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## **The Royal Australian Navy and Courts-Martial for Homosexuality**

ABSTRACT: Until November 1992 the Australian military had longstanding rules against the presence of lesbian, gay and bisexual (LGB) service members. The policies and practices for dealing with LGB people varied across time and services, but one commonality is that rarely did cases go to court martial and were generally dealt with through administrative and other disciplinary processes. Yet, the rare cases which did go to court martial leave a hitherto overlooked archival trail that provides insight into how the Australian armed forces conceptualised and policed homosexuality within its ranks. This article examines data from courts martial in the Royal Australian Navy (RAN), focusing especially on cases from the period after the Second World War. Exploring three case studies, it shows how courts martial were not so much about policing homosexuality, but rather prosecuting unsolicited advances and incidents which breached the unspoken bounds of discretion.

Keywords: gay and lesbian; LGBTIQ; Australia; courts-martial; homosexuality

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In 1942, the Royal Australian Navy (RAN) convened probably the most significant court martial in Australian history. Two stokers on board the RAN flagship *HMAS Australia* – Albert Gordon and Edward Elias – were charged for the brutal stabbing murder of a third stoker, John Riley. They were both found guilty and sentenced to death. Their lawyer appealed the death sentence to the High Court of Australia because, under Australia's *Defence Act*, the death penalty was only allowed in cases of mutiny, treason or desertion. The High Court found, though, that the *Defence Act* did not apply in this case. Early in the Second World War, Prime Minister Robert Menzies (1939-41) signed an Order-in-Council transferring control of RAN vessels and personnel to the British Admiralty. This meant that Australian sailors were under the jurisdiction of the British *Naval Discipline Act* rather than Australia's own legislation.<sup>1</sup> The cabinet of the new Prime Minister, John Curtin (1941-45), was determined to reclaim control over its defence forces.<sup>2</sup> In October 1942 the Australian Parliament ratified the Statute of Westminster – granting the country full sovereignty, including the right to repeal British legislation affective in Australia.<sup>3</sup>

Historians and legal experts have generally focused on the legal and political ramifications of the Gordon and Elias court martial. What is also remarkable about the Riley murder was the motive. On his deathbed, Riley said that Gordon and Elias had stabbed him because he threatened to reveal their homosexual relationship. Further evidence suggested that Riley, too, had been sexually involved with the men and had threatened them because he

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<sup>1</sup> This contrasts with the First World War, when the Australian government agreed that soldiers in the Australian Army would be subject to the British *Imperial Army Act* except when it was inconsistent with the *Defence Act*. This meant Australian First World War soldiers were subjected to a narrower set of death penalty offences than their British counterparts and the Governor-General, on the advice of cabinet, had to approve executions. See Mark Finnane and Yorick Smaal, "Character, Discipline, Law: Courts Martial in World War I," *Australian Historical Studies* 51, no. 3 (2020): 324-25.

<sup>2</sup> Until 1976 the RAN, Australian Army and Royal Australian Air Force (RAAF) operated independently of each other as separate services. In 1976 the three services amalgamated as the Australian Defence Force (ADF) under the leadership of the Chief of the Defence Force. Because most of this article is focusing on the period pre-1976, I do not use the term ADF when referring to them.

<sup>3</sup> Chris Clark, "The Statute of Westminster and the Murder in *HMAS Australia*, 1942," *Australian Defence Force Journal* 179 (2009): 18-29. *The King v. Bevan and Others: Ex Parte Elias and Gordon*, National Archives of Australia (hereafter NAA) A10146, 1942/6.

felt jilted. Although much of this information was available to investigators, the homosexual motive was relatively muted during the court martial. This was, in part, because the military did not want the presence of homosexuals in its ranks known lest it embarrass the forces or serve as propaganda for the enemy.<sup>4</sup> Indeed, the *Australia*'s captain noted in his diary that a subsequent investigation implicated several more sailors in homosexual conduct. Gordon and Elias were never charged for sodomy or disgraceful conduct of an indecent kind, but only murder.<sup>5</sup>

The Gordon and Elias court martial was distinct given the nature of the crime and the publicity surrounding the case. Yet, the downplaying and even blind eye turned to homosexuality were symptoms of a broad culture of silence surrounding homosexuality in the Australian military. This culture transcended the three services, but statistics are most readily accessible from the RAN. From 1912 until 1970, there were only twenty-two sailors court-martialled for homosexual-related offences: sodomy, committing an act of gross indecency, disgraceful conduct of an indecent kind, indecent assault, assault with intent to commit buggery or soliciting another male person to commit an act of gross indecency with him. Interestingly, before the Second World War, the only charges laid were for sodomy while after 1940 there were no sodomy charges.<sup>6</sup> A breakdown of these cases, as taken from the annually published Return of Naval Courts-Martial and Disciplinary Courts, is as follows:<sup>7</sup>

| <b>Year</b> | <b>Rank</b>                                 | <b>Charge</b> | <b>Finding</b>                   |
|-------------|---|---------------|----------------------------------|
| 1919        | Officers' Steward,<br>3 <sup>rd</sup> Class | Sodomy        | Guilty (sentence later annulled) |
|             | Officers' Steward,                          | Sodomy        | Pleaded guilty                   |

<sup>4</sup> The court martial record is available from NAA B6121, 123V. See also Robert Hadler, *Dark Secrets: The True Story of Murder in HMAS Australia* (Melbourne: Wilkinson Publishing, 2020).

<sup>5</sup> Gordon and Elias were commuted to life sentences and then released in 1950. See Hadler and NAA MP691/1, 4011/26/1.

<sup>6</sup> In part this may be because post-war regulation on Unnatural Offences did not list sodomy. Instead, it included "buggery" – though notably, there was only ever one prosecution for assault with intent to commit buggery. See NAA A1813, 321/251/1.

