender here where we are now, but I cross George Street in the city, or I went over to the other side of King's Cross or the other side of Surry Hills, I could be arrested for indecent exposure. It was a crime to be transgender back then.'[682] In the right spaces, they might be able to work like their cisgender peers – but they always ran the risk of breaking the law.

POLICING

The first two sections of this chapter have examined the lifestyles and specific demographic challenges of trans sex workers, and the legislative context around trans sex work in Sydney. Beyond the legislative framework, however, there was also the matter of how police and the criminal legal system interacted with trans sex workers on a day-to-day basis. Transgender sex workers tended to experience high levels of police attention, and subsequently, additional time in court, handling fines, and, potentially, prison. However, this period also saw police receiving increased public scrutiny for their interactions with sexual and gender minorities, which set the groundwork for changes in how they interacted with LGBTIQ people over the coming decades.

The policing of trans sex workers was, again, tied up with the policing of gay males for 'homosexual offences.' At the opening address at the 1983 University of Sydney seminar on Male Sex Offences in Public Places, the Chief Justice of New South Wales Supreme Court, Leslie Herron, outlined some of the questions with which the Institute and the criminal legal

14, no. 1 (2017): 86.; *Brothels Legislation Amendment Act 2007 No 29 (NSW)*, https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2007-029 (accessed 20 November 2022). It is important to note that while decriminalisation has been expanded in New South Wales, sex workers (especially independent and migrant sex workers) remain vulnerable to the harmful effects of regulation.

[682] Phlan-Michelle Purss (Walking Tour), interview.

institutions were grappling. Although he emphasised that the subject matter of the conference was 'somewhat deplorable' and that 'there are those of us who regard these matters with very considerable distaste,' he went on to describe the possible approaches to policing homosexual offences and, significantly, the 'unanswered question' of whether policing or incarceration were effective tools to use at all.[683] The possible policing approaches he described were, effectively, to 'do nothing' about male sex offences, even in public; to take a hard line on all public sexual offences; or to increase policing of homosexual men to deter offences further. But none of these possibilities addressed that underlying concern over whether policing could or would change or deter homosexual behaviour.

Police interest in public cruising spaces (beats) increased during the 1970s and '80s.[684] This heightened regulation was partnered, too, with increased methods of entrapment. Police officers would pose as gay men and enter known beat spaces, inciting approaches from men at the site – following which police would reveal themselves and enact arrests.[685] In Victoria, this type of policing and entrapment in fact paved the way for the decriminalisation of sex between men. In early 1977, the press recounted that police had been undercover, observing gay men in the Black Rock beat area, and had been 'teaching themselves to imitate the mannerisms, especially the "particular walk" by which gay men identified each other.' In the span of a few days of this blitz, sixty-eight men were arrested, some allegedly being coerced by police into giving confessions with threats of imprisonment or publicity. Outrage at police tactics led to a flurry of debates and, ultimately, Clyde Holding, leader of the Labor Party in Victoria, called for decriminalisation of homosexuality in that state, which eventually passed in December 1980 under a Liberal government.[686]

The urban spaces saw a period of distinct change in sexual diversity and expression across the 1960s and into the 1980s, which in turn shaped policing practices. Peter McGonigal, presenting on offender behaviour and policing in Sydney in 1969 and 1970, described a shift

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[683] "Male Sex Offences in Public Places," 5-6.
[684] Derek Dalton, "Policing 'Beats' in Australia," in *Policing Sex*, ed. Paul Johnson and Derek Dalton (London: Routledge, 2012), 69.
[685] Ibid., 70.
[686] Willett, Murdoch, and Marshall, *Secret Histories of Queer Melbourne*, 115.

in police practices. Whereas in 1969 police officers mostly monitored 'public conveniences in the inner-city area most used by "straight" members of the public, and perhaps by children,' in 1970 their patrolling practices had changed instead to focus on members of the Vice Squad 'visiting Green Park during the course of their other duties'. Green Park was known as a 'tea-room' (cruising area, usually in a public lavatory) meaning that arrests were very likely. McGonigal noted in his analysis that he considered the prior form of policing, that which focused on areas which were mostly visited by 'straight' people and children, to be practical, whereas he did not see the value in monitoring the known 'tea-rooms' so closely, as the general public used them less often.[687] This points to a shift in focus from the police, away from maintaining public order in frequently used public spaces, and towards specifically targeting areas of 'homosexual' behaviour in order to make arrests.

Many of the changes in Sydney's sexual spaces focused on gay visibility, with the area of Darlinghurst becoming a well-known gay area by the 1970s and events such as Sydney Gay and Lesbian Mardi Gras highlighting the visibility from 1978. Policing of these spaces and raids on gay clubs provoked public debate and a space for reformist response, which ultimately led to anti-discrimination legislation in 1982 and decriminalisation of homosexuality in 1984. The somewhat increased public acceptance of gay expression also led to a breaking down of these more secluded boundaries where gay lifestyles were practiced and expressed.[688] As gay visibility increased, so too did police attention – and ultimately, so did public disapproval of police tactics. The first Sydney Mardi Gras in June 1978 saw police disrupt the festivities, deny the permit-holding marchers' access to Hyde Park, and subsequently begin making arrests and clashing with marchers and the public. Police made further arrests when protestors marched outside the court hearings for the Mardi Gras marchers on trial. The arrests did, however, result in a surge of popular support for those

[687] "Male Sex Offences in Public Places," 21.
[688] Jason Hugh Prior, "Sexuality, Governance and Urban Space: The Sexual Restructuring of Sydney" (paper presented at the Society of Architectural Historians, Australia and New Zealand Annual Conference, 2006), 449-51.

arrested and a remarkably successful series of demonstrations which ultimately saw charges against those who were arrested dismissed or dropped.[689]

The public had generally accepted actions of the Vice Squad in the 1950s when they targeted homosexual behaviour. However, by the 1980s there was less acceptance for what was considered 'a personal campaign of the Detective Inspector,' who would go 'to great lengths to prosecute gay men.'[690] Homophobia in police practices also led to a string of deaths in gay beats which occurred throughout the 1980s, receiving inadequate levels of investigation – many cases were simply closed.[691] Furthermore, in the 1990s, long-running 'rumours and allegations' about misconduct and corruption among high-ranking New South Wales police officers ultimately led to the Wood Royal Commission into the New South Wales Police Service (1994-7), which found a culture of systemic corruption which was ingrained in the Service.[692]

Tactics used by police to target and arrest gay men in cruising spaces could also be used against transgender women, and police often specifically targeted transgender sex workers. By the early 1980s street-based sex workers in Sydney had a 'select little spot' where they worked around Darley Street and Liverpool Street and shared clients. However, in December 1982, a police blitz targeting sex work drove them out of this area. In an interview on the *Gaywaves* radio program, Roberta Perkins recounted that police arrested about seventy sex workers in the raid. She stated that the raid was 'aimed at the transsexuals in Darley Street, so they were driven out first. … From what I can gather, the transsexuals do get, still get, harassed by the police more.' [693]

One trans woman described her experience of being targeted by police in Kings Cross while walking home from a pub. A man, an undercover policeman, approached her and asked her to come to a nearby hotel with him. One of the local sex workers saw what was happening

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[689] Willett, *Living out Loud: A History of Gay and Lesbian Activism in Australia*, 138-9.
[690] Carole M Cusack and Jason H Prior, "Religion, Sexuality and Retribution: Placing the 'Other' in Sydney," in *Religion and Retributive Logic* (Leiden: Brill, 2010), 12.
[691] Wotherspoon, *Gay Sydney: A History*, 281.
[692] Janet Chan and David Dixon, "The Politics of Police Reform: Ten Years after the Royal Commission into the New South Wales Police Service," *Criminology & Criminal Justice* 7, no. 4 (2007): 446.
[693] "9th Australian Transsexual Association (ATA) program."

and told her to run, and she 'took off like a jack rabbit,' jumped over the fence of St Luke's Hospital, and hid for about four hours. While running, one of the police officers fired a gun in the air. She said:

> I wasn't game to go back to the Cross because where we lived was just around the corner from where he'd tried, and he'd tried to, the bloke that came up to me and said we could go into the hotel, it was entrapment. So, anyhow, he was trying to collar somebody. And that was what they did in those days. So, anyhow, the next thing, I've gotten out from underneath the thing. I dusted myself off and I've got the spider webs out of my hair and all of this kind of stuff. And I got down to the corner of Bayswater Road. Got into a taxi, just started to drive away and we got pulled over by the police. And the police car took me out and they took me down to Darlinghurst Prison, Darlinghurst Detention. They threw me in with, into the cage with everyone. They were all boys. I was in there for quite a while. It wasn't a pretty sight. The following morning, I was put before a magistrate. I was bloody, I was in tears, I was, I'd been smacked around, I'd been slapped around, all of this kind of stuff. … I'd been raped. I'd been, I'd had the whole lot done.

She was charged with attempting to procure for the purposes of prostitution, and was eventually released on a self-assurity after telling them she was sixteen years old (when in reality she was 13 years old and attending Murwillumbah High School at the time). She also recounted occasions where she would be walking around the street with other trans sex workers who would be picked up by police and 'shuffled into a police car.'[694] Trans sex workers were aware that attention from law enforcement was a constant presence. Purss said that police round ups might happen frequently on Friday nights, and that the workers who were experienced would feel it coming 'like electricity in the air' and would dissipate: 'After the second or third time being rounded up, you'd know not to be in town that night.'[695]

[694] Gina Miller, interview by Noah Riseman, recorded in Perth, 1 October 2019. Shared with permission.
[695] Phlan-Michelle Purss, interview.

The intersection of vulnerabilities that trans sex workers faced meant that they were disproportionately targeted by police. When police wanted to crack down on sex work, transgender sex workers were easy, visible targets. As Perkins stated: 'Whenever the police wanted to make their books look good the transexuals became the prime target because, as an identifiable, easily accessible group, without the "protection" of a house, and suffering the double stigma of whore and freak, they offered the least resistance.'[696] As the laws shifted to decriminalise street-based sex work for cisgender women, transgender sex workers bore the brunt of crack downs because laws continued to criminalise their work under other legislation. Chrissie, a transgender woman who spent two and a half months at the Metropolitan Remand Centre, spoke about her experiences with police on the *Gaywaves* radio show in 1983: '[The police] used to come around every night and just tell us to hop in the back of the car for, they used to charge us with attempt to procure and serious alarm and affront. And when we were taken to the police station, we were called shims and he's and poked fun at and everything. And after we were charged we were sent back out again to be charged again.'[697]

Perkins found that in the Darlinghurst area, transgender sex workers 'received the highest rate of arrests per woman.' She said that the increased attention paid to transgender sex workers by police was a 'clear example of police discrimination,' and that this could be verified by visiting the central court of petty sessions on any given Monday morning. The high level of policing did not necessarily result in an equivalent level of prosecution within court. At least some 'sympathetic' magistrates, for example, were likely to administer low fines and release the trans women following their court appearances. [698]

Roberta Perkins interviewed one transgender sex worker who said that she had been arrested about 100 times on soliciting or loitering charges by police, but that she'd 'missed out on a lot' because she did not work on the streets. She stated: 'Well, the coppers that pinch you go up to court it will be $100 bail. Next morning you've got to get out of bed early, work 3:00

[696] Perkins, *Being a Prostitute: Prostitute Women and Prostitute Men*, 247-8.
[697] "2nd Australian Transsexual Association (ATA) program."
[698] Perkins, *Being a Prostitute: Prostitute Women and Prostitute Men*, 247-8.

in the morning, you've got to get up at 8:00, got to go to court, they're going to fine you $80. Right? So I used to get the coppers to drop me off round the corner, give them the $100 and they'd say, "Go for a coffee, don't go back for an hour."'[699]

Sydney police practices specifically targeted sex and gender minorities throughout the period, leading trans women to experience a particularly high and visible level of policing, court appearances, fines, and exploitation. Transgender sex workers were very used to continual police attention, especially once street-based sex work was decriminalised. As stated by Martin: 'there was some sort of partial decriminalisation of the street in 1979 but from our point of view, especially from my point of view, I didn't see what that decriminalisation involved because we [transgender women] were still being entrapped.'[700] However, other states had significantly different legal frameworks around sex work – and police practices and the experiences of transgender sex workers in these states varied alongside the alternative legal systems.

SEX WORK LAWS IN OTHER STATES

Until the 1970s, laws related to sex work were fairly consistent across Australia, with laws in place prohibiting soliciting in a public place, owning a brothel, or otherwise engaging in sex work related activities. However, how these laws were enforced in practice could differ from state-to-state.[701] From the mid-1970s onwards, Australian states and territories began revising sex work legislation. These changes were aimed at targeting police corruption, community concern regarding discrimination in the law against sex workers, and the effects of street-based sex work in inner cities, and (in the 1980s) the fear of HIV/AIDS spreading through an illegal, poorly regulated sex industry.[702] New South Wales and the Australian Capital Territory decriminalised most sex work activities, and instead left regulation in the

[699] Maggie, interview by Roberta Perkins, date unknown (c.1984-85), recording location unknown. Available from the Australian Queer Archives.
[700] Chantell Martin, interview by Noah Riseman, recorded on Zoom, 19 September 2021. Shared with permission.
[701] Barbara Sullivan, "Working in the Sex Industry in Australia: The Reorganisation of Sex Work in Queensland in the Wake of Law Reform," *Labour & Industry: a Journal of the Social and Economic Relations of Work* 18, no. 3 (2008): 75.
[702] Harcourt, Egger, and Donovan, "Sex Work and the Law," 121.

hands of town planning authorities. In Victoria some sex work became legal through licensed brothels in the 1980s and more successfully in the 1990s – however, sex work outside of the licensing system remained outlawed. In Queensland in the early 1990s, private solo sex work was legalised, but brothels remained illegal for the time being.[703] The Northern Territory allowed escort sex work but criminalised operating a brothel and street-based sex work, and in Western Australia, South Australia, and Tasmania (despite some unsuccessful attempts at reform), the traditional system of twentieth-century criminalisation of sex work persisted.[704]

While South Australia was unsuccessful in its attempt to reform sex work laws, the state did implement an *Equal Opportunity Act* in 1984 which prohibited discrimination based on sex or sexuality, including against transgender individuals.[705] Parliamentary discussion about this Act in October 1984 addressed the relationship between transgender discrimination and sex work. Barbara Wiese (ALP) recounted the contents of a letter she had received from the Metropolitan Community Church in 1977 which listed forms of discrimination against transgender people:

> Among matters that could be remedied if covered by anti-discrimination legislation were examples such as employers who would not employ transsexuals because they knew that those people had no legal redress if refused employment; and employers who dismissed transsexuals knowing that they could do nothing about it. The letter pointed out that this difficulty in obtaining and keeping employment sometimes leads transsexuals to take illegal or distasteful work such as prostitution, strip tease or work in massage parlours.[706]

She added:

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[703] Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia since 1945*, 211.
[704] Harcourt, Egger, and Donovan, "Sex Work and the Law," 121.
[705] *Equal Opportunity Act 1984* (SA), https://www.legislation.sa.gov.au/__legislation/lz/c/a/equal%20opportunity%20act%201984/1991.05.31_(1990.08.01)/1984.95.pdf (accessed 11 November 2022). Under the law, 'transexual' was defined as 'a person of the one sex who assumes characteristics of other sex.'
[706] South Australia, *Parliamentary Debates*, Legislative Council, 23rd October 1984, 1318.

> The Transsexual Association of Australia, in a submission dated 5 November 1982, pointed out that discrimination against transsexuals occurs in the areas of employment, welfare, banking, loans, housing and emergency shelter accommodation. Apparently shelter operators turn away transsexuals, claiming that they do not have adequate facilities for them. God knows what sort of facilities these operators think transsexuals need; it is not as though they have two heads or particularly unusual physical needs.[707]

By addressing the relationship between job insecurity and employment discrimination against transgender people, the South Australian *Equal Opportunity Act* aimed to ameliorate some of the social conditions which caused transgender people to be overrepresented in sex work.

A bill relating to the regulation of sex work was brought to South Australian Parliament in 1986 with the stated purpose of removing criminal penalties for non-street-based sex work, to control the location of brothels, to protect sex workers from abuse, and to prevent minors from being trafficked into sex work.[708] However, there was significant opposition to the bill, and it did not progress. Further attempts to reform the laws in later decades – and as recently as a conscious vote in 2019 – were also unsuccessful.[709] Roberta Perkins described sex work in South Australia as 'possibly more regressive in Adelaide than in any other centre we visited.' She stated that neither street-based nor brothel sex work seemed to exist in Adelaide, and that the only possible avenue for transgender sex workers was escorting, which was risky because it necessitated visiting clients in their homes. Sex workers in the city at the time of Perkins' visit in the 1990s had 'gone underground' to avoid the heavy police crackdowns taking place.[710]

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[707] Ibid.
[708] South Australia, *Parliamentary Debates*, Legislative Council, 20th August 1986, 466.
[709] Casey Briggs, "Bid to decriminalise sex work in South Australia defeated in Parliament," *ABC News*, 13 November 2019, https://www.abc.net.au/news/2019-11-13/sa-sex-work-decriminalisation-bill-voted-down/11699904 (accessed 3 November 2022).
[710] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 15.

Several other states around Australia also amended their sex work laws in the 1980s, although transgender sex work did not appear to factor into the discussions as it had in New South Wales (and to a lesser extent, South Australia in the context of employment discrimination). Queensland's approach to sex work began to shift during the 1980s, when investigative journalists brought to light police corruption in 'prostitution rackets.' The Fitzgerald Inquiry (1989) investigated these issues and led to the prosecution and gaoling of some high-ranking Queensland police officers. The Inquiry recommended, in order to prevent these types of corruption reoccurring, that the state should implement a system of legalised and regulated sex work legislation.[711] Despite these recommendations, the Labor government instead tightened up restrictions on almost all sex work related activities in the 1990s.[712] Perkins stated that street-based trans sex workers in Queensland operated primarily in Brisbane's New Farm area and were subject to harassment from both police and the general public, who were 'zealous in enforcing Queensland's prostitution laws', with male sex work remaining criminal and female sex work highly restricted.[713]

Victoria introduced a licensing system for brothels and escort agencies through the *Planning (Brothels) Act* (1984) and the *Prostitution Regulation Act* (1986).[714] In 1995, the *Prostitution Control Act* took effect following a review of the sex industry and the 'failed experiment' of the prior laws. The Act laid out extensive regulations for managing brothels and escort agencies.[715] Most forms of sex work remained illegal, and most sex workers continue to operate outside of the licensing system.[716] However, the Victorian Government announced in 2021 that it would be moving towards decriminalisation of sex work.[717] The *Sex Work Decriminalisation Bill 2021* passed in February 2022, with decriminalisation occurring in

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[711] Sullivan, "Working in the Sex Industry in Australia: The Reorganisation of Sex Work in Queensland in the Wake of Law Reform," 77.
[712] Ibid.
[713] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 13.
[714] Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia since 1945*, 189.
[715] Ibid., 214-15.
[716] Harcourt, Egger, and Donovan, "Sex Work and the Law," 122-4.
[717] Victorian Government, "Decriminalising sex work in Victoria", https://www.vic.gov.au/review-make-recommendations-decriminalisation-sex-work (accessed 19th October 2021).

multiple stages. The final stages are due to be enacted in December 2023.[718] (As in New South Wales, we should be hesitant to call this a 'full' decriminalisation, as sex work will continue to be regulated through various government agencies, and we will see the forms and effects of this further down the line.) In Roberta Perkins' 1994 review of the sex work cultures around Australia, she described the Victorian environment, noting that it was not as established as the Sydney scene: 'There is some low-key street work done in the St Kilda area, but the actual location varies. According to the Prostitute Collective of Victoria, it may take the form of streetwalking (with risks of police and kerbcrawler harassment) or hanging around specific street corners (with the same risk of police harassment but lesser risks from kerbcrawlers). Brothels in Victoria are licensed and there are a few parlours in the Inner-city that employ transgender women workers. The conditions in these establishments seem as good as any in the country.'[719] Latoya Hoeg, a trans sex worker based in Melbourne, described the St Kilda scene in the late '80s, early '90s as being quite sparse. Greeves Street was 'where all the [trans] girls were working,' she stated, but there were still 'only a handful, maybe like four, five' on any given night.[720] As elsewhere, social networks and hierarchies among sex workers were integral to navigating police attention. Hoeg described the 'top dog' in the area she worked as being 'quite tough on the girls, and if she didn't like you, she'll get the police to arrest you.'[721] Navigating those networks was, therefore, essential to avoiding arrest.

