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Abstract

The ideological space created by the British Empire provided opportunities for explorations into the meanings of Victorian femininity. Woman could be the intrepid missionary, bringing light to dark Africa; the memsahib creating conflict in the colonies with her petty jealousies; or a vulnerable piece of her husband's property to be defended from the 'other'. She could also be the heroic mother responsible for the preservation of the race, or, simply an object of intensifying legal control over her reproductive capacities.

The Mother Country and Her Colonial Progeny

Louise Falconer

We can only justify our claim to this great and fertile country by effectively occupying it. Australia must advance and populate, or perish. A great number of problems confront the Commonwealth, but the declining birth rate overshadows them all. It is impossible to exaggerate its gravity. Australia is bleeding to death ... (William M Hughes, Federal Minister for Health, 1937).

The ideological space created by the British Empire provided opportunities for explorations into the meanings of Victorian femininity. Woman could be the intrepid missionary, bringing light to dark Africa; the *mem-sahib* creating conflict in the colonies with her petty jealousies; or a vulnerable piece of her husband's property to be defended from the 'other'. She could also be the heroic mother responsible for the preservation of the race, or, simply an object of intensifying legal control over her reproductive capacities.

Towards the end of the 19th century, female reproduction had increasingly become a matter of national obsession as countries experienced a fertility transition. Western nations were changing from societies with high birth rates and high death rates to societies with low birth and death rates, and were thereby undergoing a fundamental shift in their basic family structure. Australia's birth rate had started its steady decline in the 1880s: from an average of seven children per family in 1881, family size had shrunk to an average of four children in 1911

(Howe & Swain 1992: 168). Across Canada, birth rates fell by 24 per cent between 1871 and 1901 producing, according to McLaren and McLaren (1997: 9), arguably the most important social shift in Canada in the 20th century. The United States and Britain also experienced similar population transformations during this period. Billy Hughes' infamous cry to 'populate or perish' captures perfectly the anxiety that gripped western countries as they struggled to adjust to the significant changes wrought by this demographic transition. The anxiety that surfaced in the young nations of Australia and Canada however was distinctive — it was founded on a fragile national identity; driven by aspirations of imperial grandeur, and importantly, energised by racial fear. The problem of the declining birth-rate was depicted as 'a national one of overwhelming importance to the Australian people, perhaps more than to any other people and on its satisfactory solution will depend whether this country is ever to take a place amongst the great nations of the world' (Coghlan 1895: 69). This national anxiety played itself out, in part, on the site of the maternal body.

The relationship between sexism and racism is a complex one. As reproducers of the race, women have always been a preoccupation in population and immigration policies, being either encouraged (white women) or discouraged (immigrant women and indigenous women) to reproduce (de Lepervanche 1989). This article explores the intersectionality of sex and race and places the locus of this relationship amongst the laws that regulated women's reproduction at the turn of the 20th century. I suggest that measures aimed at regulating abortion and birth control in the settler colonies of Australia and Canada cannot be disassociated from the highly gendered and racialised rhetoric resonating throughout the British Empire.

An understanding of the rhetorical and cultural framework in which legislatures were operating at this time is crucial. Chandra Mohanty (1988) has warned against examining issues like reproduction, the family and marriage without specifying their local, cultural and historical contexts. More specifically, scholars have interrogated the intimate connection between the maternal body and the imperial project (Davin

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1978, Summers 1991). Anne McClintock has stated that, ‘controlling women’s sexuality, exalting maternity and breeding a virile race of empire breeders were widely perceived as a paramount means for controlling the health and wealth of the male imperial body politic’ (1995: 47). Consequently, the first part of this article emphasises the way in which popular understandings of race and gender found their way into the colonial discourse and eventually into the framework of the law. I look first to the ascendancy of social darwinism, manifested most obviously in Australian and Canadian immigration policy. I then explore the ephemeral role the colonial stage had assigned to white women. As becomes apparent, the hegemonic myth of a ‘white settler society’ was not only racialised, but highly gendered in its consignment of distinctive roles in production, reproduction and nation-building (Stasiulis & Yuval Davis 1995). My gaze throughout remains fixed almost exclusively upon the white woman. This is not to ignore the highly disturbing efforts by the state to neuter indigenous and migrant women’s fertility, but rather to leave these histories to those more capable than me of telling them (see for example Roughsey 1984, Cummings 1990, Go 1990).

The converging discourses around race and gender were especially powerful in creating a milieu in which law could legitimately intercede and attempt to control women’s fertility. An analysis of specific statutes highlights that concern over the decline in the birth rate had galvanised many politicians into pursuing action that did not have any legislative precedent. The second part of this article investigates two particular areas of legislative activity — the prohibition of contraception advertising and the regulation of maternity hospitals. The *Indecent Publications Act* 1900 (NSW) and the *Canadian Criminal Code* 1892 (Ca) both purported to eliminate the advertising of contraception. Maternity homes, believed to be (not unjustly in some instances) rudimentary abortion clinics were also the subject of regulation by Australian and Canadian authorities at this time. Appraisal of these laws needs to be negotiated with the political context borne in mind — the statutes were not only products of a moral crusade or benevolent endeavour. They were as equally a consequence of highly racialised dogma being

refracted through the maternal body. Simply put, these laws represent a range of legislative activity that changed women's fertility from being a matter of individual discretion to one requiring state regulation. Both Australia and Canada had criminal legislation that dealt specifically (and harshly) with the crime of procuring an abortion. Being worthy of consideration in its own right, this article leaves the crime of abortion to one side and instead focuses on these ancillary laws that aided and abetted the criminal law in its management of fertility control.

The term 'fertility control' is employed here in two different ways. On the one hand, it signifies the control that women were beginning to exert over their own reproductive functions in an effort to reduce their family size. On the other hand, it is a designation for the variety of legislative activity aimed at controlling and promoting women's reproductive capabilities. These two demonstrations of fertility control are inherently contradictory but began being asserted at around the same time. Paradoxically, while society outwardly embraced the values of pro-natalism, individuals controlled their fertility, leading to an inevitable separation between social control at the macro level and personal action at the micro level (Browne 1979).