<sup>7</sup> See Australian War Memorial AWM369, 1; NAA MP151/1, 445/201/123; NAA MP151/1, 445/201/53; NAA MP151/1, 455/201/234; NAA A463, 1958/86; NAA A2880, 11/8/38; NAA A/1993/04651; NAA A1813, 321/10/127.

|      |  |   |  |
|------|--|---|--|
|      | 3 <sup>rd</sup> Class                        |   |  |
| 1920 | Stoker                                       | Sodomy  | Pleaded guilty   |
| 1922 | Stoker                                       | Sodomy  | Pleaded guilty   |
| 1940 | Marine (British RN)                          | 2 charges of Sodomy and 2 charges of Committing Acts of Gross Indecency   | Pleaded guilty   |
|      | Marine (British RN)                          | 1 charge of Sodomy and 1 charge of Committing Acts of Gross Indecency   | Pleaded guilty   |
|      | Marine (British RN)                          | 1 charge of Sodomy and 1 charge of Committing Acts of Gross Indecency   | Pleaded guilty   |
| 1941 | Electric Artificer,<br>3 <sup>rd</sup> Class | 1 charge of Soliciting another person to commit an act of gross indecency with him; 3 charges of indecent assault; 3 other non-sexual charges   | Not guilty of Soliciting and 2 indecent assault charges;<br>Guilty of 1 count of indecent assault  |
| 1952 | Acting Lieutenant                            | 1 charge of gross indecency; 5 charges of indecent assault; 4 charges of conduct unbecoming an officer  | Not guilty of all charges  |
|      | Acting Leading Steward<br>(Provisional)      | 1 charge of committing an act of gross indecency; 1 charge of attempting to commit an act of gross indecency  | No prima facie case, so court acquitted without calling on defence   |
| 1955 | Telegraphist                                 | Committing an act of gross indecency with each other  | Not guilty   |
|      | Radio Electrician's Mate                     |   | Not guilty   |
| 1957 | Telegraphist                                 | An act to the prejudice of good order and Naval discipline in that they did engage in indecent behaviour; other non-sexual charges  | Not guilty   |
|      | Telegraphist                                 |   | Not guilty   |
|      | Telegraphist                                 |   | Not guilty   |
| 1959 | Radio Communication Officer                  | 1 charge of indecent assault; 1 charge of disgraceful conduct of an indecent kind   | Guilty   |
| 1960 | Steward                                      | 1 charge of disgraceful conduct of an indecent kind; 1 charge of An act to the prejudice of good order and Naval discipline in being naked on a bed with another male without reasonable excuse | 1 <sup>st</sup> charge Autrefois acquit;<br>2 <sup>nd</sup> charge Autrefois convict   |
| 1961 | Sick Berth Attendant                         | 2 charges indecent assault; 1 charge gross indecency; 1 charge disgraceful conduct of an indecent kind; 1 charge inciting the commission of an act of gross indecency                           | Not guilty of 1 charge of indecent assault and charge of inciting the commission of an act of gross indecency;<br>Guilty of other 3 charges (but Naval |

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|------|---|---|---|
|      |   |   | Board quashed finding on gross indecency)   |
| 1963 | Chief Petty Officer Steward               | 1 charge indecent assault; 1 charge committing an act of gross indecency  | Not guilty  |
| 1964 | Cook                                      | 2 charges committing an act of gross indecency; 1 charge non-sexual   | Not guilty of 1 charge gross indecency; Guilty of 1 charge of gross indecency (this later quashed by Naval Board) |
| 1968 | Acting Petty Officer Sick Berth Attendant | 1 charge indecent assault; 1 charge disgraceful conduct of an indecent kind; 1 charge assault with intent to commit buggery; 6 charges non-sexual | Not guilty of homosexual-related charges  |
| 1970 | Lieutenant SDSU                           | 1 charge indecent assault; 1 charge disgraceful conduct of an indecent kind; 2 charges non-sexual   | Not guilty of homosexual-related charges  |

The small number of Navy courts-martial for homosexuality over fifty-eight years reflects the broader history of attitudes and approaches to male homosexuality in the Australian military. As Yorick Smaal has found in the context of the Australian Army during the Second World War, commanding officers often wilfully ignored homosexual behaviour and were even tolerant of gay or bisexual men in the ranks so long as they were discreet.<sup>8</sup> When cases did come to attention, military officials tended to deal with them administratively or even to let the civilian courts charge the men.<sup>9</sup> This pattern of ignoring homosexuality when men were discreet continued across all three services of the Army, RAN and Royal Australian Air Force (RAAF) until the early 1970s. This is not to say that the armed forces formally condoned homosexual behaviour. Beginning in the Second World War, the Army adopted rules to investigate and punish suspected cases of homosexuality. Servicewomen were consistent targets of investigations and so-called witch-hunts from the Second World

<sup>8</sup> Yorick Smaal, *Sex, Soldiers and the South Pacific, 1939-45: Queer Identities in Australia in the Second World War* (London: Palgrave Macmillan, 2015).

<sup>9</sup> Yorick Smaal and Graham Willett, "Conduct Unbecoming: Homosex, Discipline and Military Cultures in the Second World War," in *Criminologies of the Military: Militarism, National Security and Justice*, ed. Ben Wadham and Andrew Goldsmith (Oxford: Hart Publishing, 2018), 176.

War onwards.<sup>10</sup> RAN regulations on “Unnatural Offences”, adopted from the British Royal Navy from at least 1954, outlined rules to investigate and punish sailors for homosexuality. These orders – updated to be called Abnormal Sexual Behaviour from 1968 – included rules around collecting medical evidence and called for most cases of “confirmed homosexuality” to be discharged administratively either at their own request, or dishonourably as “services no longer required”. After 1974, the Australian armed forces adopted a consistent, tri-service approach to investigating and discharging people for homosexuality, and those procedures were in place until the Australian government lifted the ban on homosexuality on 23 November 1992.<sup>11</sup> Transgender people continued to be banned from the Australian Defence Force under a different set of policies and guidelines until September 2010.<sup>12</sup>

Given these regulations and the common practice of turning a blind eye to male homosexuality before 1974, it is not surprising that so few men faced court martial. Yet, this begs the question of what was so unique about the cases that *did* go to court martial, and what do they teach us about homosexuality in the Royal Australian Navy and Australian military before 1970. This article focuses on three courts martial from the post-Second World War era to address these questions: two guilty cases, and one not guilty. By examining the details of the cases, the nature of the evidence, the background of the accused and the case outcomes, it

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<sup>10</sup> Ruth Ford, "Lesbians and Loose Women: Female Sexuality and the Women's Services during World War II," in *Gender and War: Australians at War in the Twentieth Century*, ed. Joy Damousi and Marilyn Lake (Cambridge: Cambridge University Press, 1995), 81-104; Ruth Ford, "Disciplined, Punished and Resisting Bodies: Lesbian Women and the Australian Armed Services, 1950s/ 60s," *Lilith*, no. 9 (1996): 53-77; Shirleene Robinson, "Sexuality at a Cost: Lesbian Servicewomen in the Australian Military, 1960s-1980s," in *Beyond Combat: Australian Military Activity Away from the Battlefield*, ed. Tristan Moss and Tom Richardson (Sydney: NewSouth Publishing, 2018), 45-58.