Roberta Perkins' review of sex work around Australia did not include many details about Western Australia or Tasmania, which she did not visit. However, she noted that the regressive social attitudes in Tasmania had reportedly left transgender sex workers essentially invisible in the state.[722] In the mid-1970s the 'containment' regulatory approach to sex work which Western Australia employed, which focused on 'selective enforcement of

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[718] Victoria Police, "Decriminalisation of Sex Work in Victoria," https://www.police.vic.gov.au/decriminalisation-sex-work-victoria (accessed 02 December 2022).
[719] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 14.
[720] Latoya Hoeg, interview by Noah Riseman, recorded in Melbourne, 9 August 2019. Shared with permission.
[721] Ibid.
[722] Perkins, *Transgender Lifestyles and HIV/AIDS Risk*, 15.

the Police Act and Criminal Code,' received public criticism; however, Western Australian laws around sex work remained unchanged.[723]

THE 1990S AND BEYOND

The 1990s (and the 2000s to follow) saw a drastic shift in trans sex work cultures around Kings Cross and Darlinghurst and in the world in general. Estimates on the numbers of trans sex workers working in the Kings Cross/Darlinghurst areas varied between sex workers, but several described a thriving scene which boomed on weekends.[724] Over time, however, this began to change. Today, the area is much less active.[725] During the 1990s and 2000s, the sex work industry in the area gradually died down as the suburbs gentrified and the advent of the internet moved sex work online.[726] Cities around the world have undergone the same shift from spatially confined sex work on streets and in brothels to a geographically dispersed online scene.[727] As Martin stated: 'Social media platforms were taking off in a huge way and so a lot of street-based sex workers were not only getting mobile phones and finding it easier to picking up a client down on the street and handing them their number so they could ring the client … and never have to come down to William Street, to come down to the street at all.'[728] As transgender recognition increased following the 1980s and 1990s, and with sex work moving off the streets and onto the internet, transgender people remained highly represented in sex work. A study looking at a cohort of transgender patients attending the Melbourne Sexual Health Centre in Melbourne between 2011 and 2014 for example, found that almost half of those surveyed had been involved in sex work at some stage in their lives and a significant portion (about 45%) of those captured in the data were still engaged in sex work at the time.[729]

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[723] Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia since 1945*, 205.
[724] Phlan-Michelle Purss (Walking Tour), interview; Chantell Martin, interview, 19 September 2021.
[725] Phlan-Michelle Purss (Walking Tour), interview.
[726] Ibid.
[727] Sudhir Venkatesh, "Underground Markets as Fields in Transition: Sex Work in New York City," *Sociological Forum* 28, no. 4 (2013): 683-4.'
[728] Chantell Martin, interview, 19 September 2021.
[729] Clare Bellhouse et al., "Patterns of Sexual Behaviour and Sexual Healthcare Needs among Transgender Individuals in Melbourne, Australia, 2011–2014," *Sexually Transmitted Infections* 94, no. 3 (2018): 214.

Aside from the gradual shift online, the 1990s saw other significant changes for trans sex workers as well. As noted earlier in this chapter, the Wood Royal Commission (1994-7) found a culture of ingrained corruption in the New South Wales police force and led to a series of major reforms.[730] According to Purss, the Royal Commission led to major changes for transgender sex workers, making things 'a lot easier' and 'a lot less sleazy.'[731] She stated that 'the round ups stopped happening because it was legal back then. A lot of the corruption stopped. We weren't being hassled by police to pay for protection anymore. You didn't have certain cops on asking you for certain favours.'[732] Martin also emphasised the changes following the Royal Commission, stating that 'the police had to clean up their act, and they did to a degree. They cleaned up their act. They no longer used to come down and call us men in dresses, they no longer used to hurl accusations at us.'[733]

In 1995, the partial decriminalisation of sex work in New South Wales was significantly expanded. This differed from the previous system where some forms of (mainly street-based) sex work were allowed while other forms of sex work were not, and it meant that the decriminalisation of sex work began (in practice) to be extended to transgender sex workers. Combined with the Wood Royal Commission, this made working 'a lot safer' for trans sex workers.[734] According to Martin, the expanded decriminalisation 'was a big change for us, a huge change, especially after being hurled accusations and nasty names from the police, years and years, day in and day out, to have them come down and address us in a pronoun that is appropriate to us and to treat us with respect, that's a huge thing, and not just one or two did it, the whole bloody lot did it. They all did it.'[735] The Wood Royal Commission itself was very explicit that the findings it uncovered of widespread extortion, abuse and corruption within the police force needed to be met with systemic and institutional changes, not individual ones. According to the report itself: 'The more significant reform lies in addressing the structure, attitudes and professionalism of the Service, with a view to preventing the

[730] Chan and Dixon, "The Politics of Police Reform: Ten Years after the Royal Commission into the New South Wales Police Service," 443-5.
[731] Phlan-Michelle Purss, interview.
[732] Ibid.
[733] Chantell Martin, interview, 19 September 2021.
[734] Phlan-Michelle Purss, interview.
[735] Chantell Martin, interview, 19 September 2021.

occurrence of such conduct. Failure to achieve this reform can only result in the cyclical reappearance of the very same culture and conduct that led to the setting up of the current inquiry.'[736]

The Sex Workers Outreach Project (SWOP) was formed in 1990 and developed out of the prior Australia Prostitutes Collective (APC), which was founded in 1983. The APC, and later SWOP, became the first government funded sex worker organisation in the world, and provided a range of services to sex workers via peer-based outreach.[737] This funding was first provided in 1986, with the New South Wales state government funding the group with the goal of preventing HIV/AIDS in the sex work community.[738] Significantly, SWOP was also reportedly started by transgender sex workers.[739] SWOP employed specific transgender outreach workers, visiting sex workers and providing direct peer-to-peer support.[740] New South Wales is presently one of only two places in the world where sex work is (mostly) decriminalised, although Victoria is due to follow suit.[741] The advocacy of sex workers throughout the 1980s after the removal of penalties for street-based sex work set the stage for the expanded decriminalisation of sex work in the state in 1995.[742]

SWOP also provided tools for sex workers to be able to communicate with one another for personal safety. As noted previously, a popular resource was the 'Ugly Mugs list', a record of clients who were blacklisted by the workers in the area for assaults, robberies, or other abuses. According to Norrie: 'It's a name and shame and "Watch out for this bloke. Here's what he looks like, here's his number, here's his car rego, here's what kind of car it is, here's what he did" – stuff that wouldn't pass defamation laws, so we couldn't publish it and we had to keep it secret from the clients, but it was our most popular resource, the Ugly Mugs

[736] Chan and Dixon, "The Politics of Police Reform: Ten Years after the Royal Commission into the New South Wales Police Service," 446-7.
[737] "About SWOP," SWOP.org.au, https://swop.org.au/about-swop (accessed 5 May 2021).
[738] Eurydice Aroney and Penny Crofts, "How Sex Worker Activism Influenced the Decriminalisation of Sex Work in NSW, Australia," *International Journal for Crime, Justice and Social Democracy* 8, no. 2 (2019): 56.
[739] Phlan-Michelle Purss (Walking Tour), interview.
[740] Norrie, interview.
[741] The other being New Zealand. Aroney and Crofts, "How Sex Worker Activism Influenced the Decriminalisation of Sex Work in NSW, Australia," 51.
[742] Ibid.

list.'[743] The Ugly Mugs List was developed in the early 1990s by a group of sex workers meeting in a coffee shop – and later this coordination and networking led to the founding of SWOP and the continuation of the Ugly Mugs list as a resource.[744]

Whenever a sex worker would report to SWOP about abuse or assault from a client, SWOP would ask if they would give permission for the information to be passed onto police. Norrie stated that 'if they said, "Yes", the police got the whole thing. Yes. We were more than happy to supply information to the police from sex workers about clients that had done the wrong thing, and the police were more than happy to take that information. They didn't think, "Oh they're just sex workers" – they took the practical view that if someone's going to attack a sex worker, they're going to work their way up and attack the private girls attending the college at SCEGCS in Darlinghurst.'[745] Likewise, Purss stated that there were a few officers she would pass along information about particularly dangerous clients.[746] SWOP also worked with police: 'We did training sessions with them regularly. I think I regularly went out to Kings Cross police station to talk to the people joining the station, or doing training courses as police. The Sex Workers' Outreach Project was seen as experts and the police wanted to hear from us and work with us.'[747]

The expanded decriminalisation of sex work in New South Wales likely at least partially led to this improved relationship between organisations such as SWOP and the police, with police treating the group as a valuable resource for information in the context of the post-Wood Royal Commission institutional changes. In other states, such as Victoria, the relationship between street-based sex workers and the police continued to be a source of tension. A major difference between Melbourne and Sydney was that in Melbourne street-based sex work remained criminalised – but licensed brothels were not. The areas where street-based sex work took place were primarily residential, which meant a lot of community

[743] Norrie, interview.
[744] Phlan-Michelle Purss, interview.
[745] Norrie, interview.
[746] Phlan-Michelle Purss, interview.
[747] Norrie, interview.

complaints and 'clean ups' from the police.[748] Hoeg described the police enacting arrests of street-based sex workers in Melbourne the 1990s:

> [The police would] take you in [to St Kilda Police Station], they have to do their procedure, you know, take down your name, your details and all that sort of stuff. And it was usually, you know, you actually, if you went to court it was better for you because then your fine became lesser because you made an appearance. But you don't really, it was a summons so you don't really have to appear but then the fine could come up from a minimum to a big, big price. So, I always turned up. The only thing I didn't like about it because in those days, also, this is still the '90s to mid-'90s, due to transgender, you know, we had no rights, they read out your name, my legal name was Latoya but it was he, he, he, he, he.[749]

However, as with elsewhere, the advent of online sex work changed how sex work took place in Melbourne and shifted how sex work was conducted, even in a smaller street-based scene like that in St Kilda: 'the business has completely gone,' said Hoeg, 'because of the internet, it's destroyed everything.'[750]

Sex work was and remains a significant avenue of employment for transgender people who continue to face discrimination in many lines of work. The upcoming chapters will examine the changing relationship between transgender people and the criminal legal system in the 2000s and 2010s, and how this has been shaped by the increased visibility of transgender people in society and the pushes for transgender rights and legal recognitions over this period.

[748] Latoya Hoeg, Interview.
[749] Latoya Hoeg, Interview.
[750] Ibid.

Conclusion

The description of transgender sex workers as a marginalised group within a marginalised group is an essential way of examining the experiences of trans sex workers throughout the 1970s and 1980s. This chapter has aimed to untangle some of the specific challenges they faced, both as trans women (as, by and large, they were trans women – not men or nonbinary people), and as sex workers. The law worked against them on both levels, and trans sex workers found themselves at the intersection of a range of legal battles. Laws against sex work, laws against homosexuality, and the lack of legislation to recognise their affirmed genders all interacted to make the challenges faced by transgender sex workers unique and distinct from their cisgender peers. Police targeted trans sex workers over other groups, due to their relative vulnerability and visibility. In Sydney this was especially the case following the decriminalisation of street-based sex work, as transgender sex workers became liable to charges for which cisgender sex workers were no longer criminalised.

However, sex work remained valuable choice of employment for transgender people. Transgender women were discriminated against in employment in most fields and were economically vulnerable to exploitation. Transgender sex workers were also able to build social networks with one another which could be extremely valuable for support and building a sense of community. For many, the benefits outweighed the risks.

This chapter has focused mostly on Sydney, due to the particularly high level of documentation which was recorded for this city. This is primarily thanks to Roberta Perkins' work and research – and demonstrates how invaluable close and detailed histories of transgender people are, and how much is missing from other parts of Australia. Transgender sex workers existed at an intersection where they were marginalised as sex workers, 'homosexual men,' and transgender women, and they were particularly vulnerable to policing based on these intersections. Even as legislation around sex work progressed, transgender women specifically were left behind and, in fact, in many ways became more visible and vulnerable to policing.

CHAPTER 6

VISIBILITY, CHANGE, AND CRIMINAL LEGAL RESPONSES

The 1990s and 2000s saw a massive increase in trans and gender diverse visibility, advocacy, awareness, and social and legal recognition. It was throughout these decades, for instance, that anti-discrimination acts in states and territories around Australia began to enshrine protection into law for gender diversity (although by no means perfectly). During these years transgender people were increasingly able to connect with one another – particularly online – and coordinate efforts to raise awareness about transgender issues and rights. Socially, transgender people were becoming increasingly visible, especially trans men and (gradually) nonbinary people, who were previously excluded from mainstream discourse.

This chapter should be read alongside Chapter 7 to follow, which looks at the period from the 2010s to the present day. These two chapters are paired together because change effectively came in two waves. The first, explored here, established trans and gender diverse policy and legislation around Australia. These changes, however, proved to be insufficient and flawed at addressing the full range of trans and gender diverse people's needs – both in the carceral system and in the rest of society. The chapter to follow, therefore, examines the wave of amendments and responses which broadened the scope of the reforms. These amendments aimed to iron out the ways in which structures were not working to respond to trans and gender diverse realities. In effect, these two chapters examine a progression from relative ignorance of trans and gender diverse issues in prison and policing, to a systemic response, to a recognition of the flaws in this response, to an overhaul (or at least a broadening) of these practices. We are left, finally, with the question of where we go from here. Are changes to accommodate trans and gender diverse people in prison and policing – if executed properly – enough? Or is a wider resetting of the criminal legal system's structure and motivations required? While I flag these questions now, this chapter will begin by examining this first wave of changes and will return to these bigger questions in the chapter to follow.

This chapter examines the social and legislative changes in the 1990s-2000s, focusing on how the criminal legal system and police responded to increased needs to address trans and gender diverse people inside their institutions. Prisons were already under scrutiny for how they interacted with marginalised groups, with reports such as the *Royal Commission into Aboriginal Deaths in Custody* released in 1991. Corrections departments gradually developed policies relating to housing trans and gender diverse people throughout these decades. In this chapter I discuss the specific challenges trans and gender diverse people faced in prisons and how the criminal legal system responded to them. Although in previous decades there were some ad-hoc responses to trans and gender diverse prisoners' needs, it was not until the 1990s that real, overarching attempts at change began to be implemented. This chapter examines those changes, what they looked like, and how effective they were (perhaps not surprisingly, their effectiveness was very limited).

A major tension throughout these decades was the question of how legally to define – for the sake of policy, legislation, prison guidelines, etc. – who is transgender. Often, legislation or policy was based off a trans or gender diverse person's medical transition, that is, whether they had had gender affirmation surgeries, and what surgeries they had undergone. Some states had broader legislation based on self-identification, whereas others rigidly determined transgender people only as those who were deemed as having undergone 'gender reassignment.' Such categorisations shaped not only trans and gender diverse people's legal recognition, but their day-to-day lives and their ability to interact meaningfully with state and territory institutions. In the case of prisons, examining the ways that trans and gender diverse legal recognition played out when it came to assigning people to 'male' or 'female' housing can provide significant insight into the (il)logic and efficacy of these binary divisions and state apparatuses. Additionally, police forces around Australia took steps throughout the 1990s and 2000s to improve their interactions with the LGBTIQ community broadly. However, many of these initiatives had a heavy focus on gay and lesbian issues, and trans and gender diverse people continued to report ongoing adverse relationships with police throughout these decades.

This chapter examines a period of significant 'boom' – at least in law and policy development – for trans and gender diverse people. It explores not only how this boom impacted on the criminal legal system's relationship to gender diversity, but what trans and gender diverse people's experiences with the criminal legal system reveal about the effectiveness and contradictions within Australian state and territory responses to trans visibility.

TRANS-HISTORICAL CONTEXT

To discuss the legal and legislative context of transgender people in Australia, it is important to start by contextualising global trans history around the turn of the twenty-first century. According to American historian Susan Stryker, transgender activism had a 'tremendous burst' from around 1990 onwards. This followed a couple of decades in which, she said, 'transgender people made only small, erratic strides towards a better collective existence.'[751] Stryker's work focuses on transgender history the United States, but the reasons that Stryker gives for the rapid mainstreaming of transgender rights and recognition in the 1990s are mostly cultural factors which existed in Australia as well. They included: 'the new political concept of queerness, the AIDS epidemic, the rapid development of the internet, the end of the Cold War, the maturation of the first post-Baby Boomer generation, and the calendrical millennial turn.'[752] The millennial turn, it is worth noting, may not be a particularly distinct turning point in and of itself – but what could be notable here was the cultural sense that society was entering a 'new' era and the resulting sense of (subjective) change and modernity.

The rise of the internet from the mid-1990s onward especially changed how trans and gender diverse people could access information, organise, and build communities. Transgender groups which had developed separately could collaborate more easily and share ideas about gender diversity; geographically isolated trans and gender diverse individuals could also connect more easily with others who shared their experiences.[753] Transgender academics became more active at putting out their work and networking during this period.[754]

[751] Stryker, *Transgender History: The Roots of Today's Revolution*, 151.
[752] Ibid., 153.
[753] Ibid., 175.
[754] Ibid., 181.

Transgender men also became more visible through artistic and creative works and advocacy. For example, the film *Boys Don't Cry* in 1999 told the story of transgender man Brandon Teena and his brutal rape and murder, bringing visibility to trans masculine identity and struggles. These trends continued into the 2000s.[755]

By the 1990s, academics outside Australia were paying more attention to issues facing transgender people in the criminal legal system. A 1996 study by Maxine Petersen et al. conducted an international survey of correctional services policies and found that seventy-eight percent of jurisdictions had no formal policy for handling transgender inmates. The survey contained responses from sixty-five international jurisdictions (primarily North American and European), including from five Australian states and territories. There was no consensus on how to classify transgender inmates, with different jurisdictions relying on a range of different measures.[756] Key issues facing transgender inmates included maintaining HRT while incarcerated and placing transgender prisoners in appropriate housing for both their gender and safety.

In Australia, researchers were starting to show interest in transgender issues and critiquing some approaches of previous decades. Henry Finlay published a paper in 1996 on the legal recognition of transgender people in Australia, [757] and in 1999 A. Sharpe published a review of anti-discrimination laws as they related to transgender people around Australia. Sharpe noted that some states or territories at the time of writing prohibited discrimination against transgender people in legislation, although others, such as Victoria and Queensland, did not (Victoria would introduce anti-discrimination legislation the following year, and Queensland would in 2002).[758] Definitions of who was considered transgender (or 'transsexual,' as was the terminology often used in the law) varied across states, ranging from broad definitions in New South Wales and the Australian Capital Territory, to narrower ones in places like

[755] Ibid., 182 - 5.
[756] Maxine Petersen et al., "Transsexuals within the Prison System: An International Survey of Correctional Services Policies," *Behavioral Sciences & the Law* 14, no. 2 (1996): 222.
[757] The Gender Centre, "Family Court Endorses Transsexual Marriage: The Marriage between a Man of Transsexual Background and his Wife is declared Valid by the Family Court of Australia," *Polare* 43 (December 2001).
[758] A N Sharpe, "Transgender Performance and the Discriminating Gaze: A Critique of Anti-Discrimination Regulatory Regimes," *Social & Legal Studies* 8, no. 1 (1999): 7.

Western Australia which recognised only 'gender reassigned people' who had undergone gender affirmation surgery.[759] South Australia and the Northern Territory classed 'transsexuality' under the broader provision of 'sexuality' for the basis of anti-discrimination. As Sharpe noted in their summary: 'The various anti-discrimination regulatory regimes, as they pertain to transgendered persons, would appear to produce myriad and contradictory effects … the central tension appears to be between the legal desire to fix categories and the legal desire to regulate positively beyond those categories.'[760]

TABLE 1. ANTI-DISCRIMINATION ACTS AROUND AUSTRALIA:

State	Anti-discrimination Act to include discrimination against transgender people	Updated Anti-discrimination Act to widen the definition of transgender
VIC	Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000 (Vic)	Equal Opportunity Act 2010 (Amended October 2021)
NSW	Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 (NSW)	Unchanged
QLD	Discrimination Law Amendment Act 2002 Act No. 74 of 2002 (QLD)	Unchanged
NT	Anti-Discrimination Act 1992 (1996)	Anti-Discrimination Amendment Bill 2022
WA	Equal Opportunity Act 1984 (2002)	Unchanged (However, review announced August 2022)

[759] Note: although Sharpe discusses WA's Gender Reassignment Bill (1997) in 1999, the Bill itself did not pass in Parliament until 2000, the following year. Ibid., 7-8.
[760] Ibid., 15.

SA	Equal Opportunity Act 1984 (1990)	Equal Opportunity Act 1984 (2016)
TAS	Anti-Discrimination Act 1998	Anti-Discrimination Amendment Act 2013
ACT	Discrimination Act 1991	Discrimination Act 1991 (2010)

Thus, visibility and awareness about trans people gradually developed into legal reform around anti-discrimination. However, it would be remiss to characterise the effects of legal reform as in any way consistent or all-encompassing.