Scholars have largely neglected the history of the laws of reproduction in Australia. Historians have tended to focus on the judicial apparatus to substantiate their conclusions and in doing so, have at times misinterpreted legislative provisions and the legal process (Allen 1990, 1993, Siedlecky & Wyndham 1990). Naturally, there are some legal analyses of this chapter of Australian and Canadian history. Legal research into prosecution trends has, for instance, highlighted that by and large, reproduction-related crime was not rigorously pursued by authorities (Backhouse 1983, 1984, 1991). Yet, legal scholars have largely failed to inquire into the legislative arm of government, or to interrogate what propelled Australia and Canada to legislate against abortion and birth control with increasing vigour at the turn of the century (Smart 1992). This failure is in part due to the tendency to place Britain at the epicentre of historical enquiry. This article shifts the locus away from the Mother Country to two of her Colonial Progeny. By doing so through

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an exploration of reproduction legislation, it unearths another aspect of the sometimes complementary, sometimes contradictory workings of Empire, and helps to further dispel the 'totalising analyses of imperialism as a coherent monolith' (Perry 2001: 7).

Comparing the trajectories of Australia's legal history with that of Canada makes intuitive sense. The white majority in these two settler colonies were deeply committed to the dream of becoming outposts of the 'British race' (Huttenback 1976). While regarding Australia and Canada as 'white settler colonies' highlights certain shared colonial traits, this does obscure others. In particular, it conceals the existence of diverse indigenous and migrant collectivities that, although neither 'white' nor 'settled', equally contributed to the formation of the Australian and Canadian nation-states. For two young nations it was vital that the myriad of internal contradictions, disharmonies and differences be concealed by a unifying national identity. Accordingly, the term 'white settler society' is not descriptive, but prescriptive. When viewed in this context, 'white settler society' is exposed as a hegemonic notion; as a construct that reveals much about historical patterns of social development and state formation (Abele & Stasiulis 1989: 269). Moreover for some scholars, situating Australia and Canada within a 'post-colonial' framework is problematic (Hutcheon 1989, McClintock 1993). Anne McClintock (1993) has maintained that 'break away settler colonies' (Australia and Canada) as distinguished from 'deep settler colonies' (Algeria and Zimbabwe, for example) have not undergone decolonisation and nor are they likely to. Without a doubt, Australia and Canada occupied a particular space in Empire. In contrast to other colonised parts of the world, Britain privileged these white settler colonies by bestowing upon them the 'gift' of liberal democratic government and some measure of political autonomy so that they might participate in and contribute to a shared framework of moral and material standards. In terms of their cultural, social and political entities, these two colonies were 'chips off the metropolitan block' (Stasiulis & Jhappan 1995: 97).

In this way, Australia and Canada were simultaneously burdened by, but receptive to imperial discourse; struggling to mimic the metropolis, yet trying to accommodate their local needs. Scholars have commented that Canada as a nation has never felt central, culturally or politically, having always felt a deep sense of marginality (Hutcheon 1989). Australia held, and continues to hold, an equal sense of dislocation. This sense of physical and spiritual isolation mandated various attempts in both colonies to establish and strengthen their position within Empire. Naturally, the reproduction legislation generated in such a milieu was not untouched by this struggle.

Birth of a nation

As the 19th century drew to a close, a sense of national identity and political independence was growing in Australia and Canada. Yet, this autonomy was constructed in the context of a continuing relationship with Empire; Australian and Canadian political leaders clearly saw their nation's future as inextricably linked to Britain. They clung to all that Britain was and all that it promised to be; in essence they were bound to its *Englishness*.¹ *Englishness* resonated throughout colonial settings and lay at the heart of white colonial identity.

The canonisation of *Englishness* manifested itself in number of different ways: *Englishness* was more than a simple racial designation. The classic *Englishman* of the period was believed to possess certain qualities. These attributes — leadership, courage, justice, honour, civility and rationality — were revered as distinctively *English*. For instance, there was the strong conviction that the Anglo-Saxon race possessed a special capacity for governing itself, and others, through a constitutional system that combined liberty, justice and efficiency (Huttenback 1976). Importantly, there was a sense that the *English* were somehow more moral than others. In the words of Sir Stamford Raffles: 'it is to British manners and customs that all nations now conform themselves ... It appears that there is something in our national character and condition which fits us for this exalted station' (Faber 1966: 39). In other words, the *Englishman* possessed 'character'. 'Character' was an ill defined,

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but also well-understood concept in which white people were seen as having more character than people of colour; and among whites, people of British descent were regarded as having the most character. Crucially, the ability to control one's sexual needs and wants was central to the acquisition and maintenance of one's character (Valverde 1991). Inextricably bound to character was the nation's 'manifest destiny' to colonise abroad. And importantly for the colonial endeavour, wherever the *Englishman* travelled, he carried *England* with him: 'England will be wherever English people are found' (Seeley 1883).

For all these rational, moral, libertarian attributes, the most essential characteristic of an *Englishman* was his Anglo-Saxon lineage. During the middle of the 19th century, 'race' had emerged as one of the century's great catchwords (Bolt 1971).² From being perceived as an important influence on human culture, race became *the* crucial determinant. And Britons in particular were developing a sense of racial uniqueness (Huttenback 1976). Theories propounded by Charles Darwin and Herbert Spencer were embraced and often contorted by intellectuals, resulting in assumptions that established a hierarchy of races, with Anglo-Saxons perched at the peak.

The hegemonic faith in the racial superiority of the *Englishman* found equal currency in the white settler colonies:

We sing the fame of the Saxon name
And the spell of its world wide power,
Of its triumphs vast in the glorious past,
And the might of the rising hour:
And our bosoms glow, for we proudly know,
With the flag of Right unfurled,
That the strength and skill of the Saxon will
Is bound to rule the world. ...

Let us stand for Right in our race's might
With our fearless flag unfurled (Wood 1898).

In Australia, this racial rhetoric was enthusiastically endorsed, as Britons and Australians alike had always envisaged Australia as an Anglo-Saxon bastion. The tangible and symbolic manifestation of this

sentiment was the 'White Australia Policy'. The legislative framework for the White Australia Policy was one of the first Acts passed by the Federal Government and it remained in force, complemented with a number of subsequent statutes, for over 50 years. As Andrew Markus (1985) has stated, the White Australia Policy was no electioneering ploy but one of the fundamental principles for the guidance of the new nation.