<sup>11</sup> Noah Riseman and Shirleene Robinson, *Pride in Defence: The Australian Military and LGBTI Service since 1945* (Melbourne: Melbourne University Press, 2020); Noah Riseman, "Hunting Gays and Lesbians in the Australian Defence Force, 1974-92," *Journal of the History of Sexuality* 28, no. 3 (2019): 325-56; Noah Riseman, "From Witch-Hunts to Pride Balls: The ADF and LGBTI Service Personnel," in *Beyond Combat: Australian Military Activity Away from the Battlefield*, ed. Tristan Moss and Tom Richardson (Sydney: NewSouth Publishing, 2018), 29-44; Noah Riseman, Shirleene Robinson, and Graham Willett, *Serving in Silence? Australian LGBT Servicemen and Women* (Sydney: NewSouth, 2018).

<sup>12</sup> Noah Riseman, "Transgender Policy in the Australian Defence Force: Medicalization and Its Discontents," *International Journal of Transgenderism* 17, no. 3-4 (2016): 141-54; Riseman and Robinson, *Pride in Defence: The Australian Military and LGBTI Service since 1945*, 169-98.

shows that it was not so much homosexuality which was being prosecuted, but rather unsolicited advances which breached the unspoken bounds of discretion and consent.

### **Courts-Martial as Historical Sources**

There is surprisingly little literature on courts-martial in Australia. A small number of legal scholars have provided overview histories of the military justice system from its British foundations, through to a series of post-Second World War reforms which enshrined the application of old British laws (even as the United Kingdom was reforming its own military laws), and eventually to the adoption of the *Defence Force Discipline Act* in 1982.<sup>13</sup> Legal scholars have taken some interest in the operation of the *Defence Force Discipline Act*, particularly in the wake of High Court rulings in the late 1980s through the early 2000s which tested the constitutionality and reach of the military justice system.<sup>14</sup>

What attracted the most scholarly attention was the 2009 High Court case *Lane v Morrison* which struck down the constitutionality of the new Australian Military Court.<sup>15</sup> The Commonwealth government established this tribunal in response to a series of parliamentary inquiries into the military justice system,<sup>16</sup> and it was intended to be more independent and impartial than previous military tribunals. The High Court ruled that the Australian Military Court exercised judicial authority of the Commonwealth in line with Chapter III of the Australian Constitution yet did not comply with Chapter III rules about the appointment and tenure of judges. The *Lane* ruling still upheld the constitutionality of courts martial, noting that they were not exercising judicial authority because the outcomes were subject to review

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<sup>13</sup> David H Denton, "The Australian Military Justice System: History, Organisation and Disciplinary Structure," *Victoria University Law and Justice Journal* 6, no. 1 (2016): 26-35.

<sup>14</sup> Andrew D Mitchell and Tania Voon, "Justice at the Sharp End: Improving Australia's Military Justice system," *University of New South Wales Law Journal* 28, no. 2 (2005): 396-425.

<sup>15</sup> *Lane v Morrison* [2009] HCA 29.

<sup>16</sup> Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice Procedures in the Australian Defence Force* (Canberra: Parliament of the Commonwealth of Australia, 1999); Australian Senate, Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System* (Canberra: Commonwealth of Australia, June 2005).



by the chain of command. Even if the chain of command would almost certainly accept a court martial finding and sentence, the High Court was interpreting the court martial as making a recommendation rather than as a binding judicial body.<sup>17</sup> Henry Burmester, a legal consultant to the Australian Government Solicitor, argues that the High Court essentially created a new test which could uphold the longstanding historical tradition of a separate military justice system while also prohibiting the establishment of judicial bodies outside the framework of Chapter III of the Constitution.<sup>18</sup>

Historians, too, have until recently mostly overlooked courts martial and the entire military justice system. The official histories commissioned by the Commonwealth for each overseas conflict, and the more recent Oxford University Press histories of the three services, have focused primarily on operational, political, medical and home front dimensions of conflict and the defence forces.<sup>19</sup> Nor have most other social and military histories used courts martial as primary sources. This is not because of a dearth of records, but perhaps the reverse – the overwhelming number of records. All courts martial before 1995 are available in the National Archives of Australia, but the catalogue entries only include the accused's name, service number and date of court martial. One would need to access each court martial file to know the charge and outcome. This is the main reason that previous searches for homosexuality-related courts martial have proven so difficult and relied on other sources like

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<sup>17</sup> Jonathan Crowe and Suri Ratnapala, "Military Justice and Chapter III: The Constitutional Basis of Courts Martial," *Federal Law Review* 40, no. 2 (2012): 161-80; Alison Duxbury, "The Curious Case of the Australian Military Court," *Oxford University Commonwealth Law Journal* 10, no. 2 (2010): 155-84; Henry Burmester, "The Rise, Fall and Proposed Rebirth of the Australian Military Court," *Federal Law Review* 39, no. 1 (2011): 195-211; Andrew D. Mitchell, "Too Close for Comfort: Lane v. Morrison and Its Effect on Australian Military Justice," *Public Law Review* 21, no. 5 (2010): 9-13.

<sup>18</sup> Burmester, "The Rise, Fall and Proposed Rebirth of the Australian Military Court," 205.