PRISONER RIGHTS AND TRANS INCARCERATION

This section explores incarceration of trans and gender diverse people during this period. However, it is important briefly to discuss the history of prisoner rights and incarceration issues within Australia more broadly.

As noted in Chapter 4, the 1970s and the 1980s saw a shift in appetite for prison reform to combat prison brutality and corruption, marked by the release of the Nagle Report in 1978.[761] At the same time, specific movements to address carceral injustice emerged, especially in relation to marginalised groups. The *Royal Commission into Aboriginal Deaths in Custody* was established in 1987 and its final report was tabled in the federal parliament in 1991.[762] Despite the raft of recommendations from this ground-breaking Royal Commission, Aboriginal and Torres Strait Islander deaths in custody are still disproportionately high and

[761] Brown, "The Nagle Royal Commission 25 Years On: Gaining Perspective on Two and a Half Decades of NSW Prison Reform," 135.
[762] Eileen Baldry, Bree Carlton, and Chris Cunneen, "Abolitionism and the Paradox of Penal Reform in Australia: Indigenous Women, Colonial Patriarchy, and Co-Option," *Social Justice* 41, no. 3 (137 (2015): 181.

many of the recommendations of the Royal Commission have not been implemented.[763] Feminist anti-carceral activism emerged in Australia, as well as internationally.[764] Bree Carlton has examined feminist campaigns which took place in Victoria between 1982 and 2011, primarily examining campaigns to end the punitive segregation of women to men's maximum-security prisons, a practice which peaked in the early 1990s.[765] While in some states, such as New South Wales and Victoria, there have been tangible steps towards prison reform projects, such outcomes have been inconsistent, and these periods also saw increased use of prisons and punitive approaches as a first approach to addressing social issues.[766] As stated by Chris Cunneen: 'At the broadest level, the political conditions of the late 1990s and the new century have not been conducive in Australia to effective reform of the criminal legal system. There is little doubt that we have moved into a more punitive period in relation to criminal justice responses, and whatever impetus there was to reform in the early 1990s has largely evaporated.'[767]

Within this context, there was undoubtedly an appetite for investigation and reform in relation to transgender experiences in the criminal legal system. Throughout the 1990s and the 2000s state and territory carceral systems developed and implemented policies, although their effectiveness was limited. It is important to note that, as will be explored further in Chapter 7, conversations about trans people in prison do not impact *only* trans people in prison. Reforms that target trans and gender diverse accommodation and care shape the ways that gender is regulated in all binary sex-segregated spaces and, even apart from their direct impact on transgender people in prison, still have an impact on the forms that incarceration

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[763] Chris Cunneen, "Reflections on Criminal Justice Policy since the Royal Commission into Aboriginal Deaths in Custody," *Reflections* 40 (2008).
[764] Bree Carlton, "Penal Reform, Anti-Carceral Feminist Campaigns and the Politics of Change in Women's Prisons, Victoria, Australia," *Punishment & Society* 20, no. 3 (2018): 287.
[765] Ibid., 290-91.
[766] Baldry, Carlton, and Cunneen, "Abolitionism and the Paradox of Penal Reform in Australia: Indigenous Women, Colonial Patriarchy, and Co-Option," 168.
[767] Cunneen, "Reflections on Criminal Justice Policy since the Royal Commission into Aboriginal Deaths in Custody."

takes for all prisoners. Cisnormativity is built into the structure of prisons, which are organised around the 'presumed absence' of trans and gender diverse people.[768]

In preceding decades, particularly the 1970s-80s, transgender women were at the centre of public discourse about trans and gender diverse issues. The increased awareness of transgender men and transmasculinity around the turn of the twenty-first century meant that transmasculine people now needed to be included in the conversation about trans and gender diverse housing in prisons. One transgender man in 1993 wrote in *Polare*, a magazine published by the Gender Centre in New South Wales, about his experience in prison, stating:

> My name is Tony, I am thirty-three years old and have been a female-to-male (F.T.M.) transgender person for seven years. I am currently on remand at Mulawa Women's Detention Centre. Being an F.T.M. tranny in the prison system makes it very hard for people to relate to me. The knowledge they have of trannies is of being male-to-female, never having thought at all about F.T.M.s. … As far as the police and courts are concerned I belong at Long Bay Prison for men, not giving a damn about the dangers. There is no special treatment for F.T.M.s. When I talk to professional people, they have no idea where to start and no knowledge of what you are.[769]

The lack of attention paid in previous decades to transgender men's issues had real impacts on the experiences trans men had when entering the prison system. Moreover, as Tony noted, being housed in the men's prison could come with its own dangers.

Prison policies typically advised against placing transgender men in male prisons out of concern for their safety from fellow inmates. In some cases, this meant housing them in female prisons; in other cases, it meant isolating them from other prisoners. Draft documents from 2001 for protocols to manage transgender men in Victorian prisons recommended, for example, that for the best duty of care it was 'necessary to segregate FtM's from other prisoners. Placing them with other male prisoners exposes them to danger and it would be

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[768] Stanley and Smith, *Captive Genders: Trans Embodiment and the Prison Industrial Complex*, 4.
[769] Tony, "Boys in Prison: The System Has No Understanding of F.T.M.s" *Polare* 2 (December 1993).

inappropriate to locate them in female cells.'[770] Blight argued that for transgender men, the high risk of sexual assault which would arise from placement in a male prison meant 'the safest option continues to be placement within a female institution unless special circumstances exist to prove otherwise.'[771]

A common thread amongst transgender men's experiences was that they were kept out of housing appropriate to their gender out of concern for their safety. For transgender women, the reverse was usually true. They were more likely to be housed in male prisons out of concern for the safety of other women prisoners if they were to be moved to the correct facility. Transgender women were (and are) consistently characterised in transphobic discourse as 'men' who are 'invading women's spaces' with the goal of sexually assaulting cisgender women.[772] These prejudiced attitudes applied to transgender women's access to women's prisons, women's bathrooms, women's shelters, and many other sex segregated services. The worries function off a belief that transgender women are inherently predatory and dangerous to cisgender women.[773] Research has shown, however, that not only are transgender women highly unlikely to assault cisgender women in bathrooms and other sex segregated spaces, but they are more likely themselves to be the victim of assault and harassment.[774]

The characterisation of transgender women as predators and invaders of women's spaces factored into the ways politicians discussed where they should be housed. For example, in

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[770] Draft Policy, 'Searching Policy Background Information for Training to support the implementation of the amended Search Policy,' 2001, p.2

[771] Jake Blight, "Transgender Inmates," *Trends and Issues in Crime and Criminal Justice*, no. 168 (2000): 5.

[772] An example of this kind of discourse within Australian contexts would include the debates around the website 'No Conflict They Said' which was created by an academic at Melbourne University in 2021 to collect public stories from cisgender women about times they have felt threatened by transgender women in sex segregated spaces. See: Karl Quinn, "'Transphobic' website puts Melbourne University academics at odds," *Sydney Morning Herald*, 25 February 2021, https://www.smh.com.au/lifestyle/gender/transphobic-website-puts-melbourne-university-academics-at-odds-20210225-p575u4.html (accessed 30 August 2021).

[773] Christine Peek, "Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment," *Santa Clara L. Rev.* 44 (2003): 1242.

[774] Amira Hasenbush, Andrew R Flores, and Jody L Herman, "Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms," *Sexuality Research and Social Policy* 16, no. 1 (2019): 80.; Charlotte Jones and Jen Slater, "The Toilet Debate: Stalling Trans Possibilities and Defending 'Women's Protected Spaces'," *The Sociological Review* 68, no. 4 (2020): 842-3.

September 2006, Peter Breen (Human Rights Party) raised a question in the New South Wales Legislative Council, stating:

> Is the Minister aware that before her sex-change operation prison inmate Maddison Hall spent eight months in F Wing of Mulawa women's prison when a man? Is he also aware that during that time Maddison Hall, as a man, had sexual relations with female prisoners at Mulawa before the Commissioner for Corrective Services ordered his return to the male prison at Long Bay? How many female prisoners at Mulawa did Maddison Hall have sex with and how many of them fell pregnant? What steps will the Minister take to ensure the proper segregation of male and female prisoners? How many other male prisoners in anticipation of a sex-change operation have been inmates at Mulawa women's prison?[775]

In response, Tony Kelly (Minister for Justice) said that while he could not speak on the details of this case, and while Hall was housed under international standards, he could 'make it clear that the Government has not paid for any treatment for transgender inmates.' Furthermore, there were approximately twelve transgender prisoners at Mulawa women's prison seeking gender affirmation surgery at the same time.[776] The framing of this question presupposed that transgender women were a danger to other women in prison. The response from the Minister for Justice was reminiscent of previous discourses from the 1980s, when New South Wales prisons received significant criticism for allowing transgender prisoners to access HRT at taxpayer expense.[777] In both instances, these discourses positioned providing appropriate gender affirming care/housing to transgender women as unnecessary and potentially dangerous. Notably, these discourses continued into the following decades, with Hall's case

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[775] New South Wales, *Parliamentary Debates*, Legislative Council, 21 September 2006. https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-36680

[776] New South Wales, *Parliamentary Debates*, Legislative Council, 21 September 2006. https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-36680

[777] See for example: "Outrage at prisoner's sex change," *Daily Mirror* (Sydney, NSW), September 19th, 1989, Hewson collection (AQUA); "Killer may lose his bid for sex change," *Daily Telegraph,* September 20th, 1989, Hewson collection (AQUA); NSW, *Parliamentary Debates*, Legislative Assembly, 1 April 1998. https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-14441.

again being cited in 2019 (as I discuss further in Chapter 7) as evidence of the 'dangers' of housing transgender women in women's prisons.

Despite a relatively comprehensive policy based on self-identification in New South Wales, transgender women prisoners were still often housed in male prisons. It is unclear whether prison administrators were ignorant of transgender policy, knowingly disregarded it, or were making use of the possible exceptions outlined in the document. The policy stated that, 'Unless there are overriding security and/or safety concerns arising from the induction screening process, then a transgender inmate is to be placed in a correctional centre appropriate to their gender of identification.'[778] Possible security or safety concerns were fairly broad, including offence history, custodial history, or potential safety risks for either the transgender inmate or other inmates.[779] The policy was developed in consultation with the Gender Centre,[780] however the self-dentification based policy alone was not enough to ensure trans and gender diverse prisoners were housed according to their gender identity.

In Parliament, Sylvia Hale (Greens) brought up the discrepancy between the New South Wales correctional policies for housing transgender people and what was happening in practice following the death of an Aboriginal transgender prisoner, Veronnica Baxter, who died in the male prison at the Silverwater Metropolitan Reception and Remand Centre in 2009.[781] Although policies were being put in place at a high level, the implementation of these policies in practice was very dependent on individual staff members, some of whom likely themselves held transphobic beliefs. As stated by Dean Gilbert, a former prison officer who worked at a New South Wales privatised gaol between 1993 and 2001: 'The transgender people copped it hard. Really hard. Just working with your colleagues and then out of ear

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[778] NSW Dept of Correctional Services, *Management of Transgender Inmates Policy,* 9 December 2000, https://webarchive.nla.gov.au/awa/20001209122800/http://www.gendercentre.org.au/policy/correctional.htm (accessed 11 November 2022).
[779] Ibid.
[780] Originally known as Tiresias House, the Gender Center was the primary hub of trans community activism and an integral space of refuge from its formation in 1983, throughout the 1990s, and after. Riseman, "New South Wales Trans History," 32-33.
[781] New South Wales, *Parliamentary Debates*, Legislative Council, 10 June 2010. https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-40927

shot from the inmates and then you hear what their personal thoughts are of these people. It's disgusting.' Gilbert stated that transgender people were 'treated better by the other inmates than they were by the staff,' and were 'denied hormone treatment and really given a hard time.' Gilbert also reenforced that separation from the mainstream prison population was a common approach to managing trans prisoners: 'A lot of them would have to go onto strict protection and mainly that's for people who were paedophiles, but they would have to go in and join just for their safety into that area.'[782]

The sex segregation of prisons created significant challenges, not only for trans and gender diverse prisoners, but also for prison administrations which struggled to find consistent approaches to housing trans and gender diverse prisoners. Housing practices exposed transphobic and gender essentialist assumptions built into the structure of the prison system about the dangers male (or trans women) prisoners might pose to female (or trans men) inmates. Often these assumptions overlooked the reality of these situations, especially the dangers faced by trans women housed in male prisons.

HRT and Mental Health Services in Prison

While housing was a prominent and immediate concern for transgender people entering prison, there were other significant areas which either uniquely or disproportionately impacted transgender people while incarcerated. Many transgender people required ongoing access to HRT during their sentences or to begin HRT. Transgender people also faced unique challenges to their mental health while incarcerated.[783] Access to HRT for transgender prisoners was a topic of contention during the 1980s, with much of the initial discourse focused on the case of Nicole Louise Pearce commencing HRT during her murder sentence. The media sensationalism led New South Wales authorities to revise HRT commencement procedures to require a panel of psychologists to sign off on an 'identified medical reason'

[782] Dean Gilbert, interview by Noah Riseman, recorded on Zoom, 15 August 2021. Shared with permission.. Note: Dean is himself a Brotherboy, however did not identify as transgender during the time he worked as a prison officer.
[783] Jess Rodgers, Nicole Asquith, and Angela Dwyer, "Cisnormativity, Criminalisation, Vulnerability: Transgender People in Prisons," *TILES Briefing Paper* 12 (2017): 6.

for a prisoner to begin hormone therapy.[784] In 1997 a transgender prisoner, Anna Lawarik, took a test case to the New South Wales Anti-Discrimination Board to challenge this policy. The state's Corrections Health Services consequently reviewed the policy to loosen restrictions on when transgender prisoners could access HRT.[785]

However, when transgender women commenced HRT in prison, political and press discourse continued to call upon the 'outrage' of taxpayer funding being used to support affirming health care, especially when the transgender individuals involved could be presented as dangerous, deviant, or delusional. Examples of this cropped up around Australia throughout the 2000s. In 2001, Lawarik pressed another claim for compensation from the New South Wales Anti-Discrimination Board. The *Daily Telegraph* titled an article about her proceedings: 'Taxpayers Fund Prison Sex Change ─ Paedophile Sues State.'[786] The article pushed the idea that taxpayers were 'footing the bill' for Lawarik's HRT, used only male pronouns to refer to Lawarik, emphasised Lawarik's sentence for sexual offences against minors, and stated that the government could be expected to fight against her case.[787] Ultimately Lawarik lost her case for compensation, as it was decided that she had not been 'transsexual,' within the meaning of the legislation, at the time of the alleged discrimination. In essence, the decision meant that because Lawarik had not yet begun to medically transition at the time of her request to access HRT, she could not at the time be recognised as 'transsexual':[788] This circular argument highlights the flawed logic of such efforts to legislate who is and is not trans or gender diverse along medical lines.

In 2006, a transgender prisoner in Queensland, Natasha Keating, received a payout from Corrective Services after bringing a complaint to the state's anti-discrimination board. While

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[784] "Jails 'not the place' for sex changes," *The Canberra Times* (ACT), 20 September 1989; 'Uproar at no-cost jail sex change for 'devil worship' murderer,' *The Herald* (Sydney), 19 September 1989, John Hewson Collection, AQUA.
[785] David Penberthy, "Taxpayers Fund Prison Sex Change – Paedophile Sues State," *The Daily Telegraph*, 27 August 2001, 3. http://ezproxy.slv.vic.gov.au/login?url=https://www-proquest-com.ezproxy.slv.vic.gov.au/newspapers/taxpayers-fund-prison-sex-change-paedophile-sues/docview/358698614/se-2?accountid=13905.
[786] "Taxpayers Fund Prison Sex Change – Paedophile Sues State," *The Daily Telegraph*, 27 August 2001.
[787] "Taxpayers Fund Prison Sex Change – Paedophile Sues State," *The Daily Telegraph*, 27 August 2001.
[788] Sam Lynch and Lorana Bartels, "Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy," *Flinders Law Journal* 19, no. 2 (2017): 202.

she had not been denied access to hormones (which she began prior to incarceration), she could not purchase other gendered products while incarcerated. When the *Sunday Mail* reported on Keating's case, the article stated that Keating was 'receiving $6000 worth of hormone treatment each year to become a woman – at taxpayer expense'. The article quoted the Queensland Opposition Leader at the time, Lawrence Springborg (National Party), who said: 'This isn't jail or justice. It's a joke. … These jails are operating like holiday camps and the only way to close them down is to change the Government.'[789] In another article, the same publication called Keating a 'serial bandit' and stated:

> It's difficult to know whether to laugh or cry over [her] outrageous demands… Sexual identity is a serious subject and there may be genuine medical grounds for the continuation of hormone treatments begun before imprisonment. However, this enlightened attitude should not extend to indulging the every whim and fashion fancy of criminals. All prisoners – male, female or in-between – are expected to go without many things while they are in prison. That's precisely what prison punishment is all about.[790]

In 2009 in Victoria, an article titled 'Jail Sex-swap Fury: Taxpayers Foot Bill for Prisoners' stated that 'at least eight criminals in [Victoria's] state jails take free medication that develops breasts' and that 'Prison workers said breasts on male inmates destabilised the jail environment.'[791] The article emphasised that prisoners at Ararat Prison could purchase and wear bras, and that the prison was 'home to some of the state's worst sex offenders.'[792] According to the article, the prison authorities would not reveal the cost of the 'contentious treatment' and would not reveal the identities of inmates receiving HRT or the offences for which they had been incarcerated.[793]

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[789] Kay Dibben, "Jail Sex Swap You Pay for - $6000 for Inmate to Become Woman," *The Sunday Mail*, 2 July 2006, 13.
[790] "Gender Bend a Bad Joke," *The Sunday Mail*, 2 July 2006, 54.
[791] Liam Houlihan, "Jail Sex-Swap Fury Taxpayers Foot Bill for Prisoners," *Sunday Herald*, 29 March 2009, 9.
[792] "Jail Sex-Swap Fury Taxpayers Foot Bill for Prisoners," *Sunday Herald*.
[793] "Jail Sex-Swap Fury Taxpayers Foot Bill for Prisoners," *Sunday Herald*.

These are just a few examples of press responses to transgender prisoners, and they say more about the media sensationalism than the prison policies or activities themselves. In fact, the reports imply that transgender people in prisons were successfully advocating for their rights to access HRT and other gender specific services throughout the 2000s. Yet, this happened with some difficulty, given that in multiple cases the prisoners had to go through state anti-discrimination complaint processes. By bringing up the 'taxpayers' expense, HRT was positioned as an unnecessary luxury. By naming transgender inmates as paedophiles, 'bandits,' or sex offenders, these narratives maintained the idea that transgender people who were transitioning in prison were sexually deviant with aberrant motivations. In many cases, these reports presented HRT as frivolous and not something which was essential to prisoners.

Access to gender affirming care improves mental health outcomes for transgender people.[794] Despite these ongoing discourses and media sensationalism, prison policies were recognising (or starting to recognise) the needs of transgender inmates. The 2001 Victorian draft policy emphasised that transgender men required ongoing access to medication (HRT) and that it was necessary to continue to provide access for trans prisoners (the policy in its draft stage only addressed transgender men's needs, although presumably this would apply to transgender women as well). However, there was no mention of procedures for a prisoner needing to commence HRT.[795]

In addition to continuing or commencing HRT, another key point for the physical and mental wellbeing of transgender inmates was reliable access to counselling and mental health services. While all prisoners benefit from access to mental health services, transgender people are especially vulnerable to negative mental health outcomes for a number of reasons, including lack of access to gender affirming care, safe housing while incarcerated, or respectful treatment from staff and/or other prisoners.[796] Without access to gender affirming practices – be it medical, social, or legislative – transgender people are likely to experience

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[794] Jae Sevelius and Valerie Jenness, "Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison," *International Journal of Prisoner Health* (2017): 35.
[795] 2001 - Victoria - Searching Policy Background Information for Training purposes re Search Policy and FtM, p2
[796] Rodgers, Asquith, and Dwyer, "Cisnormativity, Criminalisation, Vulnerability: Transgender People in Prisons," 6.

challenges to both their mental and physical health.[797] Transgender people are more likely than the general population to experience serious mental illness, including depression, anxiety, post-traumatic stress disorder, and to experience suicidal ideation and attempts. It was therefore crucial that authorities actively monitored the mental health of transgender inmates and that inmates had access to reliable and gender affirming counselling and mental health care.[798] The specific vulnerabilities transgender inmates faced, such as sexual assault and targeted abuse, meant that they were particularly at risk in a prison environment. In December 1997, a transgender woman died by suicide at the Silverwater Correctional Complex in New South Wales, where she was raped multiple times.[799] Transgender people in prison were at an intersection of increased risk of assault and increased need for mental health interventions.