In explaining the rationale behind the White Australia Policy, Alfred Deakin wrote that,

The continent is so stubbornly British in sentiment that it proposes to tolerate nothing within its dominion that is not British in character and constitution or capable of becoming Anglicised without delay. For all those outside that charmed circle, the policy is that of the closed door (*Morning Post* 12 November 1901).

Opposition to unrestricted immigration arose 'principally from a desire to preserve and perpetuate the British type in the various populations' (Memorial to Secretary of State for Colonies 1881). The paradox is that in attempting to protect the *Englishness* of Australia, the Government had resorted to measures that had no British precedent. As Alfred Deakin noted, 'British insularity, though proverbial, has never risen to this height'; Australian immigration measures were 'surely the high-water mark of racial exclusiveness' (*Morning Post* 12 November 1901). Not only had national insularity never risen to such a height, as Deakin had proudly announced, it had never been this effective. In 1891, the combined Anglo-Celtic and northern European population comprised 95 per cent of the national population. By 1947, this had marginally increased (Markus 1994). The nation was said to be more British than any other dominion, some Australians said more British than Britain itself (White 1981). Australia was successfully maintaining its *English* racial composition.

Of all the constituent parts of the British Empire, Australia is often seen as the most determined to make itself a hub of Anglo-Saxon civilisation. The desire to maintain Canada as 'white' has been identified as a major imperative in determining the racial composition of immigration there as well. Yet in contrast to the readily identifiable White Australia

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Policy, Freda Hawkins has stated that ‘the whole lengthy episode of White Canada is often down-played or clothed in discreet silence or simply not extrapolated from its historical context’ (1991: 8). Despite this, the idea that Canada should be a nation dominated by the white races of Europe was an assumption shared by all men with political power in the late 19th and early 20th centuries (Ryder 1991).

Working from the assumption that Anglo-Saxons were racially superior, immigrants to Canada were welcomed according to the degree to which they approached this ideal (A McLaren 1990). With its celebration of the Anglo-Saxon race and its appeal to an English-Canadian heritage, it is hardly surprising that this brand of Canadian nationalism marginalised many French-Canadians. Yet Carl Berger (1970) has commented upon the attempts made to include the French minority into the larger national vision. In order to incorporate the French-Canadian presence, the construction of ‘white’ had been expanded beyond the Anglo-Saxon. The minimal elbow-room granted to ethnic diversity may account for the fact that, although exclusionist racial policies were similar to those pursued in Australia, in Canada such policies were not exhibited as a coherent legislative agenda and were instead a much more fragmented affair.³ For instance, concern about Canada’s public image meant that no laws were passed to exclude the migration of Black Americans, but careful administrative measures ensured their immigration applications were rejected (Palmer 1985). Similarly, a ‘Gentleman’s Agreement’ on immigration was concluded with Japan and in 1923, legislation was passed to ensure the complete termination of Chinese immigration.

Canadian Secretary of State Chapleau stated to his parliamentary colleagues in 1885, ‘I would be ashamed to be a British subject ... if I believed for a moment that the survival of the fittest would be the survival of the Chinese race on this continent’ (House of Commons 1885: 3010). In 1903, Minister of the Interior Clifford Sifton told a British audience that ‘we are engaged in overcoming a great many natural difficulties for the purpose of building up what we believe will be outside of England, perhaps the greatest British community in the world’ (Hall 1985: 299). Even in 1910 a Member of Parliament asked his colleagues

‘what is a Canadian citizen as distinguished from a British subject?’ (House of Commons 1910: 5818). As the decades progressed a unique Canadian identity was developing, yet that identity was still firmly bound to notions of *Englishness*.

As Peter Fitzpatrick and Eve Darian-Smith (1999) have stated, European identity was constituted in opposition to an alterity that it had itself constructed. This identity was so formed by excluding peoples who were accorded characteristics opposed to it — savages and barbarians, or even those less occidental than they should be. ‘The rise of the modern nation-state was essentially an imperial project, requiring the idea of a distant other to consolidate internal state divisions’ (Darian-Smith 1999: 288). As well as the indigenous peoples, the ‘distant other’ for Australia and Canada was their non-white immigrants. Constructed as a menace to the body politic and destabilising to the social fabric, their presence (or even threatened presence) was something with which the colonials could negotiate. In this context, the domestic manifestations of exclusionist policies were symptomatic of more than a need to keep Canada or Australia racially homogenous. Being ‘white’ provided these colonies with a grand and glorious history and even more importantly, it promised a future. Above all else, it represented an identity.

Colonial identity was a fragile affair. Marilyn Lake (1993) has asserted that because Australia was in an ambiguous position of being both colonised and colonisers, Australian settlers attached special significance to the status and meaning of whiteness in order to distinguish themselves from other (coloured) colonised peoples. ‘Subject to the humiliations of being treated by the British as “colonials”, white Australians responded by asserting their status as white subjects and by redefining the meaning of Australian’ (279). Similarly, ‘Canada’s Britishness, subjected to considerable pressures, was actively, creatively and constantly renegotiated’ (Pue 1998: 86). Imperial concepts of race enabled both Australia and Canada to excavate a niche of identity within Empire. Any threat to this racial and social composition was thus perceived as a threat to the national identity itself. In this fundamental way, racial exclusivity was essential to white settler identity.

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If race was one axis upon which colonial identity turned, gender was another. By half way through the 19th century it was generally assumed that white women going to colonial territories carried as part of their personal 'baggage' civilising influences beneficial both to white men and the British Empire (Brownfoot 1984). Women of the Victorian era, colonial or metropolitan, were wrapped in an ideology of 'ideal womanhood'. Ideal Victorian women were selfless, dependent, sexually subservient and chaste. They 'provided sex on demand for their husbands along with preserves, clean linen and roast meat' (C Hall 1992: 61). This ideology of ideal womanhood was appropriated by imperial discourse and reformulated so that white femininity came to symbolise the 'heart' of western civilisation (Williams & Chrisman 1993: 193). Adele Perry has dubbed this dogma the 'well-worn panacea of white womanhood' (Perry 2001: 139).