<sup>19</sup> The multi-volume official histories are all available in the Australian War Memorial, with the First and Second World War official histories digitised and available online through <http://www.awm.gov.au>. The Oxford histories are: David Stevens, ed., *The Royal Australian Navy: A History* (South Melbourne: Oxford University Press, 2001); Alan Stephens, *The Royal Australian Air Force: A History* (South Melbourne: Oxford University Press, 2006); Jeffrey Grey, *The Australian Army: A History* (South Melbourne: Oxford University Press, 2006).

newspaper reports.<sup>20</sup> For much of the twentieth century, the RAN was the only service to publish an annual register of courts martial which is accessible in the Australian War Memorial and National Archives of Australia (and those registers cover the years 1912-1970).<sup>21</sup> For other services, one would need to go through over 90,000 index cards which are organised alphabetically, rather than by year or charge. That said, in 2020 the National Archives of Australia digitised those index cards, and the Prosecution Project from Griffith University has embarked on a crowdsourcing citizens history project to collate the data from the index cards.<sup>22</sup> Thus there is increasing scope for researchers to uncover cases of interest and to request access to those case files.

Australian historians have only recently begun to explore the significance of courts martial and the military justice system as a whole. Bruce Oswald and Jim Waddell's edited history of lawyers in the Australian Army focuses primarily on the personalities who drove the Army justice system, but they do include important information about courts martial and how they operated and changed over the 20th century.<sup>23</sup> Graham Wilson's history of detention in the Australian Army from 1914-47 certainly mentions courts martial and the justice system, but the analysis is focused on how and where punishments were meted out.<sup>24</sup> Historians who have worked with specific court martial files have focused primarily on the First World War. Peter Stanley, for instance, used courts martial in conjunction with other discipline records to explore many examples of bad behaviour and crime among the First Australian Imperial Force. Stanley's work shows how courts martial can reveal social norms

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<sup>20</sup> Smaal and Willett, "Conduct Unbecoming: Homosex, Discipline and Military Cultures in the Second World War," 169-70.

<sup>21</sup> For many years the Australian Army also kept an annual register, but these have never been handed over to the National Archives of Australia nor incorporated into RecordSearch.

<sup>22</sup> The digitised index cards are all in NAA series A3193. Information about *The Prosecution Project*, including crowdsourcing activities, is available from <https://prosecutionproject.griffith.edu.au/>. On citizen historians and crowdsourcing digital projects, see Alana Piper, "Digital Crowdsourcing and Public Understandings of the Past: Citizen Historians meet Criminal Characters," *History Australia* 17, no. 3 (2020): 525-41.

<sup>23</sup> Bruce Oswald and Jim Waddell, eds., *Justice in Arms: Military Lawyers and the Australian Army's First Hundred Years* (Newport, NSW: Big Sky Publishing, 2014).

<sup>24</sup> Graham Wilson, *Accommodating the King's Hard Bargain: Military Detention in the Australian Army 1914-1947* (Newport, NSW: Big Sky Publishing, 2018).

and common behaviour within the forces, even if those social norms were, in the eyes of military law, criminal.<sup>25</sup>

More recently, crime historians Mark Finnane and Yorick Smaal have examined a sample of court martial files from the First World War to conduct systematic quantitative analysis of the prevalence of certain charges, officers versus other ranks, and outcomes. Within their sample of 250 files, they found that officers constituted 15 percent of courts martial and other ranks were 85 percent; officers had an acquittal rate of nearly 40 percent whereas other ranks were acquitted in less than 10 percent of cases.<sup>26</sup> Although these studies all focus on the Australian Army and the First World War, they show the potential for courts martial across all three services as qualitative and quantitative data which can enrich social and legal histories of the Australian military. Indeed, all of these studies have shown that the detailed evidentiary trail and witness testimonies within courts martial make them highly valuable historical sources. Courts martial reveal the daily behaviours of service members, as well as how military law tried to police, regulate and impose societal norms within the forces.

The post-Second World War period is also rich in courts martial. One estimate from 1964 suggested that there were approximately 200 Army, 25 RAAF and 12 RAN courts martial per annum.<sup>27</sup> Over the seven-year period 1965-72, the Army alone held over 2,100 courts martial.<sup>28</sup> Aside from a few high-profile murder cases from Vietnam, there has been no scholarly exploration into courts martial from this period and what they revealed about the Australian military, its justice system or the social mores promoted and/or exhibited within the services.

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<sup>25</sup> Peter Stanley, *Bad Characters: Sex, Crime, Mutiny, Murder and the Australian Imperial Force* (Millers Point, NSW: Pier 9, 2010).

<sup>26</sup> Finnane and Smaal, "Character, Discipline, Law: Courts Martial in World War I," 331-32.

<sup>27</sup> K.E. Enderby, "Courts-Martial Appeals in Australia," *Federal Law Review* 1, no. 1 (1964): 116.

<sup>28</sup> Colonel David Wilkins, "The Vietnam War," in *Justice in Arms: Military Lawyers in the Australian Army's First Hundred Years*, ed. Bruce Oswald and Jim Waddell (Newport, NSW: Big Sky Publishing, 2014), 319-20.

Emerging research overseas highlights the potential of courts martial to explore hitherto overlooked ideological drivers of military culture, as well as the social norms within the services and the intersections and disconnects with civilian society. Matthew Barrett has recently explored a specific homosexuality-related court martial from the Royal Canadian Air Force in the Second World War. Barrett's detailed reading of the court martial and complementary records about the accused shows how the detailed evidentiary trail and testimonies within the court martial can reveal the common daily rituals and behaviours of service members, even when there was a clear disconnect from the moral expectations imposed by military law. Barrett also shows how the prosecution of homosexuality specifically could draw on contemporaneous medical, sexological and psychological understandings of homosexuality. Such evidence could either support a prosecution or a defence, depending on how the legal officers utilised the evidence to craft their arguments.<sup>29</sup>

As Kellie Wilson-Buford shows from the United States, courts martial from the post-Second World War era reveal how the military used its disciplinary system to impose a set of traditional values centred around heterosexuality, monogamy and whiteness. This is not to say that the American military necessarily was more sexually liberal before the Second World War. Rather, during the Cold War, when civilian society was imposing conservative values against so-called sexual deviancy, so too did military law actively police morality within the services. The military was reproducing and reinforcing what feminist scholar Gayle Rubin dubs the hierarchy of sexual value, with monogamy, marriage and reproductive heterosexuality at the top and sex work, pornography and homosexuality on the bottom.<sup>30</sup> The effect, Wilson-Buford explains, was: "The [military] courts' efforts to police the marital and sexual relationships of service members constructed a new category of military criminal

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<sup>29</sup> Matthew Barrett, "Conduct Unbecoming an Officer and a Doctor: Medical Attitudes toward Homosexuality and the Court Martial of Dr. Percy Ryberg," *Canadian Journal of History* 55, no. 1-2 (2020): 35-64.

