

**INQUIRY INTO GAY AND TRANSGENDER HATE CRIMES
BETWEEN 1970 AND 2010**

Organisation: NSW Young Lawyers

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Submission to the NSW Legislative Council Social Issues Committee Inquiry into Gay and Transgender Hate Crimes between 1970 and 2010

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Contact: **Jennifer Windsor**
President, NSW Young Lawyers

Maria Nawaz
Chair, NSW Young Lawyers Human Rights Committee

Contributors: Sean Bowes, Simon Bruck, Maria Nawaz

The NSW Young Lawyers Human Rights Committee welcomes the opportunity to make a submission to the Legislative Council's Inquiry into Gay and Transgender Hate Crimes between 1970 and 2010 ("Inquiry").

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Human Rights Committee

The Human Rights Committee ("the HRC") comprises a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the HRC are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and their application under both domestic and international law. Members of the HRC share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The HRC takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

Scope of submission

This submission addresses only the following Terms of Reference:

- Term of Reference (a)(ii) regarding the effectiveness of current policy and practice in addressing past impediments within the criminal justice system that impacted the protection of LGBTIQ people in NSW and the delivery of justice to victims of LGBTIQ hate crimes and their families; and
- Term of Reference (c) regarding any other related matter.

Summary of recommendations

In summary, the HRC makes the following recommendations in this submission.

The NSW Government should:

1. Convene a Royal Commission into hate crimes against LGBTIQ people in NSW;
2. Provide cultural competence training to legal and justice system personnel;
3. Support and expand the Gay and Lesbian Liaison Officer program;
4. In light of (a) the NSW Ombudsman's criticisms of the police power to use drug detection dogs in general drug detection operations, and (b) specific concerns relating to the use of drug detection dogs at LGBTIQ events and venues, the power to use drug detection dogs in Part 11 Division 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) should be repealed;
5. Amend the *Anti-Discrimination Act 1977* (NSW) to improve protections against discrimination and vilification for LGBTIQ people;
6. Increase funding for specialist LGBTIQ legal assistance services;
7. Establish a Gender and Sexuality Commissioner to monitor the human rights of LGBTIQ people and provide policy leadership;
8. Provide support for schools to prevent and respond to hate crime and hate conduct against young LGBTIQ people; and
9. Increase funding for critical support services.

Background

In recent years, NSW has achieved significant improvements with respect to the human rights of LGBTIQ people. In 2014, NSW abolished the "homosexual advance" or "gay panic" defence and established a scheme for the extinguishment of historical offences relating to consensual sex between men.¹

Australia has also achieved significant improvements at the national level. In 2017, the Commonwealth Government legislated for marriage equality.² This followed the Australian Marriage Law Postal Survey, which demonstrated majority support for same-sex marriage.³

Despite recent improvements, the human rights of LGBTIQ people continue to be violated in Australia and NSW. LGBTIQ people face widespread prejudice and discrimination, contributing to poorer physical and

¹ *Crimes Amendment (Provocation) Act 2014* (NSW); *Criminal Records Amendment (Historical Homosexual Offences) Act 2014* (NSW)

² *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

³ Australian Bureau of Statistics, "Australian Marriage Law Postal Survey, 2017: National Results" (15 November 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>>.

mental health,⁴ poorer educational outcomes,⁵ higher rates of homelessness,⁶ higher unemployment⁷ and higher rates of poverty.⁸

Hate crimes against LGBTIQ people remain a common occurrence

In reporting on the legal needs of LGBTIQ people in 2018, the Law Council of Australia (“Law Council”) concluded that hate crimes are “a common occurrence throughout Australia”.⁹ Levels of violence against LGBTIQ people have remained constant, despite positive legal developments.¹⁰ In 2011–12 alone, LGBTIQ people reported to researchers that they experienced the following because of their sexuality or gender identity:

- 25.5% reported verbal abuse;
- 15.5% reported harassment;
- 8.7% reported threats of physical violence;
- 2.9% reported sexual assault; and
- 1.8% reported physical attack or assault with a weapon.¹¹

Hate crimes are most likely to be perpetrated against LGBTIQ people who tend to be especially vulnerable, such as transgender people and young LGBTIQ people.¹² In 2010, LGBTIQ people aged between 14 and 21 years reported to researchers that they experienced the following because of homophobia:

- 61% reported verbal abuse;
- 18% reported physical abuse; and
- 69% reported other types of abuse.¹³

⁴ Australian Research Centre in Sex, Health and Society, *Private Lives 2: The Second National Survey on the Health and Wellbeing of Gay, Lesbian, Bisexual and Transgender Australians* (2012) 2–3 (“*Private Lives*”).