While post-colonial scholarship has tended to emphasise this construction of white womanhood within African and Asian contexts (Brownfoot 1984, Jolly 1993), these assumptions were relied on with equal dependency in the white settler colonies. Edward Gibbon Wakefield, colonial theorist, had stressed the importance of women in the colonial project early in the 19th century: 'as respects morals and manners, it is of little importance what colonial fathers are, in comparison with what mothers are' (Pritchard 1968: 840). White women were constructed as civilising agents who could quell disorderly masculine behaviour associated with frontier settlements (Perry 2001). But the expatriation of white women to the colonies served a further function. Suzann Buckley (1977) has stated that preserving Canada as a loyalist outpost was in fact one of the main objectives in shipping out surplus British females. Emigrant women would 'help to keep the British Empire for the British race' (Mackay & Thane 1986: 203). Implicit in this formulation was the expectation that women would marry and importantly would bear children. Motherhood had assumed a central position in the process of empire building (Stoler 1997).

It is not surprising that the imperial discourse on motherhood was soon infected by racial theory. Flowing from the eugenic proclamation

of the innate superiority of Anglo-Saxons, white women were constructed as the ‘conduits of the essence of the race’ (Mackay & Thane 1986: 201).

[Woman] has in her body the power of handing on and on the life-force which has come to her through millions of years. It is a very sacred and serious thought — is it not? — that by your conduct you can help to keep the life-stream pure, help to uplift the race; that on the other hand, you can hinder the great forces of evolution (Chesser 1914).

No longer just guardians of morality, by the end of the century white women were also guardians of the *English* race.

Continuing insecurity regarding the ability to maintain white domination was also reflected in government policies on sex and marriage between indigenous and non-indigenous people. In Australia, ‘miscegenation ... was viewed as a crime against one’s race, and against the ideal of White Australia’ (Grimshaw et al 1994: 288). The ‘purity’ of Anglo-Saxon blood was to be safeguarded from contamination through the establishment of reserves that segregated blacks from whites, as well as through the promulgation of legislation that required state authorisation of intermarriage and prohibited inter-racial sex. In addition, state officials wielded expansive powers over indigenous children and their child removal policies were crudely aimed at bleeding out the aboriginality from these children. The duplicity of state policy is not elusive: while Aboriginal mothers were systematically deprived of their children, for white women, motherhood was lauded as their grandest vocation (Grimshaw et al 1994: 207). State control of Aboriginal girls and women, and in particular containment of their fertility, presents itself as yet another dimension to the complex gender/ race dynamic.

Clearly, women’s reproductive capacities have been crucial in the ideological battles around nation and race (de Lepervanche 1989). As the President of the Australasian Association for the Advancement of Science stated in 1901, ‘the propagation of the Anglo-Saxon race has been placed largely under voluntary control ... The extent to which this control is resorted to may determine the fate of the Empire’ (de

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Lepervanche 1989: 169). In Canada, the politics of reproduction had become as equally enmeshed in the politics of race. ‘The native-born population ... fails to propagate itself, commits race suicide in short, whereas the immigrant population, being inferior ... propagates itself like fish in the sea’ (Wallace 1907–08: 360). For these governments, it was a matter of ‘propagate or perish’. William Holsman, Member of the New South Wales Legislative Assembly, captured the crux of the issue when he stated that ‘the best of all immigration is the Australian baby’ (*Daily Telegraph*, 18 September 1905). Given the ideological baggage that attended white women, it is not surprising that motherhood was conceptualised as crucial to maintaining the nation. While the language and concepts describing fertility depict it as totally natural, it is at the same time intensely political (Mackinnon 1998). Control of women’s fertility could not be left to chance or personal caprice. As women could not be trusted to safeguard these interests, Parliament had to step into the breach.

‘An evil in our midst’: The Indecent Publications Act

New South Wales Members of Parliament at the turn of the century were surprisingly conversant with the prevalence of abortion amongst their colonial constituents. Mr Suttor in the Legislative Council spoke of the everyday occurrence where women of decent appearance distributed circulars advertising abortion services to young married women in their homes (Legislative Council 1900: 674). Mr Bennet, ‘from his very own knowledge’, knew that abortion brought great disgrace and even ruin upon families (Legislative Assembly 1900: 406), while Dr Graham was personally aware of an institution run by a notorious syndicate whose speciality was curing ‘nervous debilities’. Apparently, petition after petition had been presented to the Legislative Assembly urging that legislative action be taken to prohibit the advertisement of such fertility controlling services and products (Legislative Assembly 1900: 405).

The politicians were essentially correct in their assumptions — the number of white women attempting to control their fertility was increasing, as was the array of methods to do so. By the 1890s, Australian women could purchase Malthus Soluble Quinine Tablets; Lambert's Improved Secret Spring Check Pessary; the Marvel Whirling Spray, or the 'No More Worry Co's' Patent Pessary. Evidence to a New South Wales Royal Commission revealed that in the month of October 1903, imports to New South Wales of sheaths and pessaries alone amounted to more than 21 000 pieces (Hicks 1978).

While the range of natural, chemical and barrier methods were significant in controlling fertility, demographers and historians have increasingly accorded abortion a central role in the decline in the average size of the family (Allen 1993). Edward Shorter (1991) has stated that contrary to popular modern belief, the first great increase in induced abortions was at the end of the 19th century, rather than in the 1970s. In fact, to assume that contraception alone produced the decline in the birth rate precludes a class analysis of birth control practices as, due to its low cost compared with manufactured products, abortion was probably the most prevalent form of contraception for white working-class women (Allen 1982, McLaren 1977, Knight 1977). Moreover, it appears that Australia had a greater incidence of abortion than either the United States or the United Kingdom. In 1902, an Australian doctor compared the rates of abortion in Australia and Britain and was able to state that 'we beat them easily'. It was estimated that approximately one in three pregnancies was being terminated in Australia at this time (Finch & Stratton 1988). McLaren (1984/5) has discovered a similarly high rate of abortion among Canadian women, concluding that abortion played an increasingly significant role in keeping maternal mortality figures high. Furthermore, it was not only single women accessing abortion. Contemporaries were astounded that evidence pointed to married women seeking to limit their families, and that contraception was being practised by the 'better' classes (Mitchinson 1979).