<sup>30</sup> Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, ed. Richard Parker and Peter Aggleton (London and New York: Routledge, 2007), 143-78.

– the sexual deviant – whose presence in turn necessitated an expansion of the justice system’s responsibilities and resources to regulate its boundaries.”<sup>31</sup> It is unclear to what extent Wilson-Buford’s analysis applies more broadly to the Australian military, though given the similar cultural values in both civilian and military life in the United States and Australia, her argument has merit.<sup>32</sup>

The Australian armed forces certainly constructed homosexuals as deviants – just as they were seen in civilian society.<sup>33</sup> The small number of courts martial for homosexuality reflect the silences around homosexuality in the 1950s-60s and the fact that the armed forces generally dealt with homosexuality through other means. In the Australian military justice system, offences may be dealt with through a disciplinary or administrative process. Disciplinary matters go through a tribunal (including possible courts martial) as outlined in relevant legislation. Other offences which are usually less severe are dealt with administratively, usually through investigation by service police and/or commanding officers and without going through tribunals.<sup>34</sup> Under the British Royal Navy’s regulations on Unnatural Offences, which the RAN applied since at least 1954, only cases of homosexuality with compelling evidence went to court martial. Any cases where there was less certainty or which relied on the testimony of other gay or bisexual men were to be dealt with by commanding officers administratively. Even as the RAN updated its own policy on

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<sup>31</sup> Kellie Wilson-Buford, *Policing Sex and Marriage in the American Military: The Court-Martial and the Construction of Gender and Sexual Deviance, 1950-2000* (Lincoln, NE: University of Nebraska Press, 2018), 13.

<sup>32</sup> The author has just commenced a new collaborative Australian Research Council-funded project (2021-23) which will examine this very topic, entitled *A Century of Sex and the Australian Military, 1914-2020*.

<sup>33</sup> For general Australian gay and lesbian histories, see Graham Willett, *Living Out Loud: A History of Gay and Lesbian Activism in Australia* (St Leonards, NSW: Allen & Unwin, 2000); Garry Wotherspoon, *Gay Sydney: A History* (Sydney: NewSouth Publishing, 2016); Rebecca Jennings, *Unnamed Desires: A Sydney Lesbian History* (Clayton, VIC: Monash University Publishing, 2015); Graham Willett, Wayne Murdoch, and Daniel Marshall, eds., *Secret Histories of Queer Melbourne*, reprint ed. (Parkville, VIC: Australian Lesbian and Gay Archives, 2017).

<sup>34</sup> Denton, "The Australian Military Justice System: History, Organisation and Disciplinary Structure," 30.

Abnormal Sexual Behaviour from 1968, still there was emphasis on commanding officers taking action outside the bounds of courts martial.<sup>35</sup>

Even knowing that courts martial for homosexual acts were reserved for cases with strong evidence, it is notable that of the fourteen cases from the period 1945-70, only three were found guilty of some or all charges – and one of those was then overturned by the Naval Board. The rest of this article will examine the details of three cases from that era: the two guilty cases and one not guilty. Because these men may still be alive and I do not know if they were ever open about their sexuality (or indeed if they ever even identified as gay or bisexual), I am only referring to them by their initials. I also have not referenced their records from the National Archives of Australia because those record titles list the men’s names. While this is not standard practice for historical research, it is consistent with ethical practice about not outing people unwittingly. I am happy to provide readers with further information about these cases on request.

### **JF: Guilty of Indecent Assault**

JF was spending a night in the Royal Naval House at the Rocks in central Sydney in 1959. This was hostel-style accommodation for service members who were on leave and proved popular because of the inexpensive rooms.<sup>36</sup> Around 2:00am, a witness named KD saw JF standing suspiciously close to another sailor’s dormitory bed (whose name is redacted in the court martial file). KD saw JF place his hand and then head under the sailor’s clothing in the groin region for about ten to fifteen minutes. Then JF climbed into the top bunk and placed his groin close the sailor’s face. The sailor awoke to find his hand on JF’s penis and JF’s

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<sup>35</sup> Confidential Australian Navy Order 35/66, “Unnatural Offences,” 6 July 1966, Australian Queer Archives and NAA A1813, 321/251/1; Confidential Australian Navy Order 1-2/69, “Abnormal Sexual Behaviour,” 21 February 1969, Australian Queer Archives. See also Riseman and Robinson, *Pride in Defence: The Australian Military and LGBTI Service since 1945*, 34-36.

<sup>36</sup> A brief history of the heritage-listed building is available from the Sydney Heritage and Conservation Register: [www.shfa.nsw.gov.au/sydney-About-us-Heritage-role-Heritage-and-Conservation-Register.htm&objectid=124](http://www.shfa.nsw.gov.au/sydney-About-us-Heritage-role-Heritage-and-Conservation-Register.htm&objectid=124), accessed 4 March 2021.

hand on his penis. The sailor pushed JF away and he left. KD then asked the sailor what happened, and he said that a “stumper” had groped him. KD left the dormitory and encountered JF in the hallway, where he began shouting at JF. KD reported JF as a “pooftah” to the booking clerk, who made a comment about there being a known “pooftah” there.

Royal Naval House actually has a hidden homosexual history which is absent in most publications. For instance, ex-sailor Dennis Jeffrey remembers staying at Royal Naval House sometime circa 1967-68 when he was on leave in Sydney, and on two occasions he picked up other servicemen – one in the bar downstairs, and one who was masturbating on the bunk below where he was sleeping.<sup>37</sup> One of the not guilty RAN courts martial during the post-war era involved another sailor accused of indecent assault for groping someone in one of the dormitory beds. Indeed, during JF’s court martial, one of the exchanges between the defence lawyer and the booking clerk went like this:

“Then I suppose it is fairly common knowledge about this R.N.H. [Royal Naval House] that it is a place, I won’t say it is a common occurrence, where you will find people of perverted sexual tastes – is that right?”