⁵ Jacqueline Ullman, *Free2Be?: Exploring the Schooling Experiences of Australia’s Sexuality and Gender Diverse Secondary School Students* (November 2015) 37–40.

⁶ Gay and Lesbian Foundation of Australia, *LGBTQ Homelessness: Risks, Resilience and Access to Services in Victoria* (September 2017) 7–9.

⁷ Western Australian Centre for Health Promotion Research, *The First Australian Trans Mental Health Study: Summary of Results* (2013) 16; Joseph Sabia and Mark Wooden, *Sexual Identity, Earnings and Labour Market Dynamics: New Evidence from Longitudinal Data in Australia* (March 2015) 4.

⁸ Law Council of Australia, *The Justice Project: LGBTI+ People* (August 2018) 11 (“*The Justice Project: LGBTI+ People*”).

⁹ *The Justice Project: LGBTI+ People* 16.

¹⁰ *Private Lives* 18.

¹¹ *Private Lives* 47.

¹² *The Justice Project: LGBTI+ People* 15-16.

¹³ Australian Research Centre in Sex, Health and Society, *Writing Themselves In: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People* (2010) 39 and 43 (“*Writing Themselves In*”).

LGBTIQ people aged between 14 and 21 years were most likely to experience abuse at school.¹⁴ In other words, high levels of hate crime and hate conduct are perpetrated against young LGBTIQ people in schools. Moreover, the level of abuse against young LGBTIQ people in schools has been increasing since 1998.¹⁵

LGBTIQ people often adopt strategies to reduce the likelihood of hate crimes being perpetrated against them. Such strategies include hiding their sexuality or gender identity and avoiding expressions of affection. Young LGBTIQ people are the most likely to adopt such strategies.¹⁶

Hate crimes against LGBTIQ people are significantly underreported

LGBTIQ people are significantly less likely than other victims of crime to report harassment or violence. Seventy-five percent of LGBTIQ people did “not report recent experiences of homophobic or transphobic abuse to police or seek professional assistance”.¹⁷ A significant majority of those who sought help went to community-based agencies. Only 16% of those who sought help reported the abuse to police. Young LGBTIQ people are especially unlikely to report harassment or violence to police.¹⁸

The Law Council identifies the following key reasons that LGBTIQ people do not report hate crimes:

- A deep mistrust of the legal system due to “laws that criminalised homosexuality and police history of perpetrating homophobic violence against LGBTIQ people”;¹⁹
- Fear of being ‘outed’ as an LGBTIQ person and “concerns about privacy and security”;²⁰
- Public attitudes towards LGBTIQ people, which contribute to a fear of further victimisation and a desire to avoid drawing negative attention to LGBTIQ communities;²¹
- Internalised attitudes, by which some LGBTIQ people believe that they deserve to be a victim of crime;²²
- A lack of informed and inclusive services, including legal services;²³ and
- Compounded barriers for LGBTIQ people who experience intersectional disadvantage, especially:
 - LGBTIQ people with a disability
 - Older LGBTIQ people
 - Aboriginal and Torres Strait Islander LGBTIQ people
 - LGBTIQ people in rural, regional and remote (“RRR”) areas
 - LGBTIQ people who are sex workers

¹⁴ *Writing Themselves In IX*.

¹⁵ *Writing Themselves In IX*.

¹⁶ *Private Lives 2 45*.

¹⁷ *The Justice Project: LGBTI+ People 21*.

¹⁸ *The Justice Project: LGBTI+ People 21*.

¹⁹ *The Justice Project: LGBTI+ People 22*.

²⁰ *The Justice Project: LGBTI+ People 24*.

²¹ *The Justice Project: LGBTI+ People 25*.

²² *The Justice Project: LGBTI+ People 25–6*.

²³ *The Justice Project: LGBTI+ People 26*.