At their core, these struggles as trans and gender diverse people attempted to access HRT and essential services demonstrate the issues which prisons faced in their attempts to manage the transgender body. Trans prisoners were pushing for their needs to be recognised and catered for, sometimes successfully, sometimes unsuccessfully. Efforts from the press and politicians to frame transgender needs as frivolous, or to characterise transgender inmates themselves as deviant or sex offenders, shifted the narrative away from the question of what accommodations prisons should be expected to provide, and towards a representation of trans and gender diverse individuals as people who were trying to manipulate the prison services for their own ends. Despite these characterisations, advocacy from trans and gender diverse groups was beginning to lead to legal and legislative changes, and prisons themselves were finding it necessary to develop policy for managing trans and gender diverse prisoners.

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[797] Sevelius and Jenness, "Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison," 34.
[798] Ibid., 36-7.
[799] New South Wales, *Parliamentary Debates*, Legislative Council, 19 November 1998. https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-17042

POLICE AND POLICE LIAISON OFFICERS

There were significant changes from the 1990s to the present regarding how the police approached their interactions with LBGTIQ people. Police LGBTIQ liaison officer programs were established in Australia beginning in New South Wales in the mid-late 1980s and other states and territories from the mid-1990s.

I use the term 'LGBTIQ liaison officer', though this is somewhat misleading. Many of the initial steps towards establishing these liaison officers had a heavy – or exclusive – focus on gay and lesbian issues. This was reflected in the name: New South Wales was the first state to establish the role of Gay and Lesbian Liaison Officer (GLLO), and in 1990 had GLLOs at four locations in Sydney. Victoria established their first GLLO in 2000.[800] The position is now (in 2023) called LGBTIQ+ Liaison Officers in Victoria,[801] but remains 'GLLO' in New South Wales. That said, the New South Wales Police website describing liaison officers is titled 'GLLOs - LGBTIQ Liaison Officers,' highlighting this very tension in naming, focus, and practice. GLLOs, according to this webpage, 'are contact officers for the broader sexuality, gender diverse and intersex communities.' However, the name – Gay and Lesbian Liaison Officers – alludes to the historical focus of this role.[802] While states and territories around Australia use variations on these terms, this inconsistency points to a central tension in how the role of LGBTIQ liaison officer/GLLO relates to trans and gender diverse people. Is the role even *for* them? Are liaison officers specialised in trans and gender diverse issues?

Police forces founded liaison officer programs to improve interactions and relationships between police and the LGBTIQ community.[803] There were two key factors which influenced the introduction of police/LGBTIQ partnership programs both in Australia and

[800] Alan Berman and Shirleene Robinson, *Speaking out Stopping Homophobic and Transphobic Abuse in Queensland* (Bowen Hills: Australian Academic Press, 2010), 137-8.
[801] "LGBTIQ+ liaison officers," Victoria Police, https://www.police.vic.gov.au/LGBTIQ-liaison-officers (accessed 11 November 2022).
[802] "GLLOs - LGBTIQ Liaison Officer," NSW Government – NSW Police Force, https://www.police.nsw.gov.au/safety_and_prevention/your_community/working_with_lgbtqia/lgbtqia_accordian/gllos_-_lgbti_liaison_officers (accessed 11 November 2022).
[803] Dwyer et al., "Barriers Stopping LGBTI People from Accessing LGBTI Police Liaison Officers: Analysing Interviews with Community and Police," 256. Angela Dwyer, "Pleasures, Perversities, and Partnerships: The Historical Emergence of LGBT-Police Relationships," in *Handbook of LGBT Communities, Crime, and Justice* (New York: Springer, 2014), 11.

internationally: one was an increased awareness of, and legislative support for, the civil and human rights of LGBTIQ people; the other was an increased demand for accountability from police. In Victoria, the police raid of the Tasty nightclub in 1994 led to organised legal action against the conduct of police and eventually around $6 million being awarded in damages to victims.[804] In Victoria, the first Gay and Lesbian Police Liaison Officer was appointed in February 2000.[805]

In a letter to Karen Gurney in December 2001, the Victorian Police Acting Superintendent Jill Wood, Manager of the Equity and Diversity Unit, outlined the various practices of Victoria Police for 'ensuring a working environment free of unlawful discrimination, sexual harassment and victimisation' for transgender people. The letter stated that there was force-wide Rights and Responsibilities training which focused on the Equal Opportunity Act 1995 (which was amended in 2000 to include protection for discrimination on the grounds of gender identity or sexual orientation), which included training on transgender and intersex issues. The letter stated that 'it is envisaged that all members of all ranks will have attended training during their career,' and that it was the responsibility of local managers to identify staff who required training and to coordinate the provision of the training, which was conducted on 'an ad hoc basis when the need is identified.' While there was no specific policy related to transgender people, the 'Victoria Police [did] employ a concentrated approach to managing diversity within the force.'[806] The letter also emphasised the introduction of Gay and Lesbian Liaison Officers at regional branches. It is important to note that while this letter outlines some high-level awareness of the need for training, it was vague on how this training was being disseminated within the force. Although it was 'envisaged' that all members of the police would attend this training, the strategy outlined to implement this (that is, on 'an

[804] In August 1994 around 40 police officers raided the Tasty nightclub in Flinders Lane, detaining and strip searching around 463 patrons. Six individuals were charged with possession of illicit substances. Patrons perceived the raid as targeted and a homophobic response, and an action group, COPIT (Casualties of Police Intimidatory Tactics), was formed following the raid which successfully ran a class action lawsuit against Victoria Police for damages. Graham Willett, "Tasty," *Secret Histories of Queer Melbourne*, Australian Lesbian and Gay Archives, 2011: 156-158.
[805] "Enough Is Enough: A Report on Discrimination and Abuse Experienced by Lesbians, Gay Men, Bisexuals and Transgender People in Victoria," 54.
[806] Jill Wood to Karen Gurney, 'Letter from the Victoria Police Office of the Chief Commissioner of Equity and Diversity,' 12 December 2001, courtesy Julie Peters.

ad-hoc basis when the need is identified' by local staff) gave little assurance that training was being systematically provided to all members of the police force.

This is not to say there were no instances of any police officers receiving specialised training for engaging with transgender civilians. One Western Australian politician, Lisa Loraine Baker (ALP), said in 2009 of her brother's experience joining the WA police:

> He came home at night very concerned to make a good impression and to learn well, and wanting to role-play some of the scenarios he was being asked to work on in his training. Some of the scenarios I remember him wanting to roleplay were how to deal with different religious groups and people from different ethnicities and how to deal with gay, lesbian, bisexual and transgender issues – a fleet of quite diverse and unique circumstances. Extensive training is given to police officers.

However, she did also note that there was significant risk when police officers did not receive sufficient training: 'Once people are put on the front line with the public, they need to be well trained and very well skilled in managing those diverse situations, otherwise we are setting them up for failure and for a potentially disastrous situation; we are certainly not setting them up to contribute to law and order in this state.'[807]

In a *Polare* article from 2005, Katherine Cummings stated that New South Wales Police did not have a policy specific to transgender people, despite a 'constant stream of complaints' from transgender civilians about the experiences they have had with the police. (Interestingly, a previous issue of *Polare* stated in 2001 that a New South Wales Police Service Transgender Policy was in development and would 'soon be implemented [to] ensure that transgender people, like all members of the community, will be treated with respect and dignity in any dealings they have with the police.' It is possible that the policy was in place by 2005 – and it is also plausible that it was not widely known, especially in the general public.[808])

[807] Western Australia, *Parliamentary Debates*, Legislative Council, 13 October 2009, 7886. https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/868D2266F819D894C825765100210AC0/$file/A38%20S1%2020091013%20All.pdf Note: this was in debate on a Police Amendment Bill, not specifically related to transgender criminal justice – except when raised by Baker.
[808] Elizabeth Riley, "Manager's Report: N.S.W. Police Service Transgender Policy," *Polare* 39 (April 2001).

Cummings stated: 'Despite the existence of Gay & Lesbian Liaison Officers (G.L.L.O.s) in the Police Service Officers, this is often an add-on duty handed to a junior member of the police at a given station, and little training is provided to make the classification meaningful. In the State of New South Wales there is only one full-time G.L.L.O. … Nor is there adequate protection for the transgendered in public.'[809] Similarly, when liaison officers were being set up in South Australia, select police officers had the role combined with their previous operational duties, and Local Service Area (LSA) commanders had the option to call for police within their LSAs to volunteer to have liaison officer duties added on 'to their substantive roles.'[810]

In day-to-day interactions with police, transgender people faced significant challenges. A 2001 *Polare* article by Gender Centre director Elizabeth Riley discussed the reasons transgender people might not report violence to the police. Riley highlighted some of the key issues trans people in New South Wales continued to face when interacting with the police – as well as some of the reasons police responses might be viewed as insufficient. The article featured extracts from interviews with trans people recounting their experiences of reporting incidents to the police. One interviewee, Kirk, gave his account:

> The police were … classic. I had to go down to the police station to make a statement and I said to the guy that I was transgender. He said, "oh you want to be a girl do you?" and I said, "No, I've been there, done that, didn't like it, you know, changed sex". I tried to make light of it because you know, you take the power away from them and give it to yourself if you can laugh at yourself. They don't laugh at you because it'll not achieve anything. I just said to him, "look I've got to go to the toilet. Can I go?" He said "which one would you use?" I just looked at him and I said "you've got to be kidding haven't ya?" - I had a beard you know. He said "oh the ladies are around there". I said "you might use the ladies sweetheart but I'll go here. From that moment on, because I called him a

[809] Katherine Cummings, "Organisational and Institutional Violence against the Transgendered: Sins of Omission and Sins of Commission," *Polare* 62 (March 2005).
[810] South Australia, *Parliamentary Debates*, Legislative Council, 23 November 2006, 1154. http://hansardpublic.parliament.sa.gov.au/_layouts/15/Hansard/DownloadHansardFile.ashx?t=historicpdf&d=HANSARD-4-1646

> sweetheart, he was an absolute pig. … He [the copper] made it so hard for me. … I knew who it was. Everyone knew who it was but the coppers couldn't find him. They could never find him and when he'd boasted about murdering someone already I, I actually took what he said very, very seriously because even if he's only … does half of what he says he's gonna do that's enough. That's too much uhm, but no, coppers don't listen to you.[811]

Another transgender man, Steven, said that he had chosen not to report his rape because he anticipated negative responses from police because he was transgender: 'Number one, why should I have to walk in there and educate them? I've just been raped or bashed or stabbed. Why should I have to, as a trannie boy, walk in there and say and educate the policeman or whoever, the police woman that I am transgender when I'm suffering all these, all these other pains? So no I wouldn't even step into the police station.'[812]

These accounts suggest that transgender people both anticipated and experienced discriminatory and/or insensitive responses from police when they disclosed that they were transgender. By contrast, the police officers who were interviewed seemed to minimise the role that being transgender might play in trans people's experiences of violence:

> There was a case just recently where the Gender Centre contacted me about a transgender person who had been assaulted. They thought it was a transgender related bashing. I contacted the commander just to assist in the development of policy. I wanted to find out more about what was happening out there. I rang the commander and had a good chat to him. He looked into it and found that it actually had nothing to do with the person being a transgender. The person was a drug supplier and there had been [a deal gone wrong]. Then when I relayed that information back and they went out to see the person to keep in contact and make sure that that person's okay

[811] Elizabeth Riley, "Reporting Transgender Violence: Encounters with the Police," *Polare* 39 (April 2001).
[812] Ibid.

they actually did come across the person dealing in drugs and thought okay this is what we're looking at here. So it's really, it's really tricky.'[813]

As noted by Riley, the police response assumed 'the mutual exclusivity of violence associated with drug dealing and violence against transgender people. The either/or logic erases transgender.'[814]

When asked about whether they would feel safer reporting violence to Gay and Lesbian Liaison Officers, trans people's responses included in Riley's survey were not necessarily more positive. Karen, a transgender woman, stated: 'I think because they're called gay and lesbian liaison officers it doesn't mean that they know anything about transgender. Sometimes they don't even know much about gay and lesbian issues.'[815] Kirk echoed this sentiment: 'You need a transgender person to liaison … because how could they [gay and lesbian liaison officers], they, they couldn't, they could probably have empathy for you, but they wouldn't they'd understand but they wouldn't have, they wouldn't know what we go through.'[816] Steven, however, emphasised the need for education and training for all police including liaison officers: 'If they were educated I'd feel safe. I don't care what their gender is, what they've got between their legs, what their sexuality is as a police officer or medical staff but if they were educated and, and empathetic around transgender issues, then I could [report incidents of violence to gay and lesbian liaison officers].'[817]

The *Enough is Enough* report (2000) conducted by the Victorian Gay and Lesbian Rights Lobby noted the work that Victorian police had done to review policies and implement Gay and Lesbian Liaison Officers (as they were known at the time) and noted that reports of police discrimination and abuse against LGBTIQ people had dropped substantially from the previous 1994 survey.[818] However, much of this work focused on gay, lesbian and bisexual

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[813] Ibid.
[814] Ibid.
[815] Elizabeth Riley, "Reporting Transgender Violence: Encounters with the Police," *Polare* 39 (April 2001).
[816] Ibid.
[817] Ibid.
[818] "Enough Is Enough: A Report on Discrimination and Abuse Experienced by Lesbians, Gay Men, Bisexuals and Transgender People in Victoria," 27.

issues,[819] not necessarily transgender issues, and the report also stated that 'transgender participants were three times more likely than other women and twice as likely as other men to report having experienced discrimination or abuse related to police matters.'[820] There is no doubt police took actions across the 1990s and 2000s to improve their interactions with the LGBTIQ community. However, the accounts from transgender people consistently demonstrate the limits of these police initiatives which appear to fall short of establishing lasting trust with the trans and gender diverse community or adequate awareness of trans and gender diverse issues.

LEGAL AND LEGISLATIVE CHANGES

Recognition for transgender people, specifically in the criminal legal system and incarceration, comprised a range of law reforms, legislative changes, and prison administration policies across a range of state and governmental institutions. As such, states often developed legislation and policy separately from one another leading to a scattered patchwork of legislature and regulation around the country – as shown in the table below which outlines the state-by-state prison policies and legislation throughout the 1990s and 2000s.

[819] Ibid., 28.
[820] Ibid., 7.

TABLE 2. LEGISLATION CHANGES OVER TIME:

State	Act established to legally recognise transgender people as their affirmed gender	Policies/Procedures or Acts for the management of transgender people in prisons/custody etc.
VIC	Births Deaths and Marriages Registration Act 1996 (2005)	Victoria State Government, Commissioner's Requirements – Part 2 (23 May 2016). Corrections Victoria Commissioner, 'Management of Prisoners with Intersex Conditions or Transsexualism' (Commissioner's Requirements, March 2016).
NSW	Births, Deaths and Marriages Registration Act 1995 No 62 (1996)	NSW Government, 'Section 7.23 Management of Transgender and Intersex Inmates' (Operations Procedures Manual, Corrective Services NSW, December 2015). Corrective Services NSW, '12.2 – Classification of Female Inmates' (Offender Classification & Case Management Policy and Procedures Manual, March 2015).
QLD	Births, Deaths and Marriages Registration Act 2003	QCS, Custodial Operations Practice Directive – Admissions and Induction, implemented 31 March 2014

NT	Births Deaths and Marriages Registration Act 1997	None publicly available.[821]
WA	Gender Reassignment Act 2000 (WA)	Western Australian Department of Corrective Services' Policy Directive 85 Prisoner Reception – Procedures
SA	Sexual Reassignment Act 1988 (SA)	None publicly available.[822]
TAS	Births, Deaths and Marriages Registration Act 1999 (2002)	None publicly available.
ACT	Births, Deaths and Marriages Registration Amendment Act 1997 (ACT)	Corrections Management Act 2007 (ACT) and ss 169A 169B of the Legislation Act 2001 (ACT). Corrections Management (Reception and Management of Transgender Prisoners) Policy 2007 (ACT) [1.4].

[821] Blight states that the Northern Territory has a policy, but none appears to be publicly available. Lynch and Bartels note this in their own review in 2017. Lynch and Bartels, "Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy," 224.

[822] Similar to above, Blight references a 'fairly comprehensive policy based on surgical reassignment' operating in South Australia. However, Blight does not name the policy and no policy is publicly available, as noted by Lynch and Bartels and my own searches. Ibid., 221-2.

In 2000, Jake Blight examined the available prison policies, anti-discrimination laws, and gender recognition legislation around Australia. He found that New South Wales, Western Australia, South Australia, and the Northern Territory all had prison policies for managing transgender inmates. Each policy took a somewhat different approach to gender recognition, whether based on surgical intervention, self-identity, or social approaches. New South Wales, as noted previously, had the only policy Blight described as 'comprehensive.' Victoria had a policy 'under development,' Tasmania had no formal policy, and Queensland at the time did not respond to any inquiries about their policy situation.[823] The Tasmanian government did, however, in 2000 repeal a law – in the 1935 Police Offences Act – which stated that men could be arrested for wearing female attire. Prior to repealing this law, Tasmania was the only state or territory in Australia where it was explicitly illegal to wear clothing designated for another gender.[824]

As each state and territory began to include transgender people in anti-discrimination legislation, legislators grappled with questions about whom to recognise as their affirmed genders. New South Wales developed their anti-discrimination reforms in 1996 with submissions from trans lobbying groups such as the Transgender Liberation Coalition and the Transsexual Action Group, and core to the development of the bill was deciding whom to class as transgender.[825] The Transgender Liberation Coalition (TLC) advocated for a wide-reaching definition of transgender which rejected a rigid gender binary and emphasised self-determination of gender over surgical intervention.[826] New South Wales parliamentarians considered the lobby's submissions and drew significantly from trans activist Roberta Perkins' 1994 report on HIV/AIDS risk in the transgender community.[827] The Transsexual

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[823] Blight, "Transgender Inmates," 2.

[824] Tasmania Police, 'Tasmanian Police Offences Act 1935: 2011 Public Consultation,' (2011) https://www.police.tas.gov.au/uploads/legacy/file/Miscellaneous/Tasmanian%20Police%20Offences%20Act%201935%20-%20Public%20Consultation.pdf (accessed 20 September 2021).

[825] Jesse Hooley, "Normalising Transgender and Policing Transgression: Anti-Discrimination Law Reform Ten Years On," *Australian Feminist Law Journal* 25, no. 1 (2006): 79-80.

[826] Ibid., 87.

[827] Roberta Perkins, *Transgender Lifestyles and HIV/AIDS Risk* (Canberra: Australian Government Publishing Service, 1994). This report was a project undertaken by Roberta Perkins and funded by the Commonwealth Department of Human Services and Health. Although nominally about HIV/AIDS risk in the transgender community, the report was more wide-reaching than the title suggests and consisted of an in-depth survey and

Action Group, however, believed that TLC's more radical gender politics were 'political poison' and advocated for anti-discrimination and birth certificate reform only for transgender people who had undergone gender affirmation surgery.[828] While the resulting legislation passed in 1996 was relatively comprehensive for transgender protection, it still relied on the construction of in-groups and out-groups of who was considered transgender. The law prioritised those for whom transgender identity was a permanent and visible characteristic (for example, binary transgender people who had gone through gender affirmation procedures to cross from male to female or female to male), over, for instance, those who changed their presentation or identity episodically (such as nonbinary or genderfluid people who did not align with a binary gender and who may choose not to go through any gender affirmation procedures or who may choose unconventional procedures).[829] In all instances of transgender law reform around Australia, legislators made determinations of which transgender people were protected and recognised. As Chapter 7 will explore, many states and territories would amend the law further down the track – especially in the 2010s-20s – to broaden the categories and/or alter the language used.

Likewise, each state and territory criminal legal system also needed to house transgender people entering prison. There was not necessarily a direct correlation between state legal recognition of transgender people's affirmed gender versus where authorities housed trans people in prisons. For example, as of 2000, New South Wales and Western Australia would house a transgender woman who had not undergone gender affirmation surgery in a female prison but considered her male under birth certificate legislation. In the Australian Capital Territory, the same trans woman would be recognised as male under legislation and housed in a male prison. However, if she had undergone 'breast implants and castration' (in Blight's terminology), the Australian Capital Territory would consider her female under legislation, but still house her in a male prison. If she had 'penis and testicles removed, vagina and labia

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consultation with transgender people around Australia. It covered demographic information, employment information, interactions with the criminal justice system, health outcomes, etc.

[828] Riseman, "Transgender Activism and Anti-Discrimination Reform in 1990s New South Wales and Victoria," 329.