“Only going by hearsay, I would say there had been cases when people like that had entered the place.”

“Even some civilians too?”

“Yes”

KD even acknowledged that the night after JF’s arrest, civil police arrested a civilian at Royal Naval House for a similar offence (JF’s defence counsel used this information to argue they had the wrong man). Thus Royal Naval House’s reputation for homosexuality would prove central to JF’s defence, but it also suggests why JF may have felt less inhibited about groping another sailor: this was not uncommon or unexpected behaviour at Royal Naval House.

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<sup>37</sup> Dennis Jeffrey, interview with author, 18 April 2017, Launceston, TAS, Australian Queer Archives.

In his original police interview, JF stated: “I admit the allegations. I was very much under the influence of intoxicating liquor and just had this temporary lapse. I don’t know what came over me as I have never had these tendencies before.” The attribution of homosexual behaviour to alcohol was not uncommon among accused service members, as it could be seen as a mitigating factor. From 1968, Navy regulations on Abnormal Sexual Behaviour explicitly distinguished between “confirmed homosexuals” and those for whom the act was an “isolated instance of homosexuality”. The regulation specifically said: “Occasionally an adolescent will participate in an act of homosexuality for various reasons. While this activity points to a weakness in character it might be that the behaviour is an isolated act and not indicative of the offenders [sic] normal nature...In both the adolescent and the older individual, alcohol is usually a factor in the situation.”<sup>38</sup> In his court martial testimony, though, JF recanted his admission of guilt, saying he was falsely accused and the perpetrator must have been someone else. JF said he made the statement because he feared the case would be turned over to civil police and the publicity would be devastating for him and his family (JF admitted not knowing at the time that press could also attend courts martial). He preferred to defend himself in a court martial with the potential penalty of just being thrown out of the Navy, rather than imprisonment.

Ultimately the court did not believe JF and found him guilty of indecent assault and disgraceful conduct of an indecent kind, sentencing him to three months in prison and dismissal from the RAN. There are a number of factors that suggest why JF’s case both went to court martial and ended in a guilty verdict. First and foremost was the fact that this was not a consensual act. Neither the prosecution nor the defence suggested that the sailor molested in bed was a consenting party (though the defence did question why he would stay in such a deep sleep for ten to fifteen minutes while a man was groping him). The other reason was the

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<sup>38</sup> In Confidence Australian Navy Orders IC ANO’s 1-2/69, “Abnormal Sexual Behaviour,” 21 February 1969, Australian Queer Archives.



significance of the independent witness – KD – who both reported the incident and could corroborate what the sailor experienced. The policy on Unnatural Offences placed significant weight on the importance of corroboration, and KD proved convincing. The policy also referenced the timing of reporting an allegation. Drawing on stereotypes that a real sexual assault would be reported almost immediately, the regulation noted:

If he complained at the first reasonable opportunity *after the alleged offence*, it is competent for the court to receive evidence not merely of the fact of the complaint but also of its terms, not as evidence of the fact stated, or as corroboration, but as showing the consistency of the complainant's conduct and as negating the fact that he was a willing accomplice. A charge made long after the occurrence should always be regarded with great suspicion.<sup>39</sup>

Of course, such judgements about sexual assault are problematic, and in intervening decades there has been greater understanding that many sexual assault survivors are too traumatised to report the event sometimes until years or decades after the occurrence. But in this case, even under such archaic interpretations of sexual assault, the sailor's immediate reporting deemed the evidence credible enough to convict JF.

### **Medical Acquittal: WH, RF and LB**

Sometimes multiple men who allegedly engaged in homosexual activity together would be charged and court martialled collectively, as was the 1957 case for WH, RF and LB. They were all charged with an act to the prejudice of good order and Naval discipline in that they did engage in indecent behaviour, as well as two non-sexual charges: that they were drunk on board and that they were without reasonable excuse in a cottage at HMAS Harman. The allegation was that at 2:00am, the three men returned drunk to WH's cabin. They were so

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<sup>39</sup> Confidential Commonwealth Navy Order 48/58, "Unnatural Offences," 17 June 1958, NAA A1813, 321/251/1. Original emphasis.

loud that they awakened the other room occupant PB, but he went back to sleep. He awakened again as all three sailors climbed into the same bed, where PB heard snippets of conversation, “considerable rhythmic movement in the bed” and sucking noises. Two of the men stayed in bed together and the third slept on the floor. PB then contacted the senior hand of the cottage, who came to the cabin and saw the men asleep. During a search, the senior hand found a tube of partly used lanolin on top of WH’s locker.

As explained below, this case very much followed the procedures outlined in the Admiralty Fleet Order on unnatural offences. Yet, the defence counsel did not even obtain a copy of this order until the court martial commenced, and then he had twelve minutes to read through it. The defence first tried to challenge the very legality of the charge under Section 43 of UK *Naval Discipline Act*: conduct to the prejudice of good order and discipline. The defence lawyer questioned the application of that section to try a charge of indecent behaviour which was not otherwise criminalised under the *Naval Discipline Act*. The judge advocate rejected the defence argument and said it was up to the court to determine if indecent behaviour fit under the remit of conduct to the prejudice of good order and discipline.

Most of the defence case involved challenging the circumstantial nature of PB’s testimony. PB testified that he heard the following exchanges:

WH to RF:

- (i) "Are you facing me?"
- (ii) "I can't feel your dick then."
- (iii) "Horse, you're more like a stallion." [Horse was RF’s nickname]
- (iv) "I've got a mouthful of Lanolin, that's what I'm using."

WH to RF and LB:

- (i) "I'm being assaulted on both sides."

(ii) “I feel like an old mother hen surrounded by her brood of chicks.”

(iii) "If this scandal gets out it will be on the front page of next week's  
'Confidential.'"

WH to LB:

(i) “Lie on top of me.”

RF to LB:

(i) "Now you lie on top of me."

RF to WH:

(i) “It would be funny if I duffed you.” [slang for impregnated you]

LB to RF and WH:

(i) “I’m doing it tough for room.”

