

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

Organisation: Australian Lawyers for Human Rights

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Dear Committee Secretary

Inquiry into Gay and Transgender hate crimes between 1970 and 2010

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission to the Inquiry into Gay and Transgender hate crimes between 1970 and 2010 (the Inquiry). ALHR welcomes the Inquiry as an important step towards understanding the violence experienced by the LGBTIQ community during this period and the failure of justice agencies to investigate and punish this kind of violence.

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1. Executive Summary

- 1.1 The United Nations and others have documented widespread physical and psychological violence against LGBTIQ persons,¹ including murder, assault, kidnapping, rape, and sexual violence. In many countries, the response to these violations is inadequate, they are underreported and often not properly investigated and prosecuted, leading to widespread impunity and lack of justice, remedies or support for victims. Sadly, Australia, and New South Wales, have not been immune from such human rights violations.
- 1.2 ALHR applauds this Inquiry and the commencement of an independent investigation into a crucial issue that has impacted the fundamental human rights of many people in New South Wales in a profound and devastating way. This Inquiry is an important first step, however, it is equally important that action is taken based on its findings to ensure that individual victims and the LGBTIQ community as a whole, have the opportunity to receive appropriate acknowledgment of the failings of the NSW criminal justice system and the harm suffered by the LGBTIQ community, its friends and family members as a result.
- 1.3 ALHR recommends that the NSW Government convene a Royal Commission with appropriate powers to fully investigate hate crimes against LGBTIQ people in NSW, including examining how those crimes were responded to by investigating officers, assessing any bias that existed, interrogating circumstances where evidence was lost, leads were not followed or witnesses were ignored, and with a particular focus on how the homosexual advance defence played a part, if any, in the investigation of gay hate crimes.
- 1.4 ALHR further recommends the creation of a taskforce investigating outstanding cases of hate crimes against LGBTIQ people to address the limitations of the Final Report of Strike Force Parrabell.

¹ See for example United Nations Office of the High Commissioner for Human Rights, *Living Free and Equal*, UN DOC HR/PUB/16/3 (2016).

2. Relevant international human rights law

2.1 The human rights of LGBTIQ members of the Australian community affected by hate crimes and by issues raised by the so-called “gay panic defence” include:

- a. the right to bodily integrity and security (right to life);²
- b. the right to freedom from fear;³ and
- c. the right to equal treatment, protection