[829] Jesse Hooley, "Normalising Transgender and Policing Transgression: Anti-Discrimination Law Reform Ten Years On," *Australian Feminist Law Journal* 25, no. 1 (2006): 95.; ibid.

created', she would theoretically be housed in a female prison (and recognised as female under legislation). Yet, a transgender man who also had gender affirmation surgeries (hysterectomy and mastectomy) would be recognised as male under legislation but still housed in a female prison.[830] The details of gender recognition under legislation did not guarantee that an individual's gender would be recognised for the purposes of incarceration, or vice versa.

As an aside, Blight did not consider the hypothetical scenarios of a trans man who had undergone 'bottom surgery' (e.g., phalloplasty or metoidioplasty). This is likely because these surgeries were not widely available in Australia at the time and, as Blight said: 'Few FtMs have genital surgery and such surgery is considered experimental and its results imperfect.'[831] Phalloplasty was not accessible in Australia until the late 1990s, and even then there was only one surgeon who performed it until he stopped around 2010.[832] Many policies left out transgender men entirely. As Blight stated: 'The Western Australian policy, like most others, says very little about FtM transgender prisoners leaving their placement entirely at the discretion of the prison administrators without any policy-based guidance.'[833]

According to transgender author and advocate Katherine Cummings, New South Wales created their prison policy – deemed by Blight to be the most thorough of all states – following the rape and suicide of the transgender prisoner in 1997 at the New South Wales Silverwater Correctional Complex mentioned earlier in this chapter. Prior to this, 'there was no official policy in New South Wales prisons on appropriate treatment for incarcerated transgender people. For a long time, pre- or non-operative transgender people were placed in the prisons appropriate to their birth gender.'[834] Cummings added that, despite New South Wales introducing the policy:

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[830] Blight, "Transgender Inmates," 3.
[831] Ibid., 5.
[832] Riseman, "A History of Trans Health Care in Australia: A Report for the Australian Professional Association for Trans Health (Auspath)," 29.
[833] Ibid., 4.
[834] Katherine Cummings, "Organisational and Institutional Violence against the Transgendered: Sins of Omission and Sins of Commission," *Polare* 62 (March 2005).

> We are still made aware at the Gender Centre of repeated abuses of transgender people, and various forms of victimisation from correctional staff and from other inmates. The situation will not be remedied until correctional staff are trained more thoroughly in the necessity to know and observe the rules, training which will need to be enforced at all levels, with persistent transgressors being disciplined and/or dismissed.[835]

Policies in prisons, as well as legislation to recognise trans and gender diverse people's gender identities under the law, were applied inconsistently and varied significantly around the country. In a sense, this should not be a surprise: one could argue that such policies, in the context of prisons, were trying to fit a square peg into a round hole. No policy which was based on sex characteristics or gender affirmation surgeries was going to account for the full range of trans and gender diverse experiences and realities. Policies which were based on self-identification, meanwhile, were more appropriate to trans and gender diverse lives, but challenged the rigid structures and binary classifications of the prison system, as will be explored further in the chapter to follow.

CONCLUSION

It is evident that the 1990s and 2000s saw notable shifts for trans and gender diverse people in legislation, policy, social visibility, advocacy, and subsequently in their interactions with the criminal legal system. Awareness of transgender existence heightened during these decades, and many legislative and legal institutions raced to catch up with the issues trans and gender diverse people were already discussing within their own communities. Many of these debates focused on the question of when someone could or should be considered transgender – and, more broadly, what *gender* was. Was gender a fixed biological category which could only be changed via surgery (and perhaps not even then)? Or was it a social category based on identification and lived experience?

There is a lot of nuanced discussion around the nature of gender and gender categorisation. However, when it came to legislation and policy – especially in relation to, for instance,

[835] Ibid.

prison housing – nuanced approaches to gender created significant challenges. There is little room for nuance when deciding where to house someone in a binary sex segregated prison system, and the alternative possibilities (such as solitary accommodation) often present significant challenges to a prisoner's wellbeing and human rights. Within the context of policing, again, real awareness of and engagement in transgender issues fell behind steps taken to build better engagements with LGB(TIQ+) communities. There were undoubtedly steps taken, many of them significant and tangible. However, there were also limitations. LGBTIQ liaison officers already faced challenges in training and time allocation, let alone the simple fact that transgender issues could be very different to, and in some cases seemingly at odds with, the broader issues lesbian, gay and bisexual members of these communities.

As noted earlier, this chapter must be read in conjunction with the following chapter, which looks at where these issues are at now, and what changes still need to be made. What is notable about the turn of the twenty-first century and the decades to follow is the rapid awareness of and response to transgender issues. This response is very much ongoing, and the tensions outlined in this chapter are, for the most part, not yet resolved. While activists, legislators and prison officials laid the groundwork during the 1990s and 2000s for significant change, there were fundamental tensions at play which – the next decades would show – could not be reconciled.

CHAPTER 7

CHALLENGES FROM THE 2010S AND ONWARDS

This final chapter examines trans and gender diverse experiences with the criminal legal system during the 2010s and up to the present in 2023. The issues discussed in this chapter are ongoing and subject to rapid change as new developments emerge in terms of legislation, policy, practice, and training at all levels of the criminal legal system. As noted in the previous chapter, these developments occurred in the wake of a broad wave of initial attempts at policy and legislation around Australia aimed at addressing trans and gender diverse needs in the criminal legal system. However, there were many ways in which these changes were limited, prompting further amendments in the decades to follow, which I look at here. In examining these present-day issues, I aim to shift the focus toward overarching questions about the structure and form of the Australian criminal legal system and the ways in which the lived realities of trans and gender diverse people challenge some of the core assumptions built into practices of policing and incarceration. In short: trans and gender diverse people illuminate some of the flaws in how systems categorise and control bodies. Unravelling these contradictions not only has consequences for trans and gender diverse people in the criminal legal system but has broad implications for examining the management and categorisation of all bodies in a range of social and institutional settings.

This chapter begins with some broader discussion about prisoner rights, incarceration, and bodily control, and how these relate specifically to trans and gender diverse people. Next, it will explore changes to policy and legislation within Australia throughout the 2010s and the 2020s (so far), noting updated state and territory legislation in the period since the end of the last chapter, and the implications these have had on correctional and police policies. Many state and territory governments have, for example, updated Acts to broaden the definitions or requirements to recognise transgender people as their affirmed gender more easily, such as through the removal of requirements for people to have surgery to update their identity documentation. Although most legislative reforms in Australia throughout this period have

been positive (if gradual) for trans and gender diverse people's rights, it is also necessary to discuss the heightened societal scrutiny that trans and gender diverse people are experiencing, both in Australia and internationally. In countries such as the United Kingdom and the United States, trans and gender diverse people have been the subject of intense reactionary political focus since the mid-2010s, including rising rates of transphobic hate crimes and the introduction of anti-trans law and legislation.[836] This rise in transphobic rhetoric has affected the political and legislative landscape in Australia, and also the lived experiences of trans and gender diverse people, especially in how they engage with state institutions such as the criminal legal system.

The next sections of the chapter will look at the experiences of trans and gender diverse people in prison or detainment, or with police – especially the relationship with police LGBTIQ liaison officers. Liaison officers are a specific response from police forces around Australia to address the historical tensions between police and the LGBTIQ community, aiming to provide a contact point for LGBTIQ people. However, there have been challenges with this role, ranging from liaison officers being overworked and spread across multiple regions, to lacking adequate training (particularly in trans and gender diverse awareness), through to LGBTIQ community members being unaware of their existence or how to access them. There are also the questions of: who benefits from the role of the liaison officer? Does the role protect LGBTIQ people in their interactions with police, or does it pinkwash their interactions with LGBTIQ communities?[837]

Finally, this chapter contends that many of the tension points between the legislative changes and the lived experiences of trans and gender diverse people in the criminal legal system emerge from a lack of implementation of overarching legislation/policy into meaningful

[836] "Combating rising hate against LGBTI people in Europe," *Council of Europe*, https://assembly.coe.int/LifeRay/EGA/Pdf/TextesProvisoires/2021/20210921-RisingHateLGBTI-EN.pdf (accessed 10 June 2022); Sam Levin, "Mapping the anti-trans laws sweeping America: 'A war on 100 fronts'," *The Guardian*, 15 Jun 2021, https://www.theguardian.com/society/2021/jun/14/anti-trans-laws-us-map (accessed 10 June 2022).

[837] 'Pinkwashing' in this context refers to the strategies employed by states and corporations to employ LGBTIQ inclusive messaging for profit and self-promotion, particularly when this messaging obscures the ways that these actors contribute to ongoing violence, oppression, and marginalisation against LGBTIQ people and other marginalised communities.

work and training on the ground. These tensions highlight fundamental incompatibilities between the goals of criminal legal institutions and the systems necessary to allow people to meaningfully live as their authentic selves. They also highlight that trans and gender diverse issues in the criminal legal system are fundamentally structural and societal and cannot be fully addressed separately from trans liberation and education on a broad, social level.

GENDER REGULATION IN PRISONS

To discuss the challenges trans and gender diverse people pose to the practices and logic of prisons, it would be worthwhile first to discuss what prisons *do*. In *Discipline and Punish*, Foucault stated that 'imprisonment … has never functioned without a certain additional element of punishment that certainly concerns the body itself: rationing of food, sexual deprivation, corporal punishment, solitary confinement. Are these the unintentional, but inevitable, consequence of imprisonment?'[838] Within Foucault's framework, the model of a prison is a site of both disciplinary power and power over the body, fundamentally restricting mobility.[839] Prisoners are restricted in their activities and movements and subjected to rigid management of where and how they can interact with their environments.

One aspect of this bodily control is sex or gender segregation. While Foucault never explicitly discussed the gendered element of incarceration, it is a key – near ubiquitous – element of most prisons around the world. The sex or gender segregation of prisons sits in contrast to many other institutional spaces such as (most) schools and universities, medical spaces, and workplaces where gender mixing is now the norm.[840] Gender mixing has not always been the norm in these institutions. Most of these spaces have been sex integrated since the nineteenth century as women have advocated and fought for their rights to access to education, participation in public spheres and institutions, and the labour market.[841] It is relevant to ask why this sex integration has not extended to prisons as well – and why there seems to be less

[838] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd Vintage Books ed. (New York: Vintage Books, 1995), 16.
[839] Christophe Mincke and Anne Lemonne, "Prison and (Im)Mobility. What About Foucault?," *Mobilities* 9, no. 4 (2014): 528.
[840] F Driver, "Power, Space, and the Body: A Critical Assessment of Foucault's Discipline and Punish," *Environment and Planning D: Society and Space* 3, no. 4 (1985).
[841] Saunders and Evans, *Gender Relations in Australia: Domination and Negotiation*, 221-4.

push to create co-correctional spaces compared to many of these other institutions. It appears that there are many assumptions about sex and gender interaction which are still enmeshed into the characteristics of prisons and how prison spaces are structured. To draw a comparison with professional sports (another institution which remains mostly sex segregated), there is an inbuilt assumption in the segregation of male and female sports that presupposes that even the best, most resilient, strongest, and talented female athletes will not be able to compete with male superiority.[842] Women must therefore be protected from sex-integration to hold their own space. Similar assumptions seem to be at work in the carceral space, that physical and sexual safety for women would not be possible in co-corrections spaces. However, it is important to acknowledge that many of the features of prisons which, as a society, we take for granted are not, fundamentally, *intrinsic* to incarceration.

The systems of power and control which operate in a prison are also not restricted only to the prison site. Incarceration and criminalisation are tools used by states to exert power over groups, and the effect of that power (as stated by Stephen Dillon, the 'regimes of accumulation, discipline, and immobilization [built] on much older regimes of racist and patriarchal terror and exploitation'[843]) impacts especially queer and trans people, non-white people, and disabled people continually subjected to intensified regulation as they move through society. This can shape efforts to find stable employment, housing, and support: 'The prison is thus not outside of social production, but rather, foundational to it, making subjects on all sides of the prison walls.'[844]

In recent decades, there has been greater discourse around the structure and nature of prisons, and the rights of prisoners while incarcerated. In some cases, shifting prison policies and guiding principles have moved towards limiting the physical restrictions of prisons and moving the focus away from control of movement and mobility.[845] We must be cognisant of the fact that even if sex or gender segregation of prisons *seems* ubiquitous (like restriction of

[842] Alex Channon et al., "The Promises and Pitfalls of Sex Integration in Sport and Physical Culture," *Sport in Society* 19, no. 8-9 (2016): 1112.
[843] Stanley and Smith, *Captive Genders: Trans Embodiment and the Prison Industrial Complex*, 173.
[844] Ibid., 176-9.
[845] Mincke and Lemonne, "Prison and (Im)Mobility. What About Foucault?," 537-41.

movement), that does not mean it is in practice. In fact, the presence of trans and gender diverse people in prisons highlights that the sex or gender segregation of prisons in Australia is not uniform and, fundamentally, *cannot* be within the current framework of incarceration. I have said 'sex or gender segregation' throughout this section to highlight the fact that it is unclear at present what is being segregated. While many policies (as will be discussed further shortly) emphasise gender identity, in practice, sex-based characteristics seem to determine housing most of the time. Beyond the challenges these practices pose for trans and gender diverse prisoners, the discrepancy raises a broader question about the system as a whole: What is the purpose of sex or gender-based segregation of prisoners? Whom does it work for, whom does it work against, and what can it tell us about the ways that bodies are managed and separated in prison overall?

Policy and Legislation Changes

In Chapter 6, I explored the various state and territory legislation changes related to trans and gender diverse rights which took place during the 1990s and 2000s. Since the 2010s, many states and territories have amended their legislation further. While I will not go through these amendments in detail, it is important to note that most of these changes have focused on shifting terminology to be more inclusive, particularly of nonbinary gender diversity, and on broadening the 'requirements' to be recognised as transgender. This might include removing requirements for hormones or surgery and focusing instead on self-nomination of gender identity. The key point I highlight here is the way that these changes increase the tensions between legal recognition of gender and prison practices. The following section will explore the ways that prisons determine where to place trans and gender diverse prisoners but suffice to say for now: despite changes to policy, the practice still tends to focus on sex assigned at birth and genitalia. This sits distinctly at odds with state and territory governments relaxing requirements necessary for changing one's sex on, for example, legal documents, meaning the rigid idea of binary gender inside prisons is increasingly at odds with the rest of Australian state and territory institutions.

There has been some research on the state of trans and gender diverse legislation around Australia during the 2010s. In 2017, Sam Lynch and Lorena Bartels conducted a review of

the state of law and policy in relation to trans and gender diverse people in Australian prisons. Some details may have changed since this study, especially in Tasmania and Victoria with amendments made in 2019 to birth certificate legislation allowing trans and gender diverse people to self-nominate their sex under law.[846] Lynch and Bartels referred extensively to Blight's prior review (as discussed in Chapter 6), noting – like Blight – that neither decisions based on anti-discrimination legislation or decisions based on birth certificate legislation within a prison context guarantee that transgender people will be housed in appropriate facilities.[847]

As of 2017, New South Wales and Tasmania were the only states or territories to define 'transgender' in their anti-discrimination legislation, while the remainder of the states used varying and sometimes vague terms including 'gender identity', 'sexuality' or 'gender history'. This could cause issues for trans and gender diverse people who might be recognised as transgender in one state but not in another.[848]

As noted by Lynch and Bartels, if the law fails consistently to identify trans and gender diverse people as their affirmed gender, this will, by extension, lead to inadequate and incorrect incarceration practices.[849] However, it is worth noting that legislation which *does* correctly identify transgender people as their affirmed gender does not necessarily mean that they will be housed correctly in prison. These policies and the ways they were applied were messy and inconsistent. In fact, uncertainty and ambiguity were the only consistent elements surrounding them.

In 2017, only one correctional legislative framework in Australia specifically acknowledged transgender offenders. The *Corrections Management Act 2007* (ACT) stated that the director-general would determine the sex of the detainee upon admission to the correctional

[846] Tasmanian Government, "Gender Registration," Births, Deaths and Marriages, https://www.justice.tas.gov.au/bdm/gender-registration (accessed 12 December 2022); *Births, Deaths and Marriages Registration Amendment Act 2019* (VIC), https://www.legislation.vic.gov.au/as-made/acts/births-deaths-and-marriages-registration-amendment-act-2019 (accessed 11 November 2022).
[847] Lynch and Bartels, "Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy," 196.
[848] Ibid., 190.
[849] Ibid., 191.

institution, potentially including consideration of the individual's self-nominated gender (but not necessarily). No other states and territories had a legislative framework which acknowledged transgender people specifically for prisons, and therefore management was left up to individual correctional policies.[850] Usually, any HRT that commenced prior to incarceration could be continued – however, it is not always possible to commence HRT while in prison.[851]

These legislative changes and frameworks developed off the back of significant social progress for trans and gender diverse people across the 2000s and 2010s. Trans advocacy and visibility saw huge strides during this period. However, in recent years, transphobic rhetoric and anti-trans legislation and hate-crimes have intensified significantly in the Western world. Susan Stryker cited the publication of Sheila Jeffreys's *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* in 2014 as being 'in retrospect … an inflection point in the resurgence of a transphobic feminist discourse that had seemed on the wane for nearly a quarter century.'[852] In the United Kingdom, the public debates around the *Gender Recognition Act* in 2018 have been described as being 'a flashpoint in the mainstreaming of what many recognize as trans-exclusionary radical feminism (TERF).'[853] A 2021 study showed that the Brexit vote in the UK resulted in a significant increase in crime motivated by transphobia in the month following the referendum.[854] According to a Human Rights Campaign report, 2021 was the deadliest single year for trans and gender diverse people facing fatal violence on record.[855] In Australia, transphobic rhetoric and issues were brought

[850] Ibid., 209-11.
[851] Ibid., 195.
[852] Susan Stryker, "Introduction: Trans* Studies Now," *TSQ: Transgender Studies Quarterly* 7, no. 3 (2020): 303.
[853] Ezra Horbury and Christine "Xine" Yao, "Empire and Eugenics: Trans Studies in the United Kingdom," ibid.: 446.
[854] Sylwia J Piatkowska and Brendan Lantz, "Temporal Clustering of Hate Crimes in the Aftermath of the Brexit Vote and Terrorist Attacks: A Comparison of Scotland and England and Wales," *The British Journal of Criminology* 61, no. 3 (2021): 659.
[855] Jay Brown and Tori Cooper, "An Epidemic of Violence 2021: Fatal Violence against Transgender and Gender Non-Conforming People in the United States in 2021," (Human Rights Campaign Foundation, 2021).

into the 2022 Commonwealth election discourse, though the transphobic candidates and their enablers lost the election.[856]

This chapter is not about the rise in transphobic violence and rhetoric in Australia and abroad. However, it is important to flag this context as a pervasive element which is currently underlying all interactions trans and gender diverse people have with social, legal, and state institutions. This intensification of transphobic rhetoric often means that trans and gender diverse people and trans rights activists are scapegoated for systemic and institutional issues, including within a prison environment. For example, in August 2022, the *Herald Sun* newspaper published an article by Rita Panahi which stated that the 'radical trans lobby continues to exercise disproportionate power in Australian institutions, both public and private, with little accountability.'[857] Pahani argued that inmates in the Dame Phyllis Frost Correctional Centre, a women's prison in Victoria, were having their safety threatened by the presence of a trans woman in the prison who had a history of sexual assault against women and children. Arguments against her presence in the prison included that she was not on HRT and had a 'working penis.' Panahi stated: 'So here we have a sexual predator who has attacked women and children transferred to a women's prison full of vulnerable women, many of whom have been victims of sexual assault and carry significant trauma… Corrections Victoria must [ban trans prisoners from women's jails] and prioritise the safety of female inmates instead of trying to appease the trans lobby.'[858] On the same topic, the Derryn Hinch Justice Party (DHJP) stated in a Facebook post:

[856] See for example: Paul Karp, "Morrison stands by Katherine Deves and wrongly claims 'young adolescents' can have gender confirmation surgery," *The Guardian*, 10 May 2022. https://www.theguardian.com/australia-news/2022/may/10/katherine-deves-backtracks-on-apology-for-comments-about-transgender-children (accessed 13 August 2022); Katharine Murphy and Josh Butler, "Liberal moderates concerned by Morrison raising trans women sport ban during election campaign," 12 April 2022 https://www.theguardian.com/australia-news/2022/apr/12/liberal-moderates-concerned-by-morrison-raising-trans-women-sport-ban-during-election-campaign (accessed 13 August 2022).
[857] Rita Panahi, "Safety of female inmates must rule over radical trans lobby," *The Herald Sun*, 16 August 2022, https://www.heraldsun.com.au/news/opinion/rita-panahi/rita-panahi-safety-of-female-inmates-must-rule-over-radical-trans-lobby/news-story/a59523b4b2067bae186268c5ffa4df66 (accessed 19 August 2022).
[858] Rita Panahi, "Safety of female inmates must rule over radical trans lobby," *The Herald Sun*, 16 August 2022, https://www.heraldsun.com.au/news/opinion/rita-panahi/rita-panahi-safety-of-female-inmates-must-rule-over-radical-trans-lobby/news-story/a59523b4b2067bae186268c5ffa4df66 (accessed 19 August 2022).