While the criminal law dealt with the crime of procuring an abortion, there were no laws dealing specifically with the advertisement of contraceptive products or abortion services. New South Wales did have

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legislation that regulated ‘obscenity’ but the provisions were general, targeting the sale or distribution of writings and pictures and granting search and seize powers to police (*Obscene Publications Prevention Act 1880* (NSW)). In 1889, two members had brought the House’s attention to the prevalence of ‘ladies only’ advertisements in regional newspapers, but almost without exception their concerns were ignored (Legislative Assembly 1889: 3038–47). At the height of the frenzy over the birth rate however, Parliament revisited this issue and subsequently promulgated the *Indecent Publications Act 1900* (NSW). Under this Act, an obscene publication was defined to not only include printed matter and pictures, but advertisements and reports. The most important amendment was embodied in section 4, which declared indecent:

[a]ny advertisement, picture, or printed matter relating to any complaint or infirmity arising from or relating to sexual intercourse, or to nervous debility or female irregularities which might reasonably be construed as relating to any illegal medical treatment or illegal operation.

This section was targeting advertisements for abortionists and abortifacients that were ‘practically inducements to commit abortion’ (Legislative Assembly 1900: 404). When introducing the Bill, Dr Graham stated that it was to ‘put down the nefarious practice followed by abominable scoundrels, which had led to a great deal of murder’ (Legislative Assembly 1900: 404). Although the Bill had a wider operation than simply eradicating advertisements for abortion and abortifacients, it was this issue that absorbed the attention of Parliament, receiving almost unanimous approval in both Houses of Parliament.

Attempting to bolster his second reading speech, Dr Graham informed his colleagues that not only were similar statutes in force in all the other Australian colonies, but also in Great Britain. While Britain had indeed passed the *Indecent Advertisements Act 1889* (UK), the focus of this legislation appears not to have been abortion services. Instead, it was the circulation of information about venereal disease. As the Earl of Meath explained to the House of Lords, the Bill targeted persons ‘who advertise their specifics against a certain class of diseases of a nameless character’ (House of Lords 1899: 1761). The Bill

also proposed to ‘put a stop to circulars of a class by which thousands of young men have their prospects in life destroyed’ (1763). In the legislation, ‘indecent’ was defined as pertaining to ‘syphilis, gonorrhoea, nervous debility, or other complaint arising from or related to sexual intercourse’ (section 5). ‘Female irregularities’, ‘illegal medical treatment’ or ‘illegal operations’ were not encompassed within the statute. New South Wales had deviated from the British model in a very important way: the target was not simply obscene literature, but also the aborting mother.

The legislative objective behind the *Indecent Publications Act* was emphasised by the New South Wales Supreme Court in the case *Potter v Smith* (hereinafter *Potter*). In *Potter*, the defendant was charged with selling pamphlets containing illustrations and descriptions of birth preventative measures from his shop. Stephen J stated that the object of the Act was to ‘prevent the circulation of literature of an indecent nature in every possible way’ (at 223). This incredibly broad interpretation was supported by Owen J who stated that the Act contained no qualifying words whatsoever. The object of the Act was to ‘prevent in every possible shape or form the delivery of documents of an indecent character among the people ... the Act is in the widest possible terms’ (at 224). This case can be contrasted with the earlier decision *Ex Parte Collins* which had been decided under the old obscenity legislation. In this case, Windeyer and Stephen JJ, with Darley CJ dissenting, held that the publication of Annie Besant’s *Law of Population*, which advocated and explained contraceptive measures, was not obscene under New South Wales law. However, in finding the defendant guilty in *Potter*, the Supreme Court demonstrated that the *Indecent Publications Act* was capable of achieving what the old law had been unable to do — prohibit the dissemination of birth control information.

The sub-text of the *Indecent Publications Act* is made explicit when it is placed alongside other contemporaneous dialogue, namely, the *Royal Commission on the Decline of the Birth Rate and on the Mortality of Infants in New South Wales*. The Report of the Commission, tabled in Parliament in 1904, was the high-water mark of New South Wales

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legislative reaction to the declining birth rate. The Report made it clear that in enquiring into the reasons for the declining birth rate, the Commission's principal assumption was that it was investigating a threat to the State (Pringle 1973). Moreover, this threat was the result of two inter-related facts — that women were progressively bearing fewer children and that doing so was a deliberate choice. It is hardly surprising then that the Commission laid the blame for the national predicament squarely at the feet of Australian women. The Report stated that nothing would ameliorate the situation 'unless a radical change takes place in the mental and moral attitudes of women towards child bearing' (69). Importantly however, it was the nation-state that was wearing the consequences of this sustained suppression of fertility. The Commission continuously emphasised that the implications of a declining birth rate were not only a concern for New South Wales, but for the country. 'The problem of the fall of the birth rate is ... a national one of overwhelming importance to the Australian people' (53). If the decline in the birth rate continued, the Commissioners doubted the capacity of Australia to survive in the rivalry of nations. The misogynistic, xenophobic assertions of the Commission were gilded with the fear of future insignificance. As such, they powerfully convey the tenor of political thought circulating in New South Wales, which was beginning to take root during the deliberations of the *Indecent Publications Act*.

In specifically legislating against birth control through the *Indecent Publications Act*, New South Wales Parliamentarians had unwittingly followed in the wake of their Canadian counterparts, highlighting how the global fertility transition was provoking similar legislative (re)action. As Phillipa Mein Smith has observed, 'shared alarms promoted shared strategies' (2002: 309). Similar to the established British approach, sections 179(a) and (b) of the Canadian *Criminal Code* 1892 (Ca) had included the general offence of selling or exposing for public view obscene books or written matter. There was, however, an important and innovative addition with the implementation of the *Code* in 1892. Section 179(c) of the *Code* expressly prohibited the selling or advertising of any medicine or article represented as a means of preventing contraception or causing abortion. With the inclusion of this section, the operation of

the legislation extended far beyond any British statute or the British Draft Criminal Code of 1880, upon which a large part of the Canadian *Code* was based.

When drafting this provision, Canadian legislators appear to have turned for inspiration to the American *Comstock Laws* (dubbed after its chief lobbyist and notorious moral vigilante Anthony Comstock) which had classed all instruments, images and written material relating to contraception and abortion as obscene. The explanation as to why Canadian legislators chose to follow this approach in the *Criminal Code* is hidden within other coincident parliamentary dialogue.

