

Submission
No 12

INQUIRY INTO GAY AND TRANSGENDER HATE CRIMES BETWEEN 1970 AND 2010

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Submission to the Standing Committee on Social Issues conducting the Inquiry into Gay and Transgender hate crimes between 1970 and 2010

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We are pleased to provide the following to assist the Committee in its inquiries related to Gay and Transgender hate crimes between 1970 and 2010. Regarding the terms of reference for this inquiry, the period, 1970-2010, is a very long timeframe (40 years). It is also wide, in that covers both rural and urban New South Wales. Generalising across this period and territory is perilous. The 1970s is culturally radically different from the 2000s and crime is culture dependent, both in attribution and capture; there have been many changes in law and law enforcement over this 40-year period; including:

- Delivery of services (e.g. technological changes including computers replacing the paper recording systems of 1970s)
- Execution of policy (changing hot button issues)
- Personnel flows (a cycle of people leaving and subsequent recruitment)
- Training processes (evolving over time)
- An evolving police culture (e.g. homophobia prevailing to varying degrees in the 1970s such that gay officers were closeted and worried about exposure. This can be contrasted to gay police post 2000 being *'out and proud'* and accepted within the culture)

In this submission, we will not address Part B of the terms of reference but note that some of the themes it contains (e.g. the existence of the Panic defence) does reflect on changes in the legal terrain. We will address the following:

- 1: Police investigation misconduct;
- 2: The relation between assault and homicide;
- 3: Problems of measurement;
- 4: Impediments to justice;
- 5: Concluding comments;
6. References

1. Police malfeasance/misconduct

To the extent that it is within the Committee's mandate, the question of how adequately or professionally the police investigated cases of assault and homicide in the period of the review will require extensive resources and may be difficult to answer.

- 1.1. Strike Force Parrabell does not provide an answer to this question. That mandate involved two conditions: Conduct a review of the NSWPF holdings in relation to potential gay hate crimes resulting in death; determine if any anti-gay bias was involved in any of the deaths (Instructions 2016: 2-3).
- 1.2. The requisite expertise and materials required to evaluate if police have properly and diligently investigated each case would be very hard to marshal and deploy. It is possible to do a forensic examination of the intact case files, and this would ideally be done by an experienced investigator from another police service familiar with detection procedures. We have found the NSW police to be open to such a review taking place.
- 1.3. With that caveat in mind, our review [Strike Force Parrabell] did not find any evidence that police failed to adequately investigate any of the deaths under review. Each case was accompanied by a wealth of documentation.
- 1.4. One mechanism that is relevant to an assessment of relative diligence in homicide investigations is clearance or clear up rates. Quoting from our report, we offer the following:

“Research has found that clearance rates vary based on victim and event characteristics, with higher rates of clearance for homicides involving weapons other than firearms and lower rates for homicides involving strangers and older victims (Reidel 2008). It is also known that unsolved homicides are more likely to occur during other crimes (Mouzos and Thompson 2000). In a study (Wellford et.al 1999) comparing clearance rates across 20 of the largest U.S. cities, 37 of the 51 characteristics related to arrest clearance were associated with police practices. This includes how quickly homicide detectives are sent to secure the crime scene to begin the collection of evidence. According to research by Peterson and Hagan (1984) and Puckett and Lundman (2003) police are not willing to treat all victims the same.”

- 1.5. We reviewed 85 cases and of these 23 were unsolved (our numbers differ slightly with the police report due to last minute changes they made) for a homicide clearance of 73%. We found “no significant increase in the unsolved cases in the peak period of activity between the years 1986-1995.” We did however find that the clearance of the cases in the 1970s was lower than in subsequent decades.
- 1.6. In many cases there was insufficient information to decide if the death was (a) homicide, (b) a gay-bias hate crime. It is possible that in some of these cases investigators did not adequately explore the possible connections between cases, and police have noted that “mistakes were made” and that there was “historic marginalisation of the LGBTI community” in the NSW in much of the period of review, as there was in much of Sydney and Australian society in the 1970s, 80s and into the 90s.
- 1.7. A lack of trust between the gay community and police was common in those decades as per much research, and this also will have contributed to deficiencies in

investigations. When and where homosexuality was illegal, and police were perceived as possessing an anti-gay bias, it was risky for witnesses and/or victims to come forward and provide inculpatory information to police.