> Ignore, for now, the debate about transgender athletes competing in women's events. How about this one. Female prisoners at the Dame Phyllis Frost jail are justifiably scared of being raped by a transgender inmate who is in there with them. … They have a valid argument. There were British reports two years ago that transgender prisoners born as males had carried out seven sex attacks on women in jail.[859]

Although the DHJP's post did not provide any citation for this statistic, it appears they were referring to British reporting on figures from the Ministry of Justice which stated that 'Since 2010, out of the 124 sexual assaults that occurred in the female estate a total of seven of those were sexual assaults against females in custody perpetrated by transgender individuals.'[860] Reporting noted that this data made trans women statistically more likely to sexually assault other inmates, as they only made up about 1% of the female jail population.[861] However, in 2021, the BBC reported that the High Court had ruled that the placement of trans women in women's jails was lawful, stating that: 'claims about the risk of sexual assault were a "misuse of the statistics, which … are so low in number, and so lacking in detail, that they are an unsafe basis for general conclusions."'[862]

Narratives such as Panahi's and the DHJP's around issues like this take a valid issue – the safety of inmates while incarcerated against abuse and sexual assault – and target transgender individuals (almost always transgender women) and the 'radical trans lobby' as the perpetrators and enablers of this violence. In reality, prison administrators are responsible for the safety of prisoners, and trans activists do not have the level of 'disproportionate power' and 'little accountability' that Panahi ascribes to them. It is true that a significant issue in the prison space is the presence of violent offenders who may assault other inmates. However,

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[859] Derryn Hinch's Justice Party, 2022, " Ignore, for now, the debate about transgender athletes competing in women's events," *Facebook*, August 12, 2022. https://www.facebook.com/justiceparty.com.au/posts/616799573138749 (accessed 19 August 2022).
[860] Martin Beckford and Glen Owen, "Transgender inmates have carried out seven sex attacks on women in jail: Despite the risks, male-born trans convicts are still allowed to move into women's prisons," *Daily Mail*, 10 May 2020, https://www.dailymail.co.uk/news/article-8303753/Transgender-inmates-carried-seven-sex-attacks-women-jail.html (accessed 22 August 2022).
[861] Ibid.
[862] Eleanor Lawrie, "Trans women in female jails policy lawful, High Court rules," *BBC News*, 2 July 2021, https://www.bbc.com/news/uk-57692993 (accessed 22 August 2022).

narratives which cast (cis) female prisoners only as potential victims and male prisoners (incorrectly including trans women) as potential perpetrators simplify the dynamics of interpersonal violence to the detriment of all: this narrative ignores (or even tacitly condones) interpersonal violence within male prison spaces, where trans women are disproportionately at risk; it overlooks sexual violence in women's prisons between cis women prisoners; and it fails to hold the prison system accountable for building systems and environments which prioritise the safety of prisoners. Instead, trans women who have committed violent sexual offences are positioned as not only a threat based on their own actions, but as an innate threat from their entire group, and used as justification to deny *all* trans people the validity of their genders.

While there have been steps forward towards trans inclusion in recent decades, progress is not always foregone and continual, and the rights that trans and gender diverse people have won are not set in stone and are subject to challenge and change. At times when trans and gender diverse rights are at the centre of political 'debate,' 'battlegrounds' often become sites of tension, and sex segregated spaces such as prisons are primed to be sites where the limits and limitations of these legislative rights are tested. By analysing at the management of trans and gender diverse people in prisons, we can see instances of these social and legislative discourses in action.

Transgender Experiences in Prison

As prisons make both the management and scrutiny of the body a central part of their operation and exist as a site of potential tension in the negotiation of trans and gender diverse rights and freedoms, it is important to look closely at their practices in managing trans and gender diverse prisoners. In this section I discuss examples from several different Australian states and territories, drawing from the experiences of trans and gender diverse people who have moved through them. Prison policies themselves vary, both on an individual prison level, and on a state or territory level. Despite this, the actual practices seem consistent. In my interviews and in the broader research, it appears that trans and gender diverse people are typically being housed according to their sex assigned at birth when they are incarcerated. This is a key point of contradiction between the legislative recognition of trans and gender

diversity, and the practices within the Australian criminal legal system when it comes to managing trans and gender diverse prisoners.

Corrections Victoria Commissioner guidelines from June 2017 on Management of Prisoners who are Trans, Gender Diverse or Intersex (which appears to be the currently active policy at the time of writing) outline the present practices that prison staff are expected to follow when allocating housing and interacting with trans and gender diverse prisoners. The policy cites a number of pieces of legislation, such as the Commonwealth Sex Discrimination Act (1984), the Victorian Charter of Human Rights and Responsibilities Act (2006), the Victorian Health Records Act (2001), and the Victorian Corrections Act (1986) as informing the content of the guidelines.[863] The policy advises that the safety of prisoners – both the trans prisoners themselves and the cisgender prisoners with whom they are housed – should be considered when deciding where to house a transgender individual:

> The risks associated with the placement of prisoners who present with breasts and/or a vagina in the men's prison system or prisoners with a penis in a woman's prison system are factors that must be considered when managing and supervising prisoners in either system. This is in acknowledgement that for trans, gender diverse and intersex prisoners posted in environments where the external manifestation of the gender does not accord with those people with whom they are accommodated they are at heightened risk of sexual or physical assault. Relative to this risk, a match proportion might pose safety risks to others, particularly if their criminal record indicates a history of sexual and/or physical violence.[864]

As the policy notes, 'Victoria's prison system is currently separated into two systems that are based on gender: A men's system and a women's system. These two systems currently remain the only placement options for people who identify as trans, gender diverse or intersex.'[865] This binary model of incarceration underpins the incarceration landscape in Australia and

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[863] Corrections Victoria Commissioner, "Commissioner's Requirements: Management of Prisoners who are Trans, Gender Diverse or Intersex," (2017), p.4
[864] Ibid, p.2
[865] Ibid, p.5

presents immediate challenges when it comes to managing any prisoner who does not fit clearly within this system.

In Victoria, male prisoners are likely to go to the Melbourne Assessment Prison in the first instance, and female prisoners are likely to go to the Dame Phyllis Frost Centre. When the Secretary – whose role it is to ensure compliance with government guidelines and legislation[866] – is deciding where an individual transgender person should be housed, the guidelines outline a range of factors that they are expected to consider. These include the nature of the offence for which the person has been incarcerated, the risk of the prisoner escaping from custody, the risk of any further offence being committed by the prisoner and the impact this might have on the community, risks that the prisoner poses to the order, security and management of a prison, any risk the prisoner poses to the welfare of themselves or another person, the length of a prisoner's sentence, and 'any other matter considered relevant to prison management, security and good order and the safe custody and welfare of the prisoner.'[867] In addition to these considerations, the Secretary is expected to take into account a person's gender, the gender on their legal documentation, their lived experience of their gender, as well as their expressed preference for where they would like to be housed.[868] The policy also states that prior to a decision being made, a prisoner will ordinarily be kept separate from other prisoners via accommodation in a solitary cell with separate toilet and shower facilities. It is noted that all trans and gender diverse prisoners should be provided with a copy of the policy.[869] Trans and gender diverse prisoners are to be referred to by their correct name and pronouns. The policy adds: 'the exception to this is when the general manager determines that the use of such a name is unacceptable on the basis that it may serve to threaten prison security, the safe custody or welfare of a prisoner, to further unlawful activity or be regarded as offensive by a victim or an appreciable sector of the community.'[870]

[866] Victoria State Government Justice and Community Safety, "People and Organisational Structure," https://www.justice.vic.gov.au/people-and-organisational-structure (accessed 13 August 2022).
[867] Corrections Victoria Commissioner, "Commissioner's Requirements: Management of Prisoners who are Trans, Gender Diverse or Intersex," (2017), p.5
[868] Ibid, p.6
[869] Ibid, p.6
[870] Ibid, p.10

While the policy appears to exist to support trans and gender diverse people, there is a lot of room throughout for decisions to be made about housing trans and gender diverse prisoners which are left up to discretion from the prison Secretary and staff. While some level of discretion is most likely necessary for the safety and wellbeing of trans and gender diverse prisoners, it also points to some key challenges that need discussion. On one hand, how do these interactions play out in practice? How often are trans and gender diverse people housed in prisons that align or do not align to their gender identity? On the other hand, on a more theoretical level, what does it tell us that there is no one-sized-fits all approach to trans and gender diverse housing, and what can it tell us about the nature and structure of the system as a whole? Cisnormative assumptions are clearly built into the prison system at its core, as evidenced by not only the gender segregated housing, but also the nature of the trans and gender diverse policies which assume cisgender inmates as the default and outline procedures for trans and gender diverse outliers, as opposed to creating systems which are innately gender inclusive.

As the system currently operates, discretion and flexibility may often be helpful for trans and gender diverse people in prison. Scott, an interviewee for this project and transgender man who was in the Dame Phyllis Frost Centre (a maximum-security women's prison in Victoria) in 2016, stated that he was offered the choice either to go to a male or female prison:

> I didn't even know you could choose, because legally I was still female, and I hadn't started on the testosterone at the time, but they gave me the option and kind of caught me off guard so I consulted with my lawyer who advised, look, I know of other people that have been in your position and have gone to the male one, and terrible things have happened to them and you know, the female prison they said was a lot nicer, there was a tennis court and a basketball court and a swimming pool and a library, and like, the female prison was a lot fancier and easier than the male prison. So, I chose the female prison. … They really sold it to me![871]

[871] "Scott," interview by Adrien McCrory, recorded on Zoom, 20 October 2021.

Scott also described how individual judges and magistrates could be sympathetic to his position:

> I think gender played a lot in the County Court now that they respected that I identified as male and they really took that into consideration and if I… they knew I was having a rough time in prison, and they, were quite empathetic. But magistrates court like my lawyer had to do so much to get the judge to consider how a male would be in a female prison and how a trans man would be in a male prison, and like, oh she spent so much time, just to get them to consider that. But before that, just, they… I don't know what the word is for it, but they, I guess, didn't have much respect. They kind of disregarded your own thoughts, feelings, because like, you've done the crime, you do the time, there's no halfway point.[872]

However, experiences could differ between prisons and between states. According to the 2021 New South Wales Classification and Placement of Transgender and Intersex Inmates policy, all people 'received into NSW custody must be managed as the gender with which they identify at the time of incarceration.'[873] The policy specifies that there is no requirement to have 'undergone surgical intervention' to be considered transgender for the purposes of prison management. The policy also states: 'A person who self identifies as transgender has the right to be housed in a NSW correctional centre appropriate to their gender of identification, *unless it is determined through classification that the transgender person should more appropriately be assigned to a correctional centre of their biological gender* [emphasis mine].'[874] I highlight this point because it is consistently present in most policies relating to incarceration of trans and gender diverse prisoners around the country. On a functional level, it is hard to deny that such clauses are necessary: trans and gender diverse people are – as noted in the term – diverse, and a one-size-fits-all approach is highly unlikely

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[872] Ibid.
[873] NSW Government Communities and Justice, "Classifcation and Placement of Transgender and Intersex Inmates," (2021) https://correctiveservices.dcj.nsw.gov.au/content/dam/dcj/corrective-services-nsw/documents/policies/inmate-classification-and-placement/Inmate_Classification_and_Placement_-_Classification_and_Placement_of_Transgender_and_Intersex_Inmates_Redacted.pdf (accessed 11 November 2022).
[874] Ibid.

to cater for everyone's needs. However, the clause also has the effect (intended or unintended) of undermining the policy, especially when paired with accounts from trans and gender diverse prisoners who consistently find themselves placed in either facilities inappropriate to their gender identity, or otherwise adverse housing, such as solitary confinement. The New South Wales policy does state the factors which will determine whether someone might be placed in a prison inconsistent with their gender identity, such as criminal history, custodial history, and the prisoner's own safety. However, there is still a lot of room for interpretation within this scope, especially regarding placing a transgender inmate based on their personal safety: as trans and gender diverse people are always vulnerable in a prison environment, this could apply to essentially all cases.

James, a Brotherboy who was in prison in New South Wales in 2020, said of his experience:

> I looked up procedures when it comes to transgender inmates, and there was heaps of information there. And pretty much 90% of it wasn't being followed by the officers, I had to look it up. And they would say, for example, it said if you identify as a man, you're allowed to go to a male prison. Even if you have a vagina. But if you are a safety risk, then you have to go to a women's prison. So, it was like, what's considered a safety risk? Is it like, are you going to be raped in a men's prison? I don't know what I consider a safety risk, but also, it's not down to genitals because I said to the officers, "Why am I being sent to a woman's prison?" They said, "Because you've got a vagina." And then I said, "But the procedure says, you go to whatever prison you identify as, as that gender." And they said, "That's too unsafe for us to send you to a men's prison." Which honestly, I'm glad I didn't get sent to a men's prison, because I don't really know what would have happened to me. But I think that's strange that they don't even know their own procedures and aren't even acting on them.[875]

James also stated that he thought he 'would have been fine in a men's prison' and that he wanted to be given the choice: 'I think they should have said to me, "You know what, let's try you in a men's prison. If you don't like it, let's try you in a women's prison." But at least

[875] "James," interview by Adrien McCrory, recorded on Zoom, 29 April 2021.

give me the choice, not just go "You're going to a women's prison."'[876] According to the New South Wales Department of Corrective Services policy for Management of Transgender Prisoners, 'a person who self-identifies as transgender has the right to be housed in a correctional facility of their gender of identification.'[877] While this is subject to individual case management decisions, James' experiences indicated a lack of awareness or adherence to the policy by staff.

The guidelines described above were reviewed in 2021, so may have been edited somewhat since James' time in prison. However, the version of the policy from 2017 which would have been active during James' period of incarceration appeared to be functionally the same on these points. Transgender people were still to be treated in accordance with their identified gender regardless of gender affirmation surgeries, and transgender people were still to be placed in a correctional centre appropriate to their identified gender, 'unless there are overriding security and / or safety concerns arising from the induction screening process.'[878] For trans men, these security concerns appear to primarily stem out of an assumption that men's prisons are fundamentally unsafe for trans men –or, perhaps, that men's prisons are inherently less safe, period, and that trans men need to be protected from this environment. Accounts of trans men in Australian prisons appear to be rare. Scott described a second-hand account of a trans man he knew who had been temporarily housed in a men's prison: 'They'd been to the male one, and I think some of the things that happened to them will stick with them to their grave… within two/three weeks of being there, like the prison, the male prison had no choice but to be like, look, you're going to end up being killed, we've got to move you to a female one.'[879] Most often, however, trans men appear to be housed in female prisons to pre-empt these risks.

[876] Ibid.
[877] NSW Government Justice Corrective Services, "Custodial Operations Policy and Procedures: 3.8 Transgender and Intersex Inmates," https://www.correctiveservices.dcj.nsw.gov.au/documents/copp/transgender-and-intersex-inmates-redacted.pdf (accessed 17 August 2021).
[878] N.S.W. Department of Corrective Services, "Management of Transgender Inmates," *The Gender Centre,* accessed 15 August 2022, https://gendercentre.org.au/resources/support/service-providers?download=930:management-of-transgender-inmates.
[879] "Scott," interview.

One interviewee, Devin, worked as a peer educator while incarcerated in the context of an LGBT support group at Ravenhall Correctional Centre in Victoria. Devin is cisgender, however had significant contact with transgender prisoners in his work. When I asked him about the transgender people he encountered in his role and whether they were primarily transgender women or men, he stated:

> In terms of where I was, because it was this prison, as you know, are split male and female, upon initial inspection they're put in a prison that's representative of their biological features, so I didn't actually meet any trans men, because they would have been received into the female prison. So, all the interactions I had were with trans women.[880]

At least in Devin's experience and perception, it appears that – despite or because of Victoria's highly discretional policy – most trans and gender diverse people inside this male prison facility were transgender women. I asked Devin where most transgender prisoners seemed to be housed, and he stated in his experience:

> I was a mainstream general population prisoner. And I always have been, and all of the trans women or gender diverse women that I met in prison, were all in protection. And it's very unusual for a mainstream prisoner to go to protection, because of my role, to do the various security checks to be able to go in the system. But all of them were placed in protection for the main, for the reason that they are trans and for security reasons, which in itself is, I guess, an added layer of oppression. Because that protection, particularly in a dual setting institution, like Ravenhall, where there's mainstream and protection, it's actually much, much harder to get resources and protection because there are less protection prisoners, obviously, resources are channelled towards a bigger population, right? … They weren't able to get to the library as often. For example, they weren't able to go to the gym as often, for example, they weren't able to afford the same services. For example, rehabilitation is only run once a month, for example, this particular programme was only run once a fortnight.

[880] "Devin," interview by Adrien McCrory, recorded on Zoom, 10 November 2021.

> So, it's definitely much more difficult. And the need is there that the resources are not there. And so, for them, it was easier in the sense that they were able to find camaraderie among each other. In a place that protected in a smaller environment. It's a little bit closer together. But at the same time, they're also exposed to offenders. For example, sexual offenders that have a history of antagonising transgender, gender diverse people. And so, it was kind of like this very strange place. You're putting them in a place where, you know, they're going to be harassed, you know, they're going to be annoyed. And there was very little attention to that. And the problem is that Ravenhall is that when you're first received into the prison, and you're and the prison is aware that you are TGD [trans and gender diverse], they initially put you in self-isolation, even outside protection.[881]

Devin also reported that there was significant adverse treatment from prison staff towards transgender women who were incarcerated at Ravenhall, ranging from deliberate misgendering to physical abuse, such as one transgender prisoner who had 'her food … thrown into her cell, she was pushed up the track onto the ground.'[882]

Prisons and police also used (and use) solitary housing for transgender people, although this came with its own challenges – particularly for the mental health of transgender inmates. August was arrested after a protest in Perth in 2019 and was initially put in lockup with women, but objected and was moved to a solitary cell:

> I reached breaking point when the officer comes in and says, "Hey ladies, we're just giving you an update." And I'm like, "Wait. No, I am not a woman." I say, "I'm not a woman. You can't keep me here. It's not safe for the rest of these women if I'm here" – which it is, but I'm just trying to make a point. And they're like, "Okay, all right. We'll move you out, give us two minutes, we're going to figure out where to put you."

[881] "Devin," interview.
[882] Ibid.