Apparently in response to requests from the Dominion Women's Christian Temperance Union, in 1892 Mr John Charlton drafted and then introduced to Parliament an Obscene Literature Bill. By rendering obscene 'any medicine, drug or article whatever for the prevention of conception or for causing unlawful abortion' or any advertisement of them, Charlton hoped to 'promote the welfare and morality of the people' (House of Commons 1892: 2460). Charlton's intention to target contraception and abortifacients was made explicit in his second reading speech: 'Drugs and instruments for procuring abortion and for kindred purposes are advertised secretly and are sold by agents and this abuse cannot very readily be reached by the law as it now stands' (House of Commons 1892: 2458). Parliamentary records reveal that the inspiration to criminalise contraception in the *Criminal Code* came from this Obscene Literature Bill. An annotated copy of the original Criminal Code Bill discloses that section 179 of the *Code* was amended and expanded by directly inserting Charlton's phrase: 'any medicine, drug or article intended or represented as a means of preventing conception or causing abortion'. The cross-fertilisation of ideas during the drafting processes had provided the opportunity to expand the reach of Canadian law and to relegate contraception to the realm of 'obscene'.

Throughout his parliamentary speech, John Charlton made frequent connections between morality and a strong nation-state. Drawing upon imagery of decaying empires and 'periods of decadence through effeminacy', he stated:

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We have no reason to doubt that if virtue is maintained, if integrity is maintained, a nation may exist through all time ... vile literature is secretly and widely circulated in Canada, literature of a character calculated to undermine the morals of the people, and entail the most disastrous consequences on society (House of Commons 1892: 2458).

Charlton's rhetoric typifies the philosophy of turn-of-the-century moral reform movements — that strong nations could only be built on the foundations of strong morals. 'In Charlton's view, young nations, like young women, needed protection lest the strong ... betray the weak' (Dubinsky 1993: 67).

The legislative attempt to eliminate contraception thus needs to be placed in the context of the larger 'social purity movement' that had enveloped Canada at this time. With a particular focus on sexual and moral aspects of social life, this movement was driven by organisations and individuals who endeavoured to 'raise the moral tone' of Canadian society (Valverde 1991). As Mariana Valverde has outlined, the reshaping of individual sexual morality was a vital component in the move for the social regeneration of English Canada. Obscenity was an obvious vice that required eradication, and advertisements for contraception naturally fell under the rubric of 'obscene'. The condemnation of contraception was rendered even more inevitable because the targets of these advertisements and products were women. One of the consequences of treating women as 'part angels, part idiots', as John McLaren (1991: 114) has phrased it, was the supposition that women's natural naivety made them especially susceptible to exploitation and perversion.

Colin Francome (1984) has stated that the excessive American puritanism as displayed in the *Comstock Laws*, embraced by Canadian legislators, was in part a reaction to the high proportion of immigrants in the country, as the American middle-class tended to ascribe deviant behaviour to immigrant groups. Anthony Comstock for instance not only perceived the 'vices' he was policing as foreign to America, but that also 'a large proportion of those engaged in the nefarious trade ... are not native Americans' (La May 1997: 22). Canadians had similarly succeeded in externalising 'vice'. The discourse on moral pollution

arguably reached its most vituperative expression in relation to foreign contamination. 'The greatest threat to Canadian values and virtue were seen as coming from visible minorities — Chinese, Japanese, African and East Indian — often characterised as sub-human and believed to be the source of both physical and moral contagion' (J McLaren 2001: 539). The connection between immorality and immigrants had existed in popular consciousness for decades but by the early years of the 20th century, this thinking was seen as legitimised by the science of eugenics. Through this intellectual movement the connections linking sexuality, immigrants and national degeneration became firmly established (Valverde 1991).

C S Wilson (1998) has stated that by the turn of the century, the safeguarding of *English* morality against deviant foreign habits was a central theme in the campaign for moral regeneration. This is evident in John Charlton's second reading speech for the Obscene Literature Bill when he spoke about obscene literature being imported into the country. In describing these 'corrupting influences', his choice of language communicates his obvious belief that such influences were alien to, and parasitic on the people of Canada (House of Commons 1892: 2457–61). Anne McClintock (1995) has presented the Victorian paranoia about contagion as bound up in anxieties over body boundaries, and in particular sexual and racial boundaries. She stated that 'increasingly vigilant efforts to control women's bodies, especially in the face of feminist resistance, were suffused with acute anxiety about the desecration of sexual boundaries and the consequences that racial contamination had for white male control of progeny, property and power' (47). Clearly, while the moral reform movements were motivated by concerns over class, culture, and family, they were also deeply infected by the racialised dogma that gripped Victorian Australian and Canadian society. The intractable stance against birth control cannot be disassociated from the increasing xenophobia of the white settler colonies, which was at times articulated in terms of explicit racial contamination and other times through the more subtle rhetoric of nation building.

‘Places where criminality exists’: The Private Hospitals Act

From the 1890s, observers had been aware of ‘lying-in homes’ and their strong links with abortion. These private maternity hospitals were particularly concerning as they were generally patronised by middle-class girls — the poor were more likely to go to places like the Salvation Army Home where their babies were given over to adoption (Pringle 1973). The criminality of lying-in homes was legislatively asserted for the first time in the *Children’s Protection Act* 1892 (NSW). ‘Lying-in home’ was defined in this Act as a house in which more than one woman was received for confinement, in exchange for payment. Under this legislation, lying-in homes were required to register every birth and death with the authorities. Most notably, in the advent of a still-birth, a medical certificate had to be obtained before burial. By the early years of the 20th century, there were calls for more specific legislation as concerns were mounting over the activity of these homes. The *Private Hospitals Act* 1908 (NSW) was the legislative analgesia to ameliorate these concerns.

Dr Charles Mackellar (President of the 1904 Royal Commission) steered the *Private Hospitals Act* through Parliament. Ostensibly, he introduced the Bill as a measure to regulate all private hospitals, their management and their staff. Early in the debate however, Mackellar confirmed that the object of the Bill was to tackle abortionists. With this in mind, it becomes apparent that most of the clauses were aimed at eradicating abortion — whether specifically, through the restriction of nurses who otherwise might be ‘tempted to take to service in an abortion mongering institution’ (Legislative Assembly 1908: 3255), or generally through its licensing provisions. The Bill above all else was concerned with eliminating a practice that was ‘disastrous to the state’ (Legislative Council 1908: 431). The Act defined lying-in homes separately from other hospitals. It then went on to stipulate that any death or birth in a lying-in hospital had to be reported within 24 hours to the Registrar of Births, Deaths and Marriages. But it is the definition of ‘birth’ that is alarming. The common meaning of ‘birth’ was extended to

include still-births, and most importantly, miscarriages *at any period during pregnancy*. This definition was at first resisted by Mackellar's colleagues until it was explained that if this definition was omitted, the Bill might as well have been thrown under the table (Legislative Council 1908: 519). 'The whole object was to prevent the perpetration of the crime of abortion and with this line struck out, the Bill would be useless for that purpose', explained one member (Legislative Council 1908: 523).