WH testified that all three men had been drinking in a bar. He was having difficulty walking so the others helped him back to his cabin, where they passed out. WH thought it best to leave them there, so he climbed into bed with one of them and the comments PB heard were really about there being little space in the bed and the awkwardness of the situation. The defence lawyer summarised: “It is my contention that [PB], although thinking himself in the right, has made a blunder and a mountain out of a molehill.”

What reinforced the defence case was the lack of physical evidence, and this case exposed degrading and highly problematic aspects of the policy on Unnatural Offences. When PB reported the three sailors, guards marched the men to sick bay to undergo physical examinations. The regulations on Unnatural Offences emphasised the importance of collecting medical evidence as soon as possible with multiple objectives: to corroborate if homosexual acts occurred; to determine who was the active and who was the passive partner; and to check for any signs of venereal disease. In addition to observing for any “feminine gestures”, medical officers should: examine the anus for signs of tearing, irritation, elasticity

and other signs of penetration; swab the inside of the anus for any signs of sperm or lubricant; and examine the penis for any signs of faeces or lubricant. The medical officer should also check clothing and objects (e.g. tins of lubricant) for any cum or other signs that sexual activity had occurred.<sup>40</sup>

The medical officer informed all three accused sailors that they were not required to undergo the medical exam, so WH initially declined. Yet, the policy on Unnatural Offences indicated that sailors could indeed be compelled to undergo an exam: “there is no need to ask the man whether he consents or not. If the man refuses to be examined, force should not be used but a direct order should be given, and, if he still refuses, an appropriate charge should be made.”<sup>41</sup> In this case, the doctor called in an officer, who gave a direct order for WH to undertake the physical exam. The doctor wrote almost the same summary for all three men (with slight variations):

External Genitals: No evidence of trauma discharge or faecal staining.

Anal area: No evidence of trauma [or] discharge other than faecal stains.

Proctoscopic examination of anal canal and lower rectum: No trauma or mucous revealed.

The court martial record makes it clear that the men were uncomfortable going through such an invasive procedure, yet they had little choice when ordered to do so. Even then, the evidence suggested that there had not been any sexual activity among the three men.

It is unclear why the case still proceeded to court martial, but the evidence and reasonable doubt raised over what actually happened led to an acquittal on all charges. Whereas JF’s case had an independent witness *and* a complainant, this case had three men who all denied sexual activity and an independent witness whose testimony presented only circumstantial evidence. The three men had, if they did indeed have a threesome, breached

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<sup>40</sup> “Confidential Admiralty Fleet Order 16 – Unnatural Offences,” 17 February 1956, NAA A1813, 321/251/1.

<sup>41</sup> “Confidential Admiralty Fleet Order 16 – Unnatural Offences,” 17 February 1956, NAA A1813, 321/251/1.

the unspoken bounds of discretion but only partially: they still were in a cabin and the incident was consensual. Perhaps it was the fact that a witness reported them which is why it went to court martial, but in the absence of clear opposition or even proof, the court easily found the men not guilty.

**AR: Evidence of homosexual inclinations**

AR's case involved five charges relating to two incidents which occurred one month apart in 1961. In the first, AR entered another sailor's cabin where he undressed and got in bed with the sailor BS. The third occupant of the cabin LP recalled hearing "a distinct sucking noise" and then heard dialogue: "Are you going to come?" and "You are very drunk, aren't you?" BS, who received the blow job, testified that he blacked out because he was drunk, so he had no memory of the alleged event ever happening. This incident initially went unreported. LP claimed that for "personal reasons" he chose not to report it, but what changed his mind was hearing rumours about the second incident and a "pack" of homosexuals a month later.

This second case was more dramatic and sparked an investigation. AR was in his own cabin and allegedly suggested that his cabinmate MB sleep in the nude. AR then said, "Come over here and I will give you a pull." MB declined, tried to go to bed, and then AR grabbed MB's penis and tried to kiss him. MB hit AR and a scuffle broke out before MB contacted the authorities. AR, when questioned by the master at arms, claimed that it was MB who made untoward advances on him. AR claimed that MB stated "I am going to fuck you!" before he had to fight MB off. MB made a counter-claim as outlined above, and the master at arms believed MB because there were inconsistencies in AR's account.

Authorities searched AR's locker in his presence, where they found a drawing of two men masturbating each other and short pieces of erotic fiction. The erotic story included AR's first name as one of the characters. AR's character met another man, and as both had

erections, they proceeded to have sex. The text read: “He sighed and rolled over away from me and said, belt it up my bum A\*. Right up as far as you can get it. So I pushed my self [sic] over to his bum, and he guided my cock into his arse. I pushed it very slowly up there, and he worked it up also. Soon it was right up to the hilt, and I worked it in and out, Increasing in the strokes. Then I shot up his arse, and he sighed loving every moment, and every inch that I could produce.” The second erotic story was about going to a friend’s house to help care for the friend’s ill father. The two characters then went to the friend’s room and they climbed into bed naked and had sex. The story read:

Then his hands rolled me over and I could feel his knob trying to find my arse-hole, so I reached down and allowed it to enter, just the knob first and then he pushed and grunted the whole length of my bum. Then he pushed in and out and slowly up further and further until it was hilted up. After gentle stroking of my buttocks, he suddenly hardened and pulled his cock out shooting spunk all over my balls. Oh that was lovely A\*.

After the police found the items in AR’s locker, he provided a statement indicating that he had suffered depression since the death of his mother when he was fifteen years old. He said:

On being charged on the present charges I refused to believe the evidence brought forth but they could have happened. Those indeciencies [sic] may have happened during a fit of depression or consumption of alcohol. I have known for years that I should have seen a physchiatrist [sic] but have never had the nerve to face one as I have always had a mistrust for this type of doctor.

The master at arms also asked AR about rumours of other homosexual incidents – called a “pack” – but AR denied any knowledge of them. AR testified at the court martial that he only

agreed to the locker search because the authorities said they thought they would find a list of blackmailers in the depot. AR said he did not see the police take the documents and denied that they were his, alleging that someone planted them. Interestingly, Wilson-Buford found that the American Court of Military Appeals overturned convictions from 1963 to 1968 where evidence included photographs or literature found during searches which were based on intuition or speculation. The court found that the searches were unlawful because they violated the Fourth Amendment right to privacy.<sup>42</sup> Australia has no bill of rights, so such challenges to searches did not arise in this or other cases.