August was moved to a solitary cell with 'steel walls, glass wall at the front so they can see you and there's like a bed, not really a bed, it's like a mattress.'[883]

Initially August thought that the solitary cell would be preferable to being housed with the women. However, this changed when they were left there for an extended period of time: 'It was really getting to me being alone, just with my thoughts. Thought it was going to be great, turned out it was not, I just wanted to be in the men's cell, that's all I ever wanted.' August had a history of suicide attempts and eventually attempted suicide while left in the solitary cell. Police intervened and moved them into another solitary mental health cell. August recalled asking: '"Can, can I not be with people? Can I at least call my caseworker, can I call Lifeline, that would be useful?" Asked to just talk to anybody. And they say, "No, you can't do that we're too blocked up."'[884]

Solitary housing of transgender prisoners seeks to remove individuals from harmful environments where they might experience assault, sexual violence, and harassment. However, in practice, solitary housing (even when implemented for the prisoners' 'own good' or with their consent) is not meaningfully different from punitive solitary confinement. It denies prisoners socialisation and companionship from other inmates, limits their access to shared spaces including exercise yards and prison programs, and further stigmatises them and marks them as 'other' from the rest of the prison cohort.[885]

While solitary housing is often cited as being used in transgender prisoners' best interests, there remains a consistent narrative that transgender women, particularly, should be kept separate from other female prisoners for the 'safety' of cisgender women. In Chapter 6 I discussed the case of Maddison Hall, who was housed at Mulawa women's prison and whom

[883] "August," interview by Adrien McCrory, recorded on Zoom, 30 October 2020.
[884] Ibid.
[885] Sydney Tarzwell, "The Gender Liens Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners," *Colum. Hum. Rts. L. Rev.* 38 (2006): 180.

politicians criticised for her placement, on the grounds that she was a danger to the other female prisoners.[886]

Politicians who opposed the inclusion of gender diversity in legislation continued to reference Hall's case in later decades: in 2019, during a discussion on Western Australia's Gender Reassignment Amendment Bill (2018), Nick Goiran (Liberal Party) raised it again, stating: 'This type of thing has consequences in prisons. It is all very good for everyone to straightaway jump on the bandwagon and say that they want to support reassignment, but it starts to have consequences for government when managing these things in prisons. I will go as far back to 2010. I found a very interesting story that I think will interest members.' Goiran quoted from a 2010 article on Hall's case titled 'Sex change killer Maddison Hall to be free as a bird', including statements such as: 'Although still a man, Hall was on hormone treatment but it did nothing to curb his behaviour as a sexual predator.'[887] Goiran finished by stating:

> To make it absolutely clear, I am not suggesting for a moment that every person who might be interested in gender reassignment surgery and is married might be the same as this person. That is not the point of the speech and that is the not the point of reading the article. The point is that these types of policy changes by government create consequences and, in this instance, it creates a consequence for the government to manage this prisoner in jail. If the prisoner says that they are now identifying as a female, the government now suddenly has to engage in that and sort out that person's problem in the female or male jail.[888]

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[886] New South Wales, *Parliamentary Debates*, Legislative Council, 21 September 2006. https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-36680

[887] Western Australia, *Parliamentary Debates*, Legislative Council, 12 February 2019, 11. https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/9B8403AA667070A7482583A2001BF469/$file/C40%20S1%2020190212%20All.pdf

[888] Western Australia, *Parliamentary Debates*, Legislative Council, 12 February 2019, 12. https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/9B8403AA667070A7482583A2001BF469/$file/C40%20S1%2020190212%20All.pdf

While there are of course isolated cases – such as Hall's above – of transgender women sexually assaulting cisgender women upon being housed in women's prisons, there is a significant issue in how political figures use these cases to create arguments about transgender women as a group. Although less commonly reported than in men's prisons, sexual coercion, and assault from other inmates and from prison staff are an issue in Australian women's prisons. *This is not a problem unique to transgender inmates*.[889] However, cases of transgender women perpetrating sexual assault against cisgender prisoners are framed differently to other cases of sexual assault among inmates. Politicians and the media frame individual cases as reasons why transgender women as a group should not be housed in women's prisons or have their gender identity acknowledged and validated. Although in citing Hall's case Goiran stated that he was not intending to imply that all transgender people were 'the same as this person,' the purpose of drawing upon this case was to argue against the recognition of transgender people's identities in prison settings: a position which could impact the experiences of all transgender people in prisons.

As gender diversity became more protected under anti-discrimination laws, politicians continued to raise concerns about how transgender individuals may take advantage of these changes in a criminal legal context. For example, in South Australia in 2016, during the reading and debate of the Statutes Amendment (Gender Identity and Equity) Bill, Adrian Pederick (Liberal Party) raised concerns about how transgender people might use the changes to legislation to avoid or delay being assessed in custody:

> I am just wondering what we do with custody if someone who is a male prisoner or a female prisoner clearly has the physical assets of either and suddenly decides that they should not be housed in Yatala and want to go to the women's prison but, clearly, physically, they are a male – or the other way around: if they are a female. … My concern is that if someone wanted to stick to the law they could stand their guns and

[889] Haley Clark and Bianca Fileborn, *Responding to Women's Experiences of Sexual Assault in Institutional and Care Settings* (Australian Institute of Family Studies Melbourne, 2011), 7.

> say, 'Well, no, I'm not going to be assessed unless you find', let us say, for instance, 'a transgender person'. Corrections suddenly needs to find a transgender person.[890]

These kinds of objections highlight a fundamental distrust of both transgender reality and the truthfulness of trans and gender diverse people in narrating their own experiences. It is implicit in statements such as these that transgender people do not want to be housed according to their gender identity because it is correct and congruent with their experiences, but rather that they are attempting to somehow subvert or undermine the systems and processes of the criminal legal system.

As discussed in previous chapters, transgender women faced significant risk of assault and sexual victimisation when placed in male prisons. One 2017 study by Wilson et al interviewed two transgender women who had been placed in both male and female prisons and their experiences strongly suggested that women's prisons were safer for transgender women inmates. As one of the women stated: 'I'm not scared at all in the women's prison … I don't feel intimidated here. I still love men. I could have a field day in there [male prison] but I didn't want that, because I was scared in there [of being raped], I'm not scared here.'[891] The two participants had somewhat different experiences of sexual violence inside women's prisons. While one stated that sexual violence was 'non-existent really,' the other recounted at least one incident of being sexually harassed by another woman inside the prison – although she noted that compared to a male prison, it was relatively easy to defuse the situation.[892]

There was one theme from Wilson et al's interviews which was consistent with the experiences of transgender men in prison: a noticeable gap between the policies in place and the actions taken by the prison officers themselves. The interviews and policies focused on New South Wales prisons and prisoners. As noted above, by 2017, New South Wales policies

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[890] South Australia, *Parliamentary Debates*, House of Assembly, 9 March 2016, 4625-6. http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-11-22485
[891] Wilson et al., "'You're a Woman, a Convenience, a Cat, a Poof, a Thing, an Idiot': Transgender Women Negotiating Sexual Experiences in Men's Prisons in Australia," 392.
[892] Ibid., 393.

clearly stated that prisoners should have the option to be housed in a prison associated with their self-identified gender. However, as one interviewee stated:

> There are many [policies] for many different things, but do they follow it? In my experience and what I've observed, the system is not getting constructive or better; it's getting worse. No they don't [follow transgender policy]. It comes back to their own discretion, no matter what the subject or the issue.[893]

Across all accounts, one consistency was the reliance on discretion overriding the letter of policy for transgender prisoners. Whether for the safety of the prisoners themselves or for the perceived safety of other prisoners, prison staff (or police lock-up staff) appeared consistently to house trans and gender diverse people either in accordance with their sex assigned at birth or in isolation or protection, both of which came with their own distinct challenges. Who does this discretion serve? There are several possible answers to this. On one level, it could be argued that it serves trans and gender diverse people's needs and interests. In some cases, this may be true. As noted, trans and gender diverse identities and experiences are varied, and an approach which works for one person may not work for another. However, it also seems apparent that discretion serves to maintain the status quo of the prison system and allows for trans and gender diverse prisoners to be managed in ways which align to the cisnormative preconceptions of prison staff and administration. When discretion and protection seem by and large to result in trans men being housed in women's prisons and trans women being housed in men's prisons, it does not seem as though trans and gender diverse policies are fundamentally addressing the needs of trans and gender diverse prisoners. If they were, we might expect to see more trans and gender diverse people having their genders affirmed and validated within these systems, whether through appropriate gendered housing or more consistent access to HRT and appropriate facilities.

Housing is not the only area where trans and gender diverse prisoners require special intervention. Another key aspect of trans and gender diverse incarceration is access to HRT.

[893] Ibid.

By facilitating (or not facilitating) prisoners' access to HRT, prisons effectively determine whether incarcerated trans and gender diverse people have the 'right' to transition.

Corrections Victoria's policy on management of trans and gender diverse inmates (2017-present) outlined the processes the prison is expected to follow if a prisoner elects to transition during their sentence. Staff should establish if a prisoner feels safe in their current housing, and whether they wish to remain where they are accommodated or move to a different facility. They also should find out if a prisoner wants to be known by a different name (interestingly, the policy does not mention pronouns in this section). From there the staff are expected to note the prisoners' trans and gender diverse status on their case file, and notify prison officials such as the senior officer, the offender services manager, and the prison's medical officer.[894]

Most transgender prisoners already on HRT are generally able to stay on hormones. This is consistent with previous decades: transgender people have reported being able to stay on hormones that they were already prescribed while in prison throughout the 1980s onwards.[895] However, this was not always the case in practice. Scott recounted the experiences of another trans prisoner who struggled with retaining access to hormones in a Victorian prison: '[T]hey had a hell of a time trying to stay on the hormones while they were in prison there were a lot of things that had been stripped from like, their rights to be a male and stuff. They were really struggling with it all because they weren't allowed their hormones in the end… I wouldn't recommend anyone transitioning already, to be going to prison.'[896]

Devin described his observations of the experience of one transgender woman that he worked with in prison:

> But the issue was, it's such an obstacle to start HRT … And so, and those are those objections as to how to share with you that this particular trans woman was so emotional, that she had to be put in a safe zone, because she genuinely felt, I guess,

[894] Corrections Victoria Commissioner, "Commissioner's Requirements: Management of Prisoners who are Trans, Gender Diverse or Intersex," (2017), p.8
[895] Lisa, interview by Noah Riseman, recorded on Zoom, 12 July 2021. Shared with permission.
[896] "Scott," interview.

> angry at herself for wanting to be trans. … It didn't help that she applied to start HRT from what I understand for the past six or seven months. And every single hurdle, every single process rather, was a hurdle for her, and it wasn't like a straight up no. It was oh, keep applying this paperwork, that paperwork, keep applying. And but every single step of the way, they say no. And so, it's like this pervasive feeling of, I don't know how to describe it. It's just as pervasive emotion of hope, disappointment, hope, disappointment, and I think when you go through that cycle kind of six times in like a year. I think you'd feel pretty sad about yourself, you know, and I think that's exactly how she felt.[897]

In addition to access to HRT, transgender people in prison often require mental health services which can be difficult to access. A common theme raised in interviews was the lack of support provided and a reliance on medication without sufficient therapy alongside it. As Scott stated:

> The mental health system in prison, is pretty much non-existent. … Like if you were to really hurt yourself, they've got to lock everyone down so everyone gets really pissed off at you. They give you a bandage and they send you on your way. If you wanted to kill yourself in prison, they don't care. As long as they keep you alive, till the end of your sentence, like, that's it. And they'd dope everyone up on antipsychotics… That is, I'd say over 80% of prisoners are on either Olanzapine or Seroquel.'

Scott also emphasised that this was a systemic issue rather than one based on individual prison staff:

> I didn't come across one bad prison guard, they were all really thoughtful and they cared a lot. But obviously they can only do so much in their job that they're allowed to do. Like say if you were really struggling like, mentally and stuff, they'd be there,

[897] "Devin," interview.

> but at the same time, there's nothing that they could do to help you. And if you tell them certain things, then they have to act on it. Never tell them too much.[898]

James mirrored Scott's account, stating: 'They will just like, want to medicate you until you're basically a zombie. And the biggest one was Seroquel… A lot of people were on Seroquel, you could get it like that. And that was really dangerous to me, because I know the girls used it to pass the time, to sleep, to just use it to numb themselves.'[899] In Devin's role as a peer educator in an LGBT support group at Ravenhall Correctional Centre, he saw similar trends, stating that transgender women were 'prone to more abuse and bullying' and that as a result they had 'more pressing issues in mental health.'[900]

While these issues with accessing appropriate mental health care are not necessarily unique to transgender inmates, due to the relative vulnerabilities of trans and gender diverse prisoners it is important to consider the necessity of these services when assessing the overall ability of the prison system to meet the needs of transgender inmates. Moreover, it is important that those services be offered by practitioners aware of transgender health and other challenges distinct to those prisoners.

POLICING

Prisons are, of course, only one site of contact with the criminal legal system. Contact with police is another, and one which is much more commonplace and normalised. In Chapter 6 I discussed the introduction of police LGBTIQ liaison officers. Here, I want to return to discussing the role of liaison officers and discuss their efficacy in relation to trans and gender diverse people's experiences with the criminal legal system. Australian police have made efforts to build better relationships with LGBTIQ communities by implementing LGBTIQ liaison officers and staff support networks for LGBTIQ police officers.[901] However, there are a couple of key tension points which need to be highlighted: firstly, hesitancy on the part of

[898] "Scott," interview.
[899] "James," interview.
[900] "Devin," interview.
[901] Dwyer, "Queering Police Administration: How Policing Administration Complicates LGBTIQ–Police Relations," 172.

members of the LGBTIQ community to reach out to police due to historical distrust in the institution, and secondly, specific lack of resources and education for liaison officers in relation to trans and gender diverse issues, which are often different to the challenges facing the rest of the LGBTIQ community.

Dwyer has conducted a significant amount of research on the challenges surrounding LGBTIQ liaison officers. From the perspective of the LGBTIQ community, her research found that LGBTIQ people were often aware of the programs' existence but were not likely to speak to a liaison officer when they had encounters with the police. Some of the community's challenges with the liaison services included the high rate of turnover and unavailability of officers, who were often assigned to unrealistically large territories, and the lack of adequate training.[902] Community perceptions of the historical discrimination and abuse shaped the likelihood of LGBTIQ people reaching out to police (and this continues to the present day) with LGBTIQ people – including those who have never personally been the target of police abuse – often expressing a distrust of police on the basis of these historic trends. Dwyer notes: 'These attitudes were assumed to be widespread and evidenced by the critical response to police presence at Pride events or nightclub walkthroughs – LGBTIQ patrons assumed police were there to inflict violence in their safe spaces.'[903]

From the perspective of LGBTIQ liaison officers, Dwyer's research indicated that a significant barrier was that LGBTIQ people expected officers to be on their side in disputes. As one LGBTIQ liaison officer stated: 'Sometimes it's not about being gay, straight, bi, it's about you got the wrong idea or you're in the wrong or it's got nothing to do with your sexuality.' The public was also reportedly likely to assume that police were discriminating against them for being gay in cases when, for instance, it took a long time for police to respond to them. In the liaison officers' perception, these situations were more the result of time constraints and being overworked.[904]

[902] Dwyer et al., "Barriers Stopping LGBTI People from Accessing LGBTI Police Liaison Officers: Analysing Interviews with Community and Police," 257-9.
[903] Ibid., 262.
[904] Ibid., 261.

Police administrative systems can be problematic for LGBTIQ people. As Dwyer has outlined, even in cases where police have utilised their administrative systems to make these processes easier or more beneficial for LGBTIQ people, they have needed to 'bend and stretch' the processes that are in place. Dwyer stated that when they interviewed liaison officers, 'discussion of what ideal LGBTIQ–police support looked like involved imagining police administration in ways that flowed and facilitated contact between LGBTIQ people and police.'[905] Liaison officers often had to 'work the system' in order to achieve positive results for LGBTIQ people, such as specifically contacting police officers whom they knew to be LGBTIQ friendly. While these beneficial outcomes are a positive step, the fact that they require bending the system and having insider knowledge about which officers are going to be able to help speaks to the fact that often positive outcomes require action that is not built into the systems themselves and, in some cases, may run counter to the intended processes. In some instances, the existence of liaison officers could almost be counterproductive to the issues they were meant to address: LGBTIQ issues could be handed off or unaddressed by ineffective administrators, and LGBTIQ issues were 'something considered a problem to be ameliorated by PLOs [Police Liaison Officers]'–who were not provided the necessary resources to address these problems on their own. Some administrative issues were technical in nature, such as the lack of tick boxes in forms to identify LBGTIQ hate crimes, or an inability to record crimes correctly as hate crimes because they did not meet strict legislative requirements.[906]

Rostering was also a major issue, with liaison officers spread thin and unable to support all LGBTIQ people who needed help, and also unable to get peer support from one another. Similarly, police tenure policies could limit the effectiveness of liaison officers, as policies dictated that officers could not remain in one location for longer than a set period of time.[907] In roles which – as noted earlier – require significant 'insider' knowledge of individuals,

[905] Dwyer, "Queering Police Administration: How Policing Administration Complicates LGBTIQ–Police Relations," 177-78.
[906] Ibid., 178-80.
[907] Ibid., 181-84.

systems, and processes, as well as personal contact and discretion, this lack of continuity could hinder the work that liaison officers set out to do.

When trans interviewees spoke about their experiences with liaison officers, they reported issues in line with those Dwyer outlined. For instance, M.J., a transgender woman who tried to contact a liaison officer in 2020, said of her experience:

> I rang the police station, and according to the VIC Police website, the GLLO, I think they call them – there is a person in certain police stations that are the LBGT community liaison. So, I rang the Rosebud police station and asked to speak to the person by name, [they had] never heard of them. So, I asked who was representing the LGBT community and they had no idea, and I left them the name, phone number to get back to me. Haven't heard.[908]

This is not to say the transgender community neither needs nor desires the existence of police liaison roles. In some cases, interviewees noted that a role similar to the liaison officers would be valuable within prisons. As James stated: 'There should be some officers who are actually transgendered. Like you have Aboriginal liaison officers, there should be trans officers in there that you can go to that are specifically employed to deal with this kind of situation.'[909]

James also emphasised that some LGBTIQ people are hesitant to report crimes to police due to these long-standing negative experiences. He stated: 'If we can try and educate them more, that's the best thing I think we can do, so that more people who join the police force, just like, are safer and don't cause more trauma for queer people. Because queer people don't want to call the police. They don't want to call the police when they're in danger. Because its traumatic for them.'[910]

Some transgender people had more positive interactions with police. Scott said of his experiences with Victorian police (most of which occurred between 2014-16) that when police were aware he was transgender, his experiences were generally fairly neutral or

[908] Transcript, "M.J.", Interviewed by Adrien McCrory, 11th March, 2021.
[909] "James," interview.
[910] Ibid.

respectful: ‘The ones that were aware [I was transgender], they acted like they already had an understanding and stuff, so they were quite respectful and they’d always ask me if I wanted a male or female to do the searches.’ However, when police were not aware he was transgender, they could be ‘quite cruel and rough.’ Scott also noted that his experiences were not necessarily the norm: ‘I’ve spoken to [other transgender people], but they didn’t have similar experiences. So, when I was in prison, there was a dude there that, he had initially gone to a male prison and he’d been raped and all of that, and he’d also been bashed by police in the past.’[911]

This diversity of experiences with police supports the point that positive encounters with police rely heavily on individuals. When individual police officers are respectful and educated about transgender issues, they can create positive experiences. However, this is not built comprehensively into the processes followed by police, as evidenced by the many reports of hostile or otherwise negative encounters.

Police culture sits at the core of all interactions between trans and gender diverse people (and the civilian population at large) and police. It is also important to note that trans and gender diverse people also work as police officers and have their own perspectives on these issues. Heather Panter discusses the experiences of trans and gender diverse police officers in the United States and the United Kingdom in her book *Transgender Cops: The Intersection of Gender and Sexuality Expectations in Police Cultures*. She argues that hegemonic masculinity in police cultures and perceptions of cisnormative gender relations reduced acceptance for trans and gender diverse police. Panter states that ‘feminine’ traits and behaviours – from trans feminine people, or from gay men – led to other police perceiving them as less competent at performing their duties.[912] This led to a perception from Panter’s research participants that trans women, because they wanted ‘to be as feminine as possible,’ would not be able to ‘handle’ the work required for policing.[913] Panter’s trans research

[911] “Scott,” interview.
[912] Heather Panter, *Transgender Cops: The Intersection of Gender and Sexuality Expectations in Police Cultures*, First ed., Routledge Critical Studies in Crime, Diversity and Criminal Justice (London: Routledge, 2018), 113.
[913] Ibid., 116.

participants reported that they experienced marginalisation within their profession as police as a result of coming out. Often, this marginalisation took the form of exclusion and enforced adherence to gender binaries, such as trans men no longer being included in 'girl talk,' but also not accepted in 'guy talk' among colleagues (and vice versa for trans women), harassment, or reduced hiring and promotion prospects.[914] These themes were consistent in American, English and Welsh policing – and given that Australian policing institutions are largely similar to these policing cultures, it is reasonable to assume that similar experiences would likely be present here.

Kirsti Miller transitioned while working as a senior prison officer in New South Wales and described similar experiences within the corrections environment to those reported in the police force. Although Miller found that some of her colleagues supported her, she also reported that she 'got a couple of phone calls, prank calls from other gaols, going, oh you're a fucking sicko, and all this shit.' She also stated that in her experience, while prison inmates were typically respectful, staff participated in exclusionary behaviours like those described above:

> [Prisoners were] all like, you're the bravest screw here, you're the most honest one here. But the staff, like I was the boss, and senior ranking, so they really – it was more sort of the silent treatment, or cut me out of stuff, and you'd hear stuff back from other people. And it was other things, like people would be trying to be nice, but they'd come up and go, oh you don't really look any different, or you should wear this, you should wear that. It was just a lot of pressure of people, like it wouldn't happen to any other woman.[915]

As both officers and civilians, trans and gender diverse people's interactions with policing come with an added layer of scrutiny, unpredictability, and tension. Trans and gender diverse people are often hesitant to approach police due to historical discrimination from police towards the LGBTIQ community, and an uncertainty about whether police will support them

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[914] Ibid., 158.
[915] Kirsti Miller, interview by Noah Riseman, recorded in Sydney 27 April 2019. Shared with permission.

or vilify them based on their gender identity. These concerns appear to be justified in many instances. Although some trans and gender diverse people might have positive experiences with police, negative interactions – when they do occur – will leave lasting effects on the perceptions of police aid within the trans and gender diverse community. These are big barriers to overcome. For the most part (putting aside gender segregated lockups), the contradictions between gender diversity and policing do not appear to be as baked into the literal structure of the institution as they are in prisons. Nonetheless, policing always requires monitoring and regulating bodies, and the gendered aspect of this, from body searches to the hegemonic masculinity baked into policing culture, appears deeply enmeshed within policing as an institution. Training, education, policy, and exposure to trans and gender diverse issues may help to some degree, but much deeper cultural and social change would be necessary to unpick the more enmeshed elements of tension between policing and gender diversity.