The parliamentary debate on what was to become section 11 of the *Private Hospitals Act* exemplifies the legislation's objective. The original clause as debated in the Upper House required the manager of any public hospital to notify the Board of Health when a patient was found to be suffering from pelvic peritonitis or pelvic cellulitis. When members of the opposition demanded to know what these specific conditions were, members of the Government delicately avoided the issue. Finally, Sir Henry MacLaurin (member of the 1904 Royal Commission), explained that 'we were considering cases of abortion ... [where] a patient outside who might have a miscarriage brought on, was taken into a hospital and kept there until she either got better or died. The purpose of the clause was to make certain that that fact should be reported' (Legislative Council 1908: 595). By targeting these diseases that were often the result of bungled abortions, the Government was hoping to generate further evidence that would lead authorities to abortionists.

The debates reveal a lack of real consideration about the invasive protocol that this clause established. Some members did voice concern that women would be subjected to unnecessary inquisition, but these protests were generally weak and irresolute. Mr Ashton was one Legislative Councillor who was specific and persistent in his condemnation of the clause. He alluded to the 'mental torture' of having such personal detail reported to a public office and the anguish this would cause women. Yet his opposition wavered. Provided that the diseases were not specifically mentioned in the legislation and the Board of Health was granted the power to regulate the notifiable diseases instead, he was content to support the clause (Legislative Council 1908: 604–5). The final compromise made a curious contribution to the Act. Section

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11 provided that when lying-in patients were suffering from ‘any disease’ (as proclaimed by the Governor), the matter had to be reported to the Board of Health within 24 hours. It would strike any reader of the legislation as strange that lying-in homes, and not other hospitals, had to report *any* disease to the secretary of the Board of Health.

The debates on the *Public Hospitals Act* show that legislators were not overly troubled by the enactment of measures that negatively affected women. The irresolute concern voiced about women’s privacy is reducible to political posturing. Even those Legislative Councillors who vigorously debated this clause were ‘just as anxious as ... anyone in the country, that we should be able in some way to get at the cases which were illegal, and which were sins against morality, sins against the state and against every propriety that could be thought of’ (Legislative Council 1908: 593). The fact that intimate details of women’s health were now open to public scrutiny and surveillance does not appear to have unduly concerned most Members of Parliament.

Across the Pacific, lying-in homes had also come to the attention of Canadian reformers who were similarly deeply suspicious of their activities. The homes were denounced as places where ‘large numbers of illegitimate children are born into the world annually, which children are, by some means or other, got rid of’ (Ward 1981: 49). In *Of Toronto the Good*, C S Clark wrote:

The many lying-in hospitals and institutions for the reception of illegitimate children tell but a portion of the story, and it is probable that the immorality that produced such results, widespread though it may be, is remarkably limited in comparison with that which escapes detection (1898: 96).

Ontario was the first Canadian province to pass legislation specifically regulating these maternity homes with the *Maternity Boarding Houses Act* 1897 (Ont). Two years later, Manitoba followed suit with an almost identical statute, the *Maternity Act* 1899 (Man). These statutes appear to have had two main aims: the regulation of adoption and the regulation of births in these homes. The pivotal section in these statutes made it unlawful for any person in exchange for money

to receive any woman for accouchement or to keep women (being mothers of infants and not being married) with infants for board unless they were registered with the municipality. The legislation established a registration process; provided for the inspection by municipal health officers of the premises; and, gave the means to strike proprietors from the register. In doing so, these statutes were clearly attempting to regulate the institutions and to impose some standards of care upon the proprietors. Along with surveillance of the institutions however, the legislation also provided for the monitoring of the 'inmates'. For instance, proprietors of maternity houses were required to ascertain and record the 'antecedents of women coming under their care' and to furnish that information as required. They were also expected to maintain a register of every woman, girl or infant in their care and to record where they came from, the doctor that attended the birth and to where the women went after leaving the refuge. Failure to do so left the proprietor liable to monetary penalty. The level of distrust that had grown around these maternity homes and the women they housed is made obvious in the section that required every birth taking place to be attended by a legally qualified medical practitioner and also that the birth had to be reported to the authorities immediately.

The excessive regulation of individual women, rather than just the institutions housing them, is indicative of a broader agenda not inconsistent with either the moral reform or pro-natalist movements. The Canadian statutes were not as extreme as those in New South Wales, but all statutes reveal a heightened interest in women's reproductive activities. For the purposes of assisting women in birth, details about where the women came from or were going to, or information about their antecedents should not have mattered to the Canadian authorities. Nor in the case of New South Wales did the Board of Health need to be notified about any 'disease' or any 'birth' as expansively defined by the legislation. If the object was to protect women and women's health, these aspects of the legislation were unnecessary. The statutes may have been aimed at 'protecting' women or improving the standards of women's health, but they were also about providing authorities with

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the opportunity to monitor and control women's reproductive activities. These laws highlight that while legislators may have been trying to deliver what they thought women needed, these needs were only accommodated to the extent that they coincided with the perceived wants of the nation. Elspeth Browne has neatly encapsulated this: 'very often the arguments for marriage and maternity were only peripherally about what was good for women, and substantially about what was good for the state' (Browne 1979: 172).

Conclusion

The legislative activity that centred on fertility control at the turn of the 20th century can be attributed to a number of historically specific coalescing factors. For Australia and Canada, it was concern over racial integrity, heightened by a fear generated by the declining birth rate that promoted a climate in which exercising control over women's fertility was seen as warranted. It is the position of Australia and Canada within Empire that forms the crux of this particular historical interval. When it came to questions of identity, national uncertainty and fragility forged a heavy reliance upon notions of Empire and an unquestioning allegiance to it.