AR faced five charges at the court martial: for the first incident, he was charged with indecent assault, gross indecency and disgraceful conduct of an indecent kind (for climbing into BS's bed); for the second incident with MB he faced a charge of indecent assault and inciting the commission of an act of gross indecency. The first indecent assault charge alternated with the act of gross indecency, meaning AR could only be convicted of one or the other depending on if the court believed the act happened and was consensual. Indeed, the prosecution argued that if BS was so drunk that he could not remember anything, then this was a non-consensual act and should be treated as an indecent assault.

AR's court martial represents an intersection of multiple challenges around corroboration and evidence. For the second incident, there were no witnesses and it was only AR's word versus MB. For the first incident, there was a witness, but LP could not say whether or not the sexual act was consensual. Moreover, LP only reported the incident after he heard about wider investigations into homosexuality, implying that perhaps LP did not have a problem with what happened – respecting the unspoken bounds of discretion. AR vigorously denied even being in the room where the first incident happened and insisted that the drawing and erotic fiction were planted. The prosecution implied that AR was part of a

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<sup>42</sup> Wilson-Buford, *Policing Sex and Marriage in the American Military: The Court-Martial and the Construction of Gender and Sexual Deviance, 1950-2000*, 152-53.

wider subculture of gay men at the base. The prosecutor asked AR: “Among people of your type, are you known as COLLEEN?” “No sir, I do not know anyone by the name of COLLEEN.” The defence counsel questioned AR: “Do you think that it is a disgusting habit?” “Homo-sexuality, Yes sir.” The defence counsel closed his case arguing that the accusations against AR were trumped up by blackmailers and those seeking revenge against him.

AR was found not guilty on the charge of indecent assault for the first incident and for inciting the commission of an act of gross indecency in the second incident; for the other three charges he was found guilty. AR was sentenced to six months’ imprisonment (later reduced to four) and dismissed with disgrace from the RAN. The findings suggest that the evidence was so overwhelming that AR was gay that authorities had reason to believe the other witness stories and there was no reasonable doubt. It is interesting that the authorities did not find AR guilty of indecent assault in the first instance. This would imply that the act was consensual, yet BS was not court martialled for the act of gross indecency. An early version of the regulation on Unnatural Offences included a subsection titled “consent” and explicitly stated: “This is no defence to a charge of buggery or of the attempt to commit it.”<sup>43</sup> Perhaps that is why the Naval Board overturned the guilty finding: either they both were guilty or they both were not guilty.

### **Conclusion: Why the court martial?**

As this article has shown, courts martial represent a hitherto overlooked site to explore the ways that the Australian military perceived and policed homosexuality, as well as the behaviours of gay and bisexual service members. Courts martial were sparse, in part because authorities often turned a blind eye to homosexuality and in part because they often dealt with

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<sup>43</sup> “Confidential Commonwealth Navy Order 48/58,” 17 June 1958, NAA A1813, 321/251/1.



cases through other disciplinary and administrative means. Yet what stands out about the cases that *did* go to court martial is how the accusations were often grounded in a confrontation, an independent witness, and/or, most importantly, lack of consent. All of the cases arose when a witness reported the incident and sparked an investigation. This is important because the era before 1974 was, for men at least, not a time of witch-hunts. Military police were not searching for gay and bisexual men, but rather they only investigated and prosecuted when they came to authorities' attention.

Given this context and how rare courts martial were for homosexuality, it was surprising to see how infrequent the convictions were. In other words, one might expect that the threshold of evidence to go to court martial would be so high that a guilty verdict would be likely. Yet, across the period 1912 to 1970 only ten men out of twenty-two had guilty findings (six of which were guilty pleas). In the post-Second World War era only three out of fourteen men had guilty findings, and even one of them was later quashed. This suggests that on top of the high threshold to go to a court martial, there was a substantially high standard of evidence needed for conviction. The only guilty cases were those where there was an independent witness who could corroborate the incident and/or if there were other physical evidence of a man's homosexuality. This suggests that the very act of court martial was not just to punish for homosexuality, but rather for breaching the unspoken bounds of discretion and consent when it came to homosexual acts.

It would be interesting to see how the Navy data compares with the Army and RAAF, particularly as the new digital search opportunities lead to more of those courts martial files being open for access. As Matthew Barrett's analysis of one Canadian court martial showed, each case opens a window into a service member's life.<sup>44</sup> There are further historical possibilities through exploring those members' service records, repatriation files (where

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<sup>44</sup> Barrett, "Conduct Unbecoming an Officer and a Doctor: Medical Attitudes toward Homosexuality and the Court Martial of Dr. Percy Ryberg," 35-64.

available) and records of civilian courts and newspapers. The micro-histories of each court martial thus have the possibility of revealing not just military histories of sexuality, but also civilian social norms and historical life experiences for gay and lesbian people.

Wilson-Buford found that in the United States military, prosecutions for homosexual acts through courts martial reduced from the 1970s. This was because so many men were winning on appeal over matters like unreasonable searches, entrapment, prejudicial evidence and command influence. Courts martial and appeals proved long and costly, so there was a decline in courts martial and the American military increasingly dealt with most cases of homosexuality administratively.<sup>45</sup> Australia similarly adopted a more administrative approach to dealing with homosexuality from 1974, but for different reasons: namely, authorities believed that offering an administrative discharge at one's own request would be more "sympathetic" than a disciplinary process and dishonourable discharge.<sup>46</sup> The rarity of the court martial was therefore no longer a reflection of tolerance, but instead a signifier of new mechanisms to drive gay and bisexual men and women underground and out of the Australian armed forces.

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<sup>45</sup> Wilson-Buford, *Policing Sex and Marriage in the American Military: The Court-Martial and the Construction of Gender and Sexual Deviance, 1950-2000*, 141-55.

<sup>46</sup> Riseman and Robinson, *Pride in Defence: The Australian Military and LGBTI Service since 1945*, 75-78.

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