- 1.8. Much of the public anxiety regarding anti-gay bias crimes concerns the view that there was a 'gang' [or several 'gangs'] responsible for some significant amount of the killing and/or that these crimes were associated by relation to the same people or persons.
- 1.9. The NSW police have not been unresponsive to exploring connections between gay-hate and homicide. Three separate Strike Forces could not determine a definitive association between perpetrators. Strike Force Macnamir was struck in 2013 to review each of the 30 unsolved cases that may have involved anti-gay bias. Detective Chief Inspector Pamela Young led the Unsolved Homicide Team and determined that 8 cases probably or possibly involved anti-gay bias, and she could not support a conclusion that Scott Johnson was among them (she determined his case should be open).ⁱ The percentage is consistent with Strike Force Parrabell findings. Strike Force Taradale was struck to investigate a handful of cases including Johnson, Russell, Mattaini, Warren and McMahon, chiefly to ascertain connections of serious assaults and homicide. It too failed to determine a definitive association between perpetrators. The four homicide cases [Johnson, Russell, Mattaini and Russell] remain unsolved and have been subject to sustained coronial scrutiny.
- 1.10. The above (1.9) being said, it is it is important that the Committee understands that homicide investigators do not as a rule arrive on a case with detailed knowledge of the status of the victim sufficient to form a bias. Unless an investigator is protecting someone specifically from being investigated for a homicide (an act of gross corruption) or an investigator is disinterested in discovering the identity of suspect because the victim was deemed to be gay (another gross dereliction that goes against the core craft of homicide to discover perpetrators), the conditions for individual and systemic deviations are unlikely to be met. In addition, homicide investigations involve often more than one police investigator, so that intentional obfuscation or dereliction or corruption will require some degree of collusion from other investigators or commanding officers.

2. The relationship between gay bashings and anti-gay homicide

- 2.1. In 1990 Comstock (1991) found that gay men are more likely than straight men to experience stranger violence. Dean, Wu and Martin (1992) found that gay men between 18 to 24 in 1990 experienced six times more violence than did gay men in that age group in 1985. Contemporaneous Australian research, including that from Victorian agency Gay Men and Lesbians Against Discrimination (GLAD 1994), reported that a high number of Victorian men and women were subject to physical abuse, threats of violence or assault in public. In NSW, the *Streetwatch Report* from the Gay and Lesbian Rights Lobby (Cox 1992) and the *Count and Counter Report* (Cox 1994) used surveys to find a high rate of victimization. As reported by Mason (1993: 5), the New South Wales Anti-Discrimination Board [1992] noted an "increase in reports of HIV and AIDS related discrimination and crimes against gay men."
- 2.2. According to Moffatt and Poynton (2006) a more than doubling in recorded crimes of assault in NSW between 1990 and 2007 mirrored by victimization rates and the absence of evidence in changes in reporting provides a good reason to believe that assaults were rising in this period. According to Ringland and Baker (2009: 7), increases in actual assaults occurred may well have been occurring at the same time

that there were changes to recording and reporting practices (e.g. mandatory reporting). However, there is no strong evidence that there is a “particular pattern to the size of the increase in assault”; the increase in assaults in ‘outdoor public place’ was not as high as other categories, although the rate of increase in residential places was over 100% (other places had still higher rates of increase) (Ringland and Baker 2009: 7).

- 2.3. A continuous data set permitting comparisons before and after official designation of the social problem is most often unavailable. Our argument, however, is that it is necessary to recognise this shortcoming in the available data as a true impediment to retrospective assertions about the extent of the problem. In the absence of reliable data, the danger is that unreliable and anecdotal information, which may have been enough to raise the issue’s status in the first place, is then relied upon in a makeshift empirical argument. This is too much inference, and only comes back to bite its protagonists.
- 2.4. In this regard, it is important to note that the recording of bias crime awaited the introduction of s21A(2)(h) of the Crimes (Sentencing Procedure) Act 1999 (NSW) in 2003.ⁱⁱ The means and capacity to investigate bias or hate crime depends upon reliable and consistent legislative conceptualisation and the conversion of that into police devices capable of identifying the suspected criminal element. This alone makes the *retrospective* attribution of events or cases difficult if not impossible, in most instances. Although the rise in assaults and survey research is suggestive, this does not enable support or corroboration of the claim that there is a rise, much less an epidemic, in anti-gay homicide in a particular location.