- Young LGBTIQ people.²⁴

Access to justice barriers contribute to a mistrust of the legal system amongst LGBTIQ people

From the Law Council's analysis, an image emerges of barriers to access to justice pervading the Australian legal system. Discrimination against LGBTIQ people is common within the legal profession.²⁵ LGBTIQ people often have to educate lawyers about their experiences in circumstances that specialist legal services for LGBTIQ people consider to be inappropriate.²⁶

The Law Council notes "homophobic or transphobic police responses", including responses that ignore or trivialise abuse against LGBTIQ people.²⁷ In 2013, four LGBTIQ organisations – the Inner City Legal Centre ("ICLC"), ACON, Gay and Lesbian Rights Lobby and Sydney Gay and Lesbian Mardi Gras (collectively, "the LGBTIQ organisations") – published a report titled *Policing at NSW Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Events and Venues* ("Policing Report"). The *Policing Report* notes that "police activity at LGBTIQ specific events has intensified, particularly in relation to (but not only) drug operations".²⁸ Mardi Gras and ACON received an unprecedented 58 complaints with regard to policing at the 2013 Mardi Gras, with further complaints being vocalised at a community forum on 19 March 2013.²⁹ The LGBTIQ organisations considered that the incidents "have had a negative impact on the relationship between the NSW Police Force and the LGBTIQ community, raising concerns about the public safety of members of our community in future".³⁰

LGBTIQ people in detention are particularly vulnerable. There are failures to protect LGBTIQ detainees from human rights violations and abuse, including from other detainees. Transgender detainees are often held inappropriately with detainees of the sex that they were assigned at birth. Transgender detainees are more likely to receive insufficient and inconsistent medical treatment, are more likely to self-harm, and are at a higher risk of experiencing physical and sexual assault in prison.³¹ When protection is provided to LGBTIQ detainees, it may involve solitary confinement.³² The United Nations Special Rapporteur on torture and other cruel,

²⁴ *The Justice Project: LGBTI+ People* 30–2.

²⁵ *The Justice Project: LGBTI+ People* 29.

²⁶ *The Justice Project: LGBTI+ People* 26.

²⁷ *The Justice Project: LGBTI+ People* 56.

²⁸ Inner City Legal Centre et al, *Policing at NSW Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Events and Venues* (September 2013) 4 ("Policing Report").

²⁹ *Policing Report* 5.

³⁰ *Policing Report* 4.

³¹ Lorana Bartels and Sam Lynch, "Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy (2017) *Flinders Law Journal* 19(2) 185.

³² *The Justice Project: LGBTI+ People* 57.

inhuman or degrading treatment or punishment notes that solitary confinement may, in certain circumstances, amount to cruel, inhuman or degrading treatment.³³

The Law Council further observes that “some members of the judiciary lack awareness about LGBTI+ identities and relationships, and sometimes treat LGBTI+ people less seriously than they do heterosexual people in comparable circumstances”.³⁴

Hate crimes violate the human rights of LGBTIQ people

Australia is a party to the *International Covenant on Civil and Political Rights* (“*ICCPR*”) and the *International Covenant on Economic, Social and Cultural Rights* (“*ICESCR*”). Under article 2 of the *ICCPR*, Australia has undertaken to respect and to ensure to individuals the rights recognised in the *ICCPR* “without distinction of any kind”. Likewise, under article 2 of *ICESCR*, Australia has undertaken to guarantee that the rights recognised in the *ICESCR* will be exercised “without discrimination of any kind”.

The *ICCPR* recognises the right to life and the right to security of person,³⁵ including the right to freedom from bodily and mental injury. It requires the government to respond to “patterns of violence against categories of victims ... such as violence against persons on the basis of their sexual orientation or gender identity”.³⁶

The *ICCPR* further recognises the right of all persons to equality before the law and to the equal protection of the law without any discrimination. It requires the law to prohibit discrimination and to provide “equal and effective protection against discrimination on any ground”.³⁷ This includes discrimination on the ground of sexual orientation.³⁸

Article 13 of the *ICESCR* recognises the right of all persons to education. The prevalence of hate crimes and hate conduct against young LGBTIQ people in schools prevents young LGBTIQ people from accessing their right to education without discrimination of any kind.

Regarding hate speech, article 19(3) of the *ICCPR* acknowledges that the right to freedom of expression:

“... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order ... or of public health or morals.”

