

Submission
No 22

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

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NSW Legislative Council Standing Committee on Social Issues

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To whom it may concern

Submission re Inquiry into gay and transgender hate crimes between 1970 and 2010

Thank you for the opportunity to provide a submission to this important inquiry.

I do so as a long-term advocate for the rights of the lesbian, gay, bisexual, transgender and intersex (LGBTI) community, including for the past six years in New South Wales.

However, this timeframe means I did not live in NSW during the period 1970 to 2010. I consequently do not have a personal experience of anti-LGBTI hate crimes in this jurisdiction during that period.

Nevertheless, I acknowledge and endorse the work of others, both individuals and organisations, who have documented the appallingly high number of gay and trans hate crimes which occurred here over the course of the past four or five decades.

This obviously includes the work of ACON, whose excellent 'In pursuit of truth and justice' report is cited in the terms of reference to this inquiry, as well as that of journalist Rick Feneley, whose stories over recent years have finally started to give these crimes the attention, and scrutiny, they deserve.

And it includes the work of three former NSW Police employees or consultants – Steve Page, Sue Thompson and Duncan McNab – whose work has confirmed the failure by NSW Police to adequately investigate many of these same crimes.

This failure can be seen as one reason, perhaps even the primary reason, why, of the 88 homicide cases identified in *In pursuit of truth and justice*, approximately 30 remain unsolved today.

I therefore welcome the initiative of the Legislative Council in establishing this inquiry, to hear from people who have been affected by these hate crimes, either directly or who have valuable information about crimes committed against others.

Indeed, this fits with ACON's recommendation 1.2:

ACON recommends the NSW Government, in partnership with community, undertake a process to comprehensively explore, understand and document the extent of historical violence experienced by the LGBTI community.

And also with recommendation 4.1:

ACON recommends an independent investigation into the actions of the various arms of the criminal justice system to fully understand the impediments to justice during this period in history, their relevance to current practices, and to identify opportunities to finalise unsolved cases.

However, I would argue that, while a positive start, a short parliamentary inquiry is unlikely to be sufficient in and of itself to comprehensively address these issues. I form this view on the basis of the following factors:

- The sheer scale, and seriousness, of the subject matter involved, noting that we are discussing at least 88 homicides, with more that may yet be identified through this process,
- Remembering that figure does not include the hundreds, perhaps thousands, of additional homophobic and transphobic hate crimes that occurred during this period, including serious and violent assaults, many of which have never been properly documented,
- The role of NSW Police in failing to adequately investigate many of these crimes (both homicides and assaults), and
- The allegations of complicity and/or even direct participation by NSW Police members in some of these horrific crimes.

Given all of the above, I believe that this subject matter should be investigated through a Royal Commission, which would have the appropriate powers, resources and timeframes to fully explore the gay and trans hate crimes which occurred in NSW over the past half-century.

Recommendation 1: That the Committee call on the NSW Government to establish a Royal Commission into the issue of gay and trans hate crimes in NSW since 1970.

In terms of the 'gay panic' or 'homosexual advance defence' and the role it 'played in the culture of LGBTIQ hate crimes between 1970 and 2010' and how it 'impacted the delivery of justice and the treatment of gay men during LGBTIQ hate crime investigations and court proceedings', I believe it did contribute both to helping to incite these crimes, and in undermining their proper investigation.

As I wrote to the Legislative Council Provocation Committee in 2012, calling for the abolition of the gay panic defence:

In my opinion, there is nothing so different, so special or so extraordinary, in the situation where the non-violent sexual advance is made by a man to another man, as to justify offering the offender in such cases any extra legal protection. In contemporary Australia, a man who receives an unwanted sexual advance should exercise the same level of self-control as we expect of any other person.

To have a separate legal standard apply to these cases is homophobic because it implies there is something so abhorrent about a non-violent sexual advance by a

man to another man that a violent reaction is almost to be expected, and at least somewhat excused. This does not reflect the reality of contemporary Australia, where, with the exception of marriage, gay men enjoy the same rights as other men, and are accepted as equals by the majority of society.

Even if a small minority of people remain firmly intolerant of homosexuality, that does not mean there should be a 'special' law to reduce the culpability of such a person where they are confronted by an unwanted homosexual sexual advance. To retain such a provision is unjust and discriminatory, and is a mark against any legal system which aspires to fairness.

The above discussion outlines why the homosexual advance defence is wrong in principle. What should not be forgotten is that the homosexual advance defence is also wrong in practice, or in the outcomes which it generates. After all, the defence does not simply exist in the statute books, ignored and unused. Instead, it has been argued in a number of different criminal cases, sometimes successfully.

This means there are real offenders who are in prison (or who have already been released), who have had their conviction reduced from murder to manslaughter, and most likely their sentence reduced along with it, simply because they killed in response to a non-violent homosexual advance. The legal system has operated to reduce the liability of these offenders even when broader society does not accept that such a reduction is justified. As a result, these offenders have not been adequately punished, meaning that above all these victims have not received justice.

Similarly, the family members and friends of the victims killed in such circumstances have witnessed the trials of these offenders, expecting justice to be served, only to find that the killer is not considered a murderer under the law. Instead, these family members and friends find some level of blame is placed on the actions of the victim, that somehow by engaging in a non-violent sexual advance they have helped to cause and even partly deserved their own death.

The painful 'lessons' of the gay panic defence, which were learnt over many decades by the LGBTI community, included the following:

- That the life of a gay man was valued as less than that of other victims,
- That a non-violent sexual advance by a gay man to another man was abhorrent, and that a violent response to such an advance was at least partially justified, and
- That the law enforcement and justice systems of NSW were not on our side.

These same lessons were learnt by the perpetrators of anti-gay and anti-trans hate crimes. They worked out that LGBTI people made for easy targets, both because we were unlikely to report crimes and, even if we did, that NSW Police were unlikely to do anything about it.

Based on the behaviour of some NSW Police officers, including reportedly in the 1989 assault of Alan Rosendale, as witnessed by Paul Simes (see Rick Feneley, 'Erased from the records; Investigation into bashing of gay man by police in Surry Hills in 1989', *Sydney Morning Herald*, 19 January 2015: <https://www.smh.com.au/national/nsw/erased-from-the-records-investigation-into-bashing-of-gay-man-by-police-in-surry-hills-in-1989-20141030-11e4pz.html>), it seems that they too believed the lives of gay men mattered less than others.

It is perhaps unsurprising that, when the law – via the homosexual advance defence – said gay men's lives were less valuable than those of heterosexual people, some members of the law enforcement arm of government acted in the same way.

So, while the abolition of the gay panic defence by NSW Parliament in May 2014 was a major step forward for LGBTI rights in this state, we should not underestimate the damage it caused during its (too-many) years of operation.

Thank you in advance for taking this submission into consideration as part of this inquiry. If you would like to clarify any of the above, or for additional information, please do not hesitate to contact me at the details provided.

Sincerely

Alastair Lawrie