Key Tension Points and Areas

In this final section, I discuss the key tension points between legislation and practice when it comes to trans and gender diverse experiences in the criminal legal system. The main problem areas are a lack of knowledge and awareness of trans and gender diverse issues from those involved in decision making, and a lack of truly entrenched training for staff at nearly all contact points of the criminal legal system.

In late 2019, I joined a team of academics, community organisation representatives, activists, and lawyers to design and distribute surveys which examined the experiences of trans and gender diverse people's lived experiences in Victoria's criminal legal system. The surveys targeted two groups: one survey sought responses from trans and gender diverse people on their own experiences in the criminal legal system, while the other sought the perspectives of lawyers with trans and gender diverse clients. While the sample size of responses was small – 42 total responses collected in 2020, consisting of 17 trans and gender diverse people and 25 lawyers – this project provided insightful initial data in this under researched area. The results of the surveys demonstrated that trans and gender diverse Victorians (and it would not be surprising if similar issues were present in other Australian states) experienced adverse treatment from police, correctional officers, lawyers and judicial officers at all stages of

interaction with the criminal legal system.[916] I will not reproduce the whole article here, but rather highlight some key points from the findings of the study which suggest that these issues are present, ongoing, and historically consistent.

Trans and gender diverse people who responded to this survey stated that in their interactions with police, they found police officers were not very knowledgeable about trans and gender diverse issues. Most respondents who interacted with police reported adverse experiences, stating that they felt police were disrespectful to them because of their gender identity, including consistently using the wrong pronouns to refer to them. Likewise, the reported experiences of trans and gender diverse respondents who had been in prison in Victoria were overwhelmingly negative. All respondents felt that prison staff had discriminated against them because of their gender identity, and many reported issues accessing housing, hormone therapy, and clothing appropriate to their gender identity and expression. Around half of those surveyed were housed in prison facilities which corresponded to their gender identity. However, half were not. This split suggests, as discussed above, that prison guidelines and policies are not being equally and evenly applied in all situations.

A consistent theme raised by both trans and gender diverse respondents and legal professionals was the need for better training and education at all points of contact with the criminal legal system, so that police, lawyers, magistrates, and prison staff were all more aware and better trained about the needs of trans and gender diverse people.[917] In Dwyer's research, similarly where police identified barriers to supporting LGBTIQ people in their work, they cited a lack of funding, resources, time, and training.[918] When I interviewed him, Devin had likewise observed that under-training was a significant issue in the corrections space. As he stated:

> The other part is that there is a lack of professionalisation within the corrections space. Officers don't need a degree to become an officer. And officers don't need to go and

[916] Mitchell et al., "Criminalising Gender Diversity: Trans and Gender Diverse People's Experiences with the Victorian Criminal Legal System," 4-6.
[917] Ibid.
[918] Dwyer, "Queering Police Administration: How Policing Administration Complicates LGBTIQ–Police Relations," 179.

> do further study to understand this and not just professionalisation but lack of training in understanding that TGD space is vividly different to the LGBT space. Right. And I think that's the last I think the lack of training manifests in them using their personal views on sexuality to, to the way they conduct their work. And I think that's probably the most important and most salient thing in terms of how they interact with TGD people.[919]

I asked Devin about his reflections on the tension between Ravenhall's actions in support of LGBTIQ prisoners – such as support groups – and the ongoing vilification from prison staff towards trans and gender diverse prisoners. He responded that while there were some pushes for LGBTIQ resources and training, they were at 'the very bottom of the hierarchy … of priority' and that there was 'a lack of buy-in from those who need to buy-in to the social change.'[920]

There is a significant gulf between policy or legislation which supports trans and gender diverse people and practice which is truly trans affirming. What stands out from my interviews with trans and gender diverse people, from responses to surveys, and from prior research in this area, is that the issues facing trans and gender diverse people moving through the criminal legal system today are not so different to the issues facing them decades ago. When police and prison staff are ignorant or undertrained in the top-down policy or legislative changes taking place, it is unsurprising that trans and gender diverse people continue to report that they are being housed in prisons inconsistent with their gender identity, mistreated by police, or otherwise face adverse experiences in the criminal legal system. It also speaks to the ways that gender and gender diversity is constructed and understood at all levels of the criminal legal system. From the masculinised culture of the police force to the binary segregation of the prison system, to the marginalisation that trans and gender diverse people experience at all levels of this system, gender, the management of gendered bodies,

[919] "Devin," interview.
[920] "Devin," interview.

and the reinforcement of societal gender norms and expectations is built into these systems, processes, and interactions.

This brings us back to the question raised in Chapter 6 of whether changes to accommodate trans and gender diverse people in the criminal legal system can be executed satisfactorily, or whether bigger restructuring is required. Returning briefly to the *Royal Commission into Aboriginal Deaths in Custody*, it is important to discuss how, despite this being a landmark inquiry into prison reform and justice for a group heavily marginalised within the Australian criminal legal system, relatively few of the recommendations have been sufficiently implemented. As positives, the Royal Commission has had long-lasting effects in terms of aiding the establishment of bodies such as the Council for Aboriginal Reconciliation, the Aboriginal Justice Advisory Committee and triggering the Bringing Them Home inquiry which brought the horrors of the Stolen Generations to public light. Still, Chris Cunneen noted in 2001 that 'there are many areas where little or no progress has been made' and that 'The rate of imprisonment of Indigenous people is higher now than it was 10 years ago and the number of Indigenous people in prison is more than double.'[921] Similarly, in responding to the 2019 Deloitte review of the implementation of the Royal Commission's recommendations, Jordan et al noted that 'Aboriginal people now die in custody at a greater rate than before the RCIADIC handed down its report in 1991. … Many outcomes central to the concern of RCIADIC have continued to worsen.'[922] What this suggests is that moderate reform and response to issues in the criminal legal system is not only insufficient for trans and gender diverse people – it appears to be insufficient for many (if not all) groups who are marginalised within this system. This raises a bigger question: fundamentally, can the criminal legal system be structured in a way which does not perpetuate these issues? I have raised the issue numerous times of trans and gender diverse prisoners having fundamental rights to gender expression and medical care taken from them. Perhaps, however, this is not

[921] Chris Cunneen, "Assessing the Outcomes of the Royal Commission into Aboriginal Deaths in Custody," *Health Sociology Review* 10, no. 2 (2001): 63.
[922] Kirrily Jordan et al., "Joint Response to the Deloitte Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody," (2019): 1.

surprising when the prison system is built on restricting the rights of those who move through it: rights to move freely, express themselves, associate with their communities.

What might a 'good' prison system for trans and gender diverse people look like? A functional system, at minimum, would affirm the genders of trans and gender diverse people while also safeguarding their physical and mental wellbeing and protecting them from harm and abuse. Presumably, this would mean housing trans and gender diverse people in facilities which align with their gender identity, except where this would cause them harm. This aligns with the current policies. This thesis has already explored the limitations inherent to this solution. What if we established a specific trans and gender diverse prison? While this would solve some questions of housing, it also creates larger issues of otherising trans and gender diverse people further and is reminiscent of the 'homosexual' prison at Cooma. Issues of funding for a prison that houses a small minority of the prison population would leave it vulnerable to being poorly staffed and maintained, potentially worsening outcomes.

Another option may involve doing away with gender segregation in prison entirely. As noted earlier in this chapter, the twentieth and twenty-first centuries have witnessed a gradual shift away from gender segregation in society more broadly, with prisons seemingly slow to 'catch up.' While establishing co-correctional prisons would present new challenges, for example, challenges around monitoring physical and sexual contact between prisoners and risks of pregnancy – these challenges are ones that would be worth addressing anyway, to a) bring prisons in-line with the rest of society and b) as they are challenges which already exist, given that trans and gender diverse people are housed ad-hoc within both male and female prisons and may get pregnant or impregnate other prisoners as the situation currently stands. Likewise, physical and sexual contact between prisoners and the risk of sexual assault that comes from this is also already present in both male and female prisons and creating systems that respond to it effectively would be to the benefit of everyone's safety. Research on co-correctional prisons is sparse but suggests that co-corrections tend to encourage 'more normal

relations between men and women, staff and inmates included.'[923] Co-corrections would provide opportunities to not only safeguard trans and gender diverse people but encourage meaningful change in terms of prisoner rights and interaction.

A still better option would be to seek alternatives to incarceration. Co-corrections still does not solve the more Foucauldian problems inherent to prisons, and it still does not address the fact that marginalised groups are more likely to be incarcerated, discriminated against, harmed, and sexually assaulted. It also does not address the need for prison staff not to perpetrate transphobia, homophobia, racism, and sexism reflective of issues embedded into broader society. This is, of course, an issue which is present in all institutions, ranging from prisons, police, courts, to governmental bodies, employment, public spaces, housing, schooling, and so forth. Broader systemic change to radically remove transphobia from all societal institutions may be outside the scope of this thesis. However, seeking alternative models of engagement in how we conceptualise and respond to crime would be a good start for mitigating cycles of incarceration and oppression.

Conclusion

This chapter has dealt with some very contemporary history, and many of the areas discussed here are still subject to rapid ongoing change. Trans and gender diverse people are not being treated with consistency in their interactions with the criminal legal system. This is most evident in the context of prisons, where policies and procedures frequently suggest that trans people should be housed according to their gender identity, yet in practice, prisoners tend largely to be housed according to their sex assigned at birth. Whether this is for the safety of trans and gender diverse people themselves or for the perceived safety of other prisoners or for the convenience of prisons, this exposes a contradiction between the state's legal recognition of trans and gender diverse people and the state's practices of policing and incarceration.

[923] Sue Mahan et al., "Sexually Integrated Prisons: Advantages, Disadvantages and Some Recommendations," *Criminal Justice Policy Review* 3, no. 2 (1989): 156.

More than this, however, it forces us to question what the criminal legal system is doing when it divides spaces along binary sexed lines. Typically, the rationale given is one of protection. Female prisoners must be housed separately from male prisoners for their protection. Trans men must be housed separately from cisgender men for their protection. Trans women must be housed separately from cisgender women for the protection of the cisgender women, and trans women must also often be housed separately from cisgender men for the protection of the trans women – leaving trans women with isolation as one of few viable options. Nonbinary people especially cannot be situated clearly within this framework, and any attempts to house nonbinary people either fall back on solitary isolation or classification along binary gender lines.

These structures tell us a lot about how society views gender and builds gender norms into our institutions. Society assumes that men are male assigned at birth, and women are female assigned at birth. It views men as aggressors and women as potential victims. It builds systems around these presumptions, discounting the possibility – or the harm – of violence that does not fit this pattern. Any individuals or occurrences of harm which run counter to these assumptions (whether through gender diversity or gender nonconformity or behaviour which defies these norms) are outliers to which the system is not structured to respond. Binary classifications of sex and gender harm trans and gender diverse people explicitly, creating situations where they are forced to navigate complex gendered spaces and risk discrimination, marginalisation, and abuse. However, binary classifications of sex and gender can also be problematic for cisgender people whose experiences run counter to the presumptions built into the criminal legal system. The inconsistencies and the ad-hoc nature of responses to trans and gender diversity expose that these issues with sex segregated spaces exist, and the lack of consistent response in how to navigate them shows us that this is an area which requires systemic and focused interrogation – for the safety and equity of all.

When it comes to both prisons and policing, many aspects of trans and gender diverse experiences come down to individuals. Where trans and gender diverse people have positive experiences, they typically do so because specific police or prison staff are well-informed about trans and gender diversity and respectful. Likewise, negative interactions often come

from police and prison staff having a lack of knowledge about gender diversity or internal bias against transgender people. While individual interactions are always at the core of institutional experiences, the institutions themselves should be structured to safeguard the people moving through them, regardless of the biases of individual staff. Not only are current systems not build to adequately safeguard trans and gender diverse people, but they are built fundamentally in opposition to trans and gender diverse realities.

CONCLUSION

This thesis has examined the history of trans and gender diverse experiences in the Australian criminal legal system throughout the twentieth century and into the present day. The nature of these experiences has changed significantly across this period, as have understandings of what gender diversity is and what it means to be transgender. However, at every stage, the presence of gender diversity has challenged assumptions built into the criminal legal system and exposed flaws in the logic and motivations of the system. As a society, we need to radically reimagine what the criminal legal system is, what it does, and who it serves. This is not just for trans and gender diverse people, but gender diversity provides a critical lens for interrogating many mechanisms of the criminal legal system.

Prisons and policing seek to punish people for transgressing norms. Often these norms are codified in law, but not always. Prisons enforce gender norms in both physical (e.g., gender segregation) and cultural ways. Likewise, police monitor public and private spaces for violations of accepted behaviour which, within a gendered society, includes acceptable gendered behaviour. Although the manner of gender policing has changed over the course of the twentieth and twenty-first centuries, it is nonetheless ongoing. Reform to include trans and gender diverse people within the 'in-groups' of society – through legal protection, through sensitivity training, inclusion, policy amendments – is partially effective at best, and cannot sufficiently address problems that are inherent to what policing and incarceration *are* and *do*.

Policing of gender does not rely on the existence of law explicitly to prohibit gender nonconforming expression or behaviour, as evidenced within this thesis by the active policing of gender nonconformity in the early twentieth century despite the lack of law against such expression existing 'on the books.' Policing and incarceration are fundamentally concerned with imposing and enforcing social and state-approved norms on the public, and this will always disproportionately target marginalised groups. While society is transphobic, the criminal legal system, concerned with labelling and disciplining disobedience from those

who disrupt the social and political status quo, will be transphobic as well. If, through policy change and reform, trans and gender diverse people were accepted as part of the status quo, there would still be 'deviant' out-groups to take their place.

The malleability of the criminal legal system in terms of how it constructs and responds to in- and out-groups can be seen in the first two chapters of this thesis. This period, from the turn of the twentieth century to the 1950s (or so), witnessed significant reconstruction of gender and sexual norms and the shift in policing in response to these changes. Earlier in these decades much of the media attention (in absence of real statistics around police activity) on policing of gender nonconformity focused on female-assumed individuals presenting as male in public spaces. This trend shifted in response to reconceptualisation of gender expectations and socially accepted behaviours. As ideas about homosexuality and sexual 'deviance' were developed and disseminated into the Australian cultural mindset from the 1920s, the conflation of gender nonconformity with 'deviance' resulted in increased attention to policing of male-assumed people presenting as female. What I examined in these chapters was not the policing of trans and gender diverse people per se, but the policing of gender nonconformity, and the regulating of gender nonconformity to reenforce social norms and regulate public spaces and behaviour.

Chapter 3 of this thesis acted as a bridging chapter between these earlier decades and modes of policing and the modern period in the latter-half of the twentieth century. It examined a period wherein gender diversity was gradually identified and defined, while still being policed as part and parcel with homosexuality. The first notable public representations of 'transsexualism' or 'transsexuality' occurred throughout this period, with descriptions of people medically or surgically transitioning receiving public media attention. These representations simultaneously challenged and reenforced concepts of binary gender. Acknowledgment that someone might be able to transition from one binary gender (e.g., male) to another (e.g., female) both validated the possibility of transgender existence, and reenforced the underlying binary concept of gender as two opposing sides of a one-or-the-other split.

Meanwhile, throughout this period of the 1950s-70s, homosexuality became increasingly systemically and aggressively policed, and media, press or social discourse often depicted gender nonconformity within homosexual spaces, conflating and villainising the two. We can also observe something of a parallel between the vilification of homosexuality in those decades and the vilification of transgender people in the present-day. During the preceding decades, society was slowly exploring and defining the idea of homosexuality, and as terminology and concepts were developed, spaces and communities were gradually created – and subsequently, policed. By the 1950s, gay people were 'the greatest social menace' facing Australia. A similar process took place in the 1980s, 1990s and 2000s with trans and gender diverse people carving out their own communities and vocabularies and receiving subsequent backlash as wider society integrated, negotiated, and challenged these new concepts.

Chapters 4 and 5 examined the experiences of transgender women especially in their interactions with police and prisons during the 1980s. Chapter 4 looked at transgender women's experiences inside prison, and how the media and the press sensationalised and responded to them. Ad-hoc responses in this period established standards for how prisons would deal with gender diversity, setting the stage for coordinated law and legislation reforms in the decades to follow. Chapter 5 focused on sex work and the disproportionate targeting of trans sex workers in New South Wales following the decriminalisation of street-based sex work. While homosexuality related charges remained embedded in the law and legislation classed transgender women as male, they were subjected to increased police attention and prosecution. What both chapters show is the presence of transgender led communities and advocacy throughout this period, and their efforts to advocate for their rights to live and express their gendered reality.

Finally, Chapters 6 and 7 looked at coordinated criminal legal system responses to gender diversity since the 1990s, such as the establishment of policies and procedures to manage trans and gender diverse prisoners, state legislative and anti-discrimination changes to acknowledge trans and gender diversity and police actions to establish liaison officers and policy frameworks. More pertinently, these chapters argued that these efforts have not

resulted in actual necessary change and that a more radical restructuring and reimagining of the criminal legal system is needed.

By examining such a broad stretch of time – from the turn of the twentieth century right up to the present day – this thesis demonstrates that, firstly, there is not enough research currently out there regarding trans and gender diverse experiences of the criminal legal system. This thesis, in many ways, is a scope setting exercise, attempting to get an overhead view of these histories. However, much more research is needed to dive into the details and complexities of all the periods covered in this research. Trans and gender diverse people are systemically marginalised inside the criminal legal system and outside of it. This thesis demonstrates that the marginalisation trans and gender diverse people experience in the criminal legal system is not only based off transphobia, cisnormativity and gender essentialism (although these are major factors), but it is also an extension of the fundamental ways the criminal legal system is designed to monitor and control populations. Minority groups are disproportionately harmed by this. Gender diversity particularly exposes some deep logical flaws around incarceration and practices of policing and regulating gender. We can observe that the criminal legal system responses to gender diversity have changed significantly as concepts of trans and gender diversity emerged and evolved. Criminal legal institutions do not sit above day-to-day social issues and harms: they are enmeshed with them. This points to significant flaws in the 'justice' part of so-called criminal justice – a term I have avoided throughout this thesis. Producing justice requires that these institutions do not reproduce discrimination and harm to marginalised populations. If they are incapable of doing so, they are not administering justice.

I started writing this thesis in mid-2019, and shortly into my project it became clear that I was going to be conducting this research during a difficult and fraught time. During these years of global pandemic and international unrest, political groups and individuals, high-profile figures, and the media have continuously scrutinised and scapegoated trans and gender diverse people during culture war debates. The intense scrutiny that trans and gender diverse people are subjected to forces us to speak to these debates, forcing us to justify our existence, forcing us to demonstrate our resilience, persistence, and, importantly, our

histories. Trans and gender diverse history is important because it challenges narratives that tell us transgender people are new, or a fad, or a trend, or in any way aberrant or unnatural. Transgender history demonstrates that we have always been here, and that gender diversity has taken many forms, dependent on social context, but is always present.

More research is necessary on trans and gender diverse history in Australia in general. We need more research on trans and gender diverse people in prisons, trans and gender diverse interactions with police. We need more research on alternative approaches to the current criminal legal system and research seeking alternatives such as community based restorative justice initiatives, healing and restitution projects, and systemic change to alleviate poverty and discrimination to combat the roots of the systems which regulate and marginalise gender diversity. It is telling that binary gender division is so built into the criminal legal system that we rarely even stop to question its presence. It is telling that we rarely stop to question binary gender segregation in public toilets, professional sports, etc. As trans and gender diverse people become more prominent, these spaces become battlegrounds and trans and gender diverse people are othered, demonised, and spotlighted. But why? Why focus on trans and gender diverse people's presence in these institutions instead of focusing on what (if anything) segregating these spaces by sex or gender does for us? We need to abolish gender policing and regulation, not only in police forces or prisons, but in all our interactions and in all Australian institutions. Gender diversity continues to evolve, and the criminal legal system has been consistently slow to respond to the changing needs and developments evident within our society. Inconsistencies across states, territories and institutions can only lead to differencing in policing, incarceration, and outcomes for trans and gender diverse people Australia-wide.

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