The central issue propelling this article has been the question of how colonial societies arrived at a position in which it was logical and natural that women's reproduction be regulated by law. The spate of legislative activity at the turn of the 20th century was a turning point in the control of women's fertility, as it passed from being a matter of individual discretion to one requiring state regulation. To properly situate the inquiry, the first part of this article explored the cultural and social climate of 19th century Australia and Canada. If, as Lord Carnarvon stated, the truest imperialism was that based on the 'extension of British institutions and wholesome influences' (Roberts 1979: 200), Australia and Canada needed to demonstrate that *English* wholesome influence had extended to their corner of the Empire. For the settler colonies, particularly New South Wales burdened by its convict stain,

an adherence to moral righteousness needed to be explicitly exhibited. If the white settler colonies could not achieve and sustain an *English* moral character, the fragile distinction drawn between them and the ‘uncivilised’ parts of the Empire collapsed. For counterpoised against pure and proper *Englishmen* were the *savages*, who were by definition ‘unrestrained by any sense of delicacy from a copartnery in sexual enjoyments’ (Stocking 1987: 202); people who could not control their sexual desires and thus were unlikely to lead orderly and civilised lives (Valverde 1991). A repudiation of *English* morality thus implied an alliance with those peoples the settler colonies were desperate to distinguish themselves from.

The rhetoric surrounding, and the reaction to women’s fertility control can be evaluated within this context. If sexual restraint formed an integral part of one’s *English* character, the use of birth control was an indisputable exhibition of lack of sexual self-control and therefore countered any assertions regarding personal worth. Because women were iconified as moral guardians and Anglo-Saxon masculinity demanded self-discipline, the use of birth control was seen as indicative of an individual’s moral decline as well as the nation’s. Fertility control implied a degree of sexual excess and moral degeneracy that was inimical to the maintenance of good character, in both men and women. However, the fact that it encroached so overtly upon the sexuality of women and by implication impugned their virtue compounded its gravity.

This moral aspect of the reproduction laws should not however obscure the irrefutable fact that governments of this period desired population growth, and more importantly, white population growth. In fact, Mackinnon has stated that ‘the growth of maternal and child health services needs to be viewed in this perspective as first and foremost, although not exclusively, a population policy and not an intervention for the intrinsic benefit of women and children’ (2000: 112). In other words, women’s health was a means to an end, rather than an end in itself. Clearly, discourses around gender and race collided to form powerful beliefs about women’s reproductive capabilities and its importance for the nation.

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The second half of this article explored two different legislative strategies that were pursued once it was recognised women were not deterred from contraception and abortion and that this was in turn affecting the birth rate. Comparing the *Indecent Publications Act* with the *Criminal Code* allowed both statutes to be placed in the international context of heightened vigilance against birth control. The *Private Hospitals Act* and the *Maternity Boarding Houses Acts* are examples of laws that, while perhaps innocuous in appearance, were intended to operate in additional ways not necessarily obvious from a de-contextualised reading of the legislation. As we have seen, the indecent publications and public hospital laws were the product of a number of coalescing factors. For instance, it was fortuitous for pro-natalists and moral reformers that calls to strengthen ‘morality’ or the ‘nation’ were often mutually reinforcing. Similarly, the tidy way in which the pro-natalist agenda dovetailed with the dominant ideologies of motherhood and broader humanitarian goals probably sustained and legitimised it, permitting it a measure of success that it may not have accomplished on its own. Evidence generated by the legislative debates indicates that reproduction legislation was the product of a number of uniting factors: xenophobia, misogyny, racism, imperialism, pro-natalism, humanitarianism, moralism, classism and economics. Most of all however, it was generated by fear — fear of the unknown and fear of change. Unfortunately for Australian and Canadian women, that fear was partly assuaged by exerting control over the maternal body.

The Australian Federal Minister of Health, William Hughes, told Parliament in 1934 that a fall in the birth rate had more serious consequences for Australia than for Britain because the White Australia Policy and indeed the very existence of the nation were endangered by such a development (*Sydney Morning Herald* 5 December 1934). In 1985, Hiram Caton, an Australian philosopher, stated that ‘it is for women to bear and nurture children; it is for men to provide for and defend kith and kin ... [men’s] awe of women, so important for subduing their grosser impulses, disappears with the contraceptive control of the consequences of the sexual act’ (de Lepervanche 1989: 175). In 1999 in *The Decline of*

Males, Canadian author Lionel Tiger (1999) argued that the use of birth control is leading to an inevitable decrease in men's power and prestige. More recently in July 2002, the Treasurer of the Australian Liberal Party, Malcolm Turnbull, warned that Australia faces a 'fertility crisis' as 'our young folks are not having enough babies' and advocated tax benefits aimed at the family (*Sydney Morning Herald* 15 July 2002, *Canberra Times* 16 July 2002). While the legislation examined here was the result of peculiar, historically specific circumstances, the construction of women's reproductive capacity as important to larger sexual, political and national agendas is not. The history of the legislative control of women's fertility is an important reminder that while circumstances may be politically, culturally and historically particular, it is a recurring theme to find women and their bodies buffeted and exploited by the exigencies of the moment. We need to therefore remain alive and alert to the potential for new and competing claims to be placed upon the maternal body.

Notes

- 1 Although during this period the term 'British' was often employed for purposes of self-identification, I have deliberately chosen the expression 'English'. Use of the word *English* grants me the latitude, with an historian's retrospectivity, to subtly shade my discussion with a degree of scepticism, to distance myself from its assumptions and to thereby acknowledge its artificiality. Moreover, the word *English* plainly recognises the marginalisation of the other British Isles inhabitants — the Welsh, Scottish and Irish. Although a Welsh identity, for example, could never be anything other than distinctively Welsh, an *English* identity could claim to provide the norm for the whole of the United Kingdom, if not the Empire (Hall 1992). In particular, italicising *English* here serves to visually distinguish it from the subjects' use of English/ British and reinforces my reasons for consciously employing it.
- 2 The word 'race' was frequently employed during this period, but there was constant slippage in its meaning. At times 'race' meant the whole human race, at times it signified the white race. Often it conveyed both meanings simultaneously, tending to identify the human race with the white race.

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‘The slippery term “race” allowed Anglo-Saxons to think of themselves as both a specific race and as the vanguard of the human race’ (Gordon 1976: 142, Valverde 1991).

- 3 Similar latitude was obviously not extended to the original inhabitants of either Canada or Australia and both indigenous peoples were systematically alienated from the national identity.

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