³³ United Nations Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, “Interim Report”, A/66/268 (5 August 2011) 2.

³⁴ *The Justice Project: LGBTI+ People* 56.

³⁵ *International Covenant on Civil and Political Rights* arts 6(1) and 9(1) (“*ICCPR*”).

³⁶ United Nations Human Rights Committee, *General Comment No 35* [9].

³⁷ *ICCPR* art 26.

³⁸ *Toonen v Australia*, United Nations Human Rights Committee, Communication No. 488/1992 (31 March 1994) [8].

Given that LGBTIQ people have rights to freedom from mental injury and to protection against discrimination, the prohibition of hate speech is necessary for respect of the rights of LGBTIQ people. The United Nations Office of the High Commissioner for Human Rights has recommended that states prohibit hate speech on the basis of sexual orientation, gender identity, gender expression and sex characteristics.³⁹

The duty to respect human rights includes a duty to “provide effective remedies to victims, including reparations”.⁴⁰ This is recognised by the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights Law and Serious Violations of International Humanitarian Law* (“*Basic Principles*”), The *Basic Principles* provides that remedies, including reparations, should be “adequate, effective and prompt”.⁴¹

There is increasing concern at the international level about the human rights of LGBTIQ people. On 30 June 2016, the United Nations Human Rights Council (“UNHRC”) passed a resolution stating that it “strongly deplores acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation or gender identity”.⁴² It appointed an Independent Expert to report on the issue annually for three years to the UNHRC and the United Nations General Assembly.⁴³

Term of Reference (a)(ii): The effectiveness of current policy and practice

Based on the above, it is clear that current policy and practice in NSW faces significant limitations. The HRC makes the recommendations below for improving current policy and practice.

Recommendation 1: Convene a Royal Commission into LGBTIQ hate crimes in NSW

The Inquiry’s Terms of Reference cite ACON’s *In Pursuit of Truth and Justice* report (“ACON Report”). The ACON Report’s findings include the following:

- 88 suspected anti-gay killings have been identified;
- Almost 30 of the suspected anti-gay killing cases remain unsolved;
- Many of the identified killings were brutal;

³⁹ Office of the High Commissioner for Human Rights, *Living Free and Equal: What States Are Doing to Tackle Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People* (2016) 30.

⁴⁰ United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147 (16 December 2005) art 3(d) (“*Basic Principles*”).

⁴¹ *Basic Principles* art 11(b).

⁴² Human Rights Council, “Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity”, A/HRC/Res/32/2 (30 June 2016) [2] (“Resolution 32/2”).

⁴³ Resolution 32/2 [3].

- The list of killings is “by no means comprehensive” and does not include “the hundreds if not thousands of violent assaults that did not result in death”; and
- The trauma and victims and their families have often been compounded by inadequate institutional responses.⁴⁴

There have not been adequate, effective and prompt reparations, as required by the *Basic Principles*, for such violations of the human rights of LGBTIQ people. The *Basic Principles* recognise that appropriate reparations may include:

- “Verification of the facts and full public disclosure of the truth”;⁴⁵ and
- “Inclusion of an accurate account of violations that occurred in international human rights law.”⁴⁶

The HRC considers that a Royal Commission into LGBTIQ hate crimes in NSW has significant potential as a reparative measure. The HRC understands that ACON supports a full independent inquiry such as a Royal Commission into LGBTIQ hate crimes. A Royal Commission would have broad investigative powers, including powers to summons witnesses, examine witnesses under affirmation or oath, and compel witnesses to produce documents.⁴⁷ These powers would assist in verifying the facts and formulating an accurate account of hate crimes against LGBTIQ people, forming a sound basis for improvements to current policy and practice.

A Royal Commission is likely to attract significant public attention. This is likely to facilitate participation and engagement by a broad section of the public and to raise community awareness of hate crimes against LGBTIQ people. A Royal Commission should have an adequate timeframe and sufficient resources to perform its duties.

We recommend that the NSW Government convene a Royal Commission into hate crimes against LGBTIQ people. The Terms of Reference should be formulated in consultation with LGBTIQ people and LGBTIQ organisations.