3. Problems of measurement: *under*, and *over*-representing bias

- 3.1. In part due to advocacy and moral crusading for law enforcement reforms scholars and activists have developed and elaborated the putative empirical basis of bias crime (Tomsen 2002; Mouzos and Thompson 2000). There is now a large body of work that is concerned with its extent or incidence, particularly its underreporting and under recording. The frequency of anti-gay bias is reported in victimisation studies (Miller and Humphreys 1980), police reports (Nolan and Akiyama 1999; Perry, 2001) court records (Bartlett 2006; Tomsen 2009), news media reports (Bartlett 2006; Miller and Humphries 1980; Comstock 1991) and by dataset comparisons of regular homicides against anti-gay homicides (Bartlett 2006; Mouzos and Thompson 2000). This work is directed at reform and has helped to raise the profile of a social problem. As we noted above however, crime depends upon construction and capture. Where it attracts less consensus, construction and capture will be subject to wide variations of interpretation. And if crime, in robust objective facticity, is weak or empirically wanting, then bias crime is at the weak end of the weak concept.
- 3.2. In fact, “there is no consensus among social scientists or lawmakers on definitional elements that would constitute a global description of hate crime” (Boeckmann and Turpin-Petrosino 2002: 208). Chakraborti and Garland (2015: 3) note that it is difficult to overcome the “subjectivity associated with the notion of hate”. The Association of Chief Police Officers (ACPO) in the U.K. defines hate crime as “any incident perceived by the victim to be motivated by hate or prejudice” (ACPO, 2005, emphasis added). However, victims are often in no better position to determine the motivation for behaviour than is the perpetrator or the bystander. As per Hall (2012), the concept loses meaning where it permits subjective over-inclusion.
- 3.3. Bias is over-represented where the definition is too unselective, and many events or phenomena are captured as bias that ought not to be, either as a case of generic or

specific bias. [To provide one illustration, assaults or homicides that occur near the vicinity of a beatⁱⁱⁱ may not have any relation to homophobia. Over-capture of bias can occur here if one presumes that the beat location for the crime is *always* indicative of hate sentiment.]

- 3.4. There are difficult questions to be asked when assessing whether an incident is a bias crime and quite often investigators do not have the information to answer them. For example, what is the relationship of the alleged victim to the alleged perpetrator? What is the status of both the victim and the perpetrator regarding the protected or vulnerable group? Many of the cases of alleged bias crime that were investigated by Parrabell (both police and academics) involved perpetrators who were conflicted in their sexual preferences who acted violently against older men they regarded as paedophiles. A method of counting bias that pulls this cohort under the category of anti-gay bias for policy decision-making is over-counting against the grain of researchers and constituents.
- 3.5. We note wide variations in how bias crime is measured across jurisdictions. This variation is impacted by the conditions and tools of attribution. For example, England and Wales adopts the Association of Chief Police Officers (ACPO) definition, “Any hate incident, which constitutes a criminal offence, perceived by the victim or any other person, as being motivated by prejudice or hate.” England and Wales have enormous numbers of bias crimes, no doubt due to the over-inclusive definition used to discover the phenomenon. Hall (2012) compares hate crime rates in London and New York to find that the broader official definition in the former construct the ‘reality’ of hate crime in ways that predominantly serve to inflate the official statistics (2012: 79).^{iv}
- 3.6. The tool used by NSWSP, the Bias Crime indicators Review Form (BCIRF), draws its ten indicators from the National Centre for Hate Crime Prevention, and is a qualitative instrument with four variations in each numbered category. It leaves too much discretion and does not rank or prioritise among the indicators and is being discontinued by the NSWSP.
- 3.7. We recommend that police must conduct a systematic review of best practices in the attribution of bias in crime. This review will link the concept of bias directly to means of attribution. Some common threads are important: perceived affiliation of the victim is noted (Chakraborti and Garland 2015: 3; Mason 2014: 78; Gerstenfeld 2004: 9; Gerstenfeld 2013: 11). Gerstenfeld defines hate crime as “illegal acts motivated, at least in part, by the group affiliation of the victim” (Gerstenfeld, 2004: 9). Added to this is the concept of vulnerability, or vulnerable populations (Chakraborti and Garland 2012; Wolfe and Copeland 1994: 201). Going further, Perry (2001: 29) says that it is the generic *subordinate identity* of the victim rather than any individual characteristics that must be viewed as key. She (Perry 2001:10) defines hate crime as involving the reassertion of the dominance of the perpetrator’s group over the victim.
- 3.8. In sum, important to a conceptualisation of bias is reference to the *relative powerlessness* of vulnerable peoples vis-à-vis a dominant, privileged class of people. Taking selectively from this, we designed a simple three-part test of bias is as follows. Bias crime: *expresses* a categorical animus (directed at a person or group on the basis of his/her perceived identification with a *vulnerable* group); produces an act that *intentionally*, by way of criminal predation on the basis of that categorical animus, causes harm to that person or group; is mitigated or aggravated by an offender’s contemporaneous *associations* that are linked by a commitment of *denunciatory non-*

identification with the vulnerable person or group. In simple terms, bias expresses an animus towards a vulnerable person and acts intentionally to cause harm to that person, an act that is aggravated or mitigated by associations and denunciatory statements. In our evaluation of the gay bias homicides in NSW for the NSWPC, we applied this instrument to the information on the cases we were presented to make our findings.

4. Impediments to Justice

- 4.1. Victimology is the study of the social and institutional conditions of crime victimisation, and it is well-established that criminal justice actors from police to courts do not accord every person equal consideration as victim (Svennon 2007).
- 4.2. Among complainants or victims who are known to have received unsatisfactory consideration from the criminal justice system, LGBTIQ people have been prominent (eg. Judge and Neil 2008).
- 4.3. It is well-established that especially over the first two decades of the 40-year period in NSW under review, criminal justice practitioner attitude towards gay males as victims of crime has been at best reluctant and negligent; and at worst prejudicial.
- 4.4. Particularly during the 1970s and 1980s a trio of social institutions framed LGBTIQ people in a negative light: *medicine* promulgated that homosexuality was an illness; *law* criminalised male homosexual conduct and prosecuted and imprisoned gay men for crimes including ‘gross indecency’ or ‘sodomy’ (Carbery 2010; Dalton 2011); *religious institutions* proselytised that homosexuality was a sin or abominable crime and that men who participated in homosexual sex were indulging in the gravest of sins – unnatural sex (Henderson 1996).
- 4.5. Stigmatised as, variously: perverted; criminal; sick; deviant; abnormal; predatory and sinful; LGBTIQ people suffered great social condemnation both as individuals and as members of a much-maligned ‘community’ (see Willett 2000). In tandem, these three models ensured that LGBTIQ people were despised; disrespected and actively discriminated against.
- 4.6. Despite decriminalisation of homosexuality in NSW in 1984; the damage had already been done and LGBTIQ people shouldered ongoing stigma and social exclusion.^v
- 4.7. The impact of the prevailing social hostility resulted in LGBTIQ people being afraid or reluctant to report crime (especially ‘hate’ motivated assaults); LGBTIQ people failing to report assaults allegedly perpetrated by police officers (for fear of reprisal and/or being ‘outed’); and a reciprocal climate of dislike and suspicion between the police and the LGBTIQ community that worked to thwart the achievement of justice in a range of cases from the trivial to the most serious.

5. Concluding Comments

- 5.1. The discovery of hate or bias crime involves legislative and policing instruments as well as training and education sufficient to ensure reliable attributions.
- 5.2. Each of these (hate crime legislation, instruments of capture {BCIRF, bias crime unit}, training and education) are adaptive to social and cultural contexts that are shifting in their demands of police and crime policy.
- 5.3. It is not clear that police have been unresponsive to demands to re-evaluate homicides as involving anti-gay bias. They have applied measures retrospectively to some cases that predate anti-bias legislation and occurred in different social and cultural contexts.

- 5.4. We have not seen evidence in the information we have seen regarding the homicide cases in dispute that police have been reluctant to pursue them as bias crimes [gay-hate inspired].
- 5.5. There is no research or available evidence that suggests that the number of anti-gay homicides in Sydney was significantly higher than it was in other comparable cities. Given the first two points above [# 5.1 & 5.2], it is not possible to make such a determination.
- 5.6. Assaults are another matter, and as noted above (# 2.1-2.4), there is evidence that gay men were subjected to extraordinary criminal violence. Not all of this is related to homophobia; some of it is related to lifestyle^{vi} and proneness.
- 5.7. It should not be assumed that where there are more assaults there are more homicides. If that assumption is made, it is still open to find that those homicides may also be related to lifestyle as well as or instead of bias.

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ⁱ It should be stressed that the Scott Johnson case was not part of the Strike Force Parrabell review because it was sequestered to a third coronial inquest. Having said that, clearly the death itself was part of the wider *context* that underpinned the review.

ⁱⁱ As per the *Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(2)(h)*, in New South Wales it is an aggravating factor at sentencing where 'the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability)'

ⁱⁱⁱ In Australia, the term beat is used to refer to 'spaces where men gather to seek out or arrange casual sexual encounters with other men, irrespective of the sexual identity of participants' (Dalton 2012: 67). Beat users include homosexual men, bisexual men and heterosexual men who are closeted and/or married.

^{iv} Tomsen (2009: 38) – drawing on the work of Levin (2007) – notes that "the term 'hate crime' (or bias crime) evolved in the 1980s and 1990s to refer to victimisation from assaults, abuse, harassment and attacks on property on the basis of a particular minority group identity".

^v Additionally, the advent of HIV/AIDS did much to pathologise gay men as dirty and diseased. Repudiated as a class of people addicted to causal sex and in doing so 'spreading AIDS', public health responses – including the infamous Grim Reaper with a bowling ball television advertisement (Lupton 1993; Donovan 1995) – contributed to a climate of fear where gay men were understood as sexual subjects synonymous with death and suffering.

^{vi} To be clear, we do not use the term "lifestyle" in any pejorative sense (e.g. like the homophobic slur gay lifestyle that is often deployed in the media) but rather simply to refer to *routine activities* (that occur on a frequent basis) which put one in crime-prone environments or contexts [For example, gay men leaving venues late at night and subject to violence where other men perform their perceived masculine role by seeking to assault them].