Recommendation 2: Provide cultural competence training to legal and justice system personnel

The United Nations High Commissioner for Human Rights recommends that governments implement sensitivity training with respect to LGBTIQ people for law enforcement personnel, including police and prison officers.⁴⁸ Similarly, the Law Council considers it a priority that Australian governments support the legal and

⁴⁴ ACON, *In Pursuit of Truth and Justice: Documenting Gay and Transgender Prejudice Killings in NSW in the Late 20th Century*, 3-4.

⁴⁵ *Basic Principles* art 22(b).

⁴⁶ *Basic Principles* art 22(h).

⁴⁷ *Royal Commissions Act 1923* (NSW) ss 8, 9 and 11.

⁴⁸ United Nations High Commissioner for Human Rights, “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity”, A/HRC/19/41 (17 November 2011) 25 [84g].

broader justice system to develop “policies and processes to ensure they are inclusive, welcoming and sensitive towards the needs of LGBTI+ people” (“the inclusivity priority”). The Law Council notes that this could include “ongoing training programs to build cultural competence”.⁴⁹

Victorian police officers who have received training on LGBTIQ issues tend to report that it is highly beneficial.⁵⁰

The HRC recommends that the NSW Government provide cultural competence training regarding LGBTIQ people to legal and justice system personnel, including police, corrective services personnel and government lawyers. We further recommend that the NSW Government support the provision of cultural competence training to lawyers in private practice and judicial officers.

Recommendation 3: Support and expand the Gay and Lesbian Liaison Officer program

The NSW Police Force formally established a Gay and Lesbian Liaison Officer (“GLLO”) program in 1990.⁵¹ The *Policing* Report praises the useful work performed by GLLOs in NSW.⁵² LGBTIQ people aged 16-25 identified GLLOs “as a key point of contact for LGBTIQ people who needed police assistance or direction”.⁵³

Three limitations of the GLLO program are as follows:

- The name of the program creates barriers to access for bisexual, transgender, intersex and queer people;
- There are significant gaps in when and where GLLOs are available; and
- There is limited evaluation of the performance of GLLOs in their role.⁵⁴

The HRC therefore makes the following recommendations:

- The name of the program be changed to the LGBTIQ Liaison Officer program;
- The number of LGBTIQ liaison officers be increased, particularly in areas where gaps exist; and
- The performance of LGBTIQ liaison officers be regularly evaluated and adequate support provided for such officers to perform effectively in their roles.

⁴⁹ *The Justice Project: LGBTI+ People* 61.

⁵⁰ Human Rights Law Centre, *End the Hate: Responding to Prejudice Motivated Speech and Violence against the LGBTI Community* (2018) 17.

⁵¹ NSW Police Force, *NSW Police Force Strategy on Sexuality, Gender Diversity and Intersex 2016-2020* (June 2016) 24

<https://www.police.nsw.gov.au/__data/assets/pdf_file/0012/478794/Sexuality,_Gender_Diversity_and_Intersex_Policy_2016-2020_July_Intranet.pdf 24>.

⁵² *Policing Report* 7.

⁵³ William Leonard and Bianca Fileborn, *Policing for Same Sex Attracted and Sex and Gender Diverse (SSASGD) Young Victorians* (2018) 81.

⁵⁴ *The Justice Project: LGBTI+ People* 57.

Recommendation 4: In light of (a) the NSW Ombudsman’s criticisms of the police power to use drug detection dogs in general drug detection operations, and (b) specific concerns relating to the use of drug detection dogs at LGBTIQ events and venues, the power to use drug detection dogs in Part 11 Division 2 of the *Law Enforcement (Powers and Responsibilities) Act 2002* should be repealed

The NSW Ombudsman has firmly criticised the use of drug detection dogs in general drug operations. In a review of this power, the NSW Ombudsman found that:

The use of drug detection operations does not significantly assist police in targeting drug suppliers. Overwhelmingly, the use of drug detection dogs led to searches where no drugs were found...there is little to no evidence to support claims that drug detection dog operations deter drug use, reduce drug-related crime, or increase perceptions of public safety. Further, criticisms of the cost-effectiveness of general drug detection operations appear to be well-founded.”⁵⁵

The *Policing Report* raises specific concerns as to the use of drug detection dogs at LGBTIQ events and venues. The LGBTIQ organisations observe a troubling relationship between the widespread use of drug detection dogs at LGBTIQ events, the high rates of false indications by drug detection dogs, the use of strip searches following indications by drug detection dogs and the resultant personal indignity and loss of liberty.⁵⁶ In other words, LGBTIQ people are disproportionately subjected to the personal indignity and loss of liberty of strip searches, including in situations where they are not in possession of illegal drugs. Incidents involving the use of drug detection dogs and strip searches have been a significant source of complaints with regard to policing at LGBTIQ events.⁵⁷

In light of the NSW Ombudsman’s findings and specific concerns relating to the use of drug detection dogs at LGBTIQ events and venues, the *Policing Report* recommends that the use of drug detection dogs at events and venues “be brought to an end”.⁵⁸ The HRC supports this recommendation.

Recommendation 5: Amend the *Anti-Discrimination Act 1977 (NSW)* to improve protections against discrimination and vilification

Protected attributes

⁵⁵ NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001* (June 2006) viii (“NSW Ombudsman Review”).

⁵⁶ *Policing Report* 8.

⁵⁷ *Policing Report* 3.

⁵⁸ *Policing Report* 9.

Existing protections against discrimination for LGBTIQ people under NSW law are limited. Currently, the *Anti-Discrimination Act 1977* (NSW) (“ADA”) protects against discrimination on the basis of “homosexuality”⁵⁹ or “transgender grounds”.⁶⁰ Intersex status and bisexuality are not covered, creating significant gaps and uncertainty of coverage for LGBTIQ people. We recommend that the ADA be amended to protect against discrimination for the protected attributes of sexual orientation, gender identity and intersex status, consistent with the *Sex Discrimination Act 1984* (Cth).⁶¹ This will provide clear coverage against discrimination for LGBTIQ people.

Vilification

The ADA contains protections against “homosexual vilification”⁶² and “transgender vilification”⁶³ but coverage is limited, with hate speech on the grounds of bisexuality and intersex status not unlawful under the ADA. We recommend that the ADA be amended to protect against vilification on the grounds of sexual orientation, gender identity and intersex status.

The current definition of vilification under the ADA sets a high threshold, requiring that the conduct complained of involve inciting hatred towards, serious contempt for or severe ridicule of a person or group of persons based on their homosexuality or transgender status. This requires the applicant to prove that the conduct has incited a third party, setting a high onus of proof which is difficult to discharge. We recommend that the definition of vilification in the ADA be replaced with “expresses hatred against, or brings into contempt or ridicule”. This will lower the threshold for vilification, bringing the ADA into line with community expectations and deterring individuals from engaging in vilification.

Hate speech offences

The HRC welcomes the recent passing of the *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) which amended the *Crimes Act 1900* (NSW) to create a new offence of publicly threatening or inciting violence against people on various grounds, including sexual orientation, gender identity, intersex status or HIV/AIDS status. This new offence carries a maximum penalty of three years imprisonment and a fine of \$11,000 for an individual or a fine of \$55,000 for a corporation.⁶⁴ We recommend that the NSW police officers and prosecutors receive training on the availability, elements and importance of this new offence.

Recommendation 6: Increase funding for specialist LGBTIQ legal services

The Law Council notes that LGBTIQ people “have complex legal needs that require specialist advice”. This arises from:

⁵⁹ *Anti-Discrimination Act 1977* (NSW) Part 4C.

⁶⁰ *Anti-Discrimination Act 1977* (NSW) Part 3A.

⁶¹ *Sex Discrimination Act 1984* (Cth) ss 5A-5C.

⁶² *Anti-Discrimination Act 1977* (NSW) s 49ZT.

⁶³ *Anti-Discrimination Act 1977* (NSW) s 38S.

⁶⁴ *Crimes Act 1900* (NSW) s 93Z.

- The complex areas of law that touch upon LGBTIQ people's lives;
- The differential application of many laws to factual circumstances relevant to LGBTIQ people;
- The need for cultural competence when providing services to LGBTIQ people; and
- The need for community education and advocacy.⁶⁵

There is only one specialist legal service in NSW for LGBTIQ people, the ICLC. There are “significant gaps in specialist service provision, including in metropolitan areas” and especially in RRR parts of NSW.⁶⁶

The national funding agreement for legal aid commissions and community legal centres does not identify LGBTIQ people in its list of priority client groups.⁶⁷ This is despite the fact that LGBTIQ people meet the description of a priority client group as people who “are more likely to experience legal problems, less likely to seek assistance and/or less able to access services for a range of reasons.”⁶⁸

We recommend that the NSW Government increase funding for specialist LGBTIQ legal assistance services.

Recommendation 7: Establish a Gender and Sexuality Commissioner to monitor the human rights of LGBTIQ people and provide policy leadership

Former Human Rights Commissioner Tim Wilson observed in 2015 that LGBTIQ issues frequently “fall through the gaps of policy”.⁶⁹ When LGBTIQ issues are raised and addressed as part of the policy process, it is often only through the action of the LGBTIQ community. The lack of coordinated action by government contributes to a situation in which policy changes affecting LGBTIQ people are often ad hoc and insufficiently considered.⁷⁰ The Law Council attributes this situation to a lack of policy leadership.⁷¹

Policy leadership with respect to LGBTIQ could be improved by creating a dedicated LGBTIQ position.⁷² Such a position would be similar to existing positions at the Commonwealth level – for example, the Sex Discrimination Commissioner, Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner.

⁶⁵ *The Justice Project: LGBTI+ People* 34.

⁶⁶ *The Justice Project: LGBTI+ People* 37.

⁶⁷ *National Partnership Agreement on Legal Assistance Services 2015-20* cl B3.

⁶⁸ *National Partnership Agreement on Legal Assistance Services 2015-20* cl B1.

⁶⁹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights* (2015) 1.

⁷⁰ *The Justice Project: LGBTI+ People* 40.

⁷¹ *The Justice Project: LGBTI+ People* 39.

⁷² *The Justice Project: LGBTI+ People* 60.

In 2015, Victoria appointed a Gender and Sexuality Commissioner.⁷³ We recommend that the NSW Government appoint such a commissioner to monitor the human rights LGBTIQ people and provide leadership on LGBTIQ issues.

Recommendation 8: Provide support for schools to prevent and respond to bullying and discrimination against young LGBTIQ people

As noted above, hate crimes are especially likely to be perpetrated against young LGBTIQ people, and high levels of hate crime and hate conduct are perpetrated against young LGBTIQ people in schools. In light of this, school-based interventions have significant potential to reduce hate crimes and hate conduct against LGBTIQ people.

It is concerning that programs to improve school safety for young LGBTIQ people have been defunded.⁷⁴ General anti-bullying programs are insufficient to address the uniquely high prevalence of hate crime and hate conduct against young LGBTIQ people in schools, bearing in mind Australia's obligation under articles 2 and 13 of *ICESCR* to guarantee to young LGBTIQ people the right to education without discrimination of any kind.

The HRC recommends that the NSW Government provide support for schools to prevent and respond to bullying and discrimination against young LGBTIQ people. Consultation should be undertaken with teachers, LGBTIQ people and their representative organisations to determine the content of such support.

Term of Reference (c): Any other related matter

Recommendation 9: Increase funding for critical support services

Both the impact of hate crimes and access to justice barriers for LGBTIQ people are exacerbated by the lack of critical support services.⁷⁵ The Law Council identifies a range of critical service gaps faced by LGBTIQ people, including in services relating to homelessness, crisis accommodation, family violence, counselling, sexual assault and healthcare.⁷⁶ The HRC recommends that the NSW Government increases funding for such services.

Concluding Comments

⁷³ Victorian Minister for Equality, "Rowena Allen Is Victoria's First Gender and Sexuality Commissioner" (15 July 2015) <<https://www.premier.vic.gov.au/ro-allen-is-victorias-first-gender-and-sexuality-commissioner/>>.

⁷⁴ See, eg, Nour Haydar, "Safe schools program ditched in NSW, to be replaced by wider anti-bullying program", *ABC News* (16 April 2017) <<https://www.abc.net.au/news/2017-04-16/safe-schools-program-ditched-in-nsw/8446680>>.

⁷⁵ Law Council of Australia, *The Justice Project: Critical Support Services* (August 2018) 4

⁷⁶ *The Justice Project: LGBTI+ People* 35-37.

NSW Young Lawyers and the Human Rights Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

Contact:

Jennifer Windsor

President

NSW Young Lawyers

Alternate Contact:

Maria Nawaz

Chair

NSW Young Lawyers Human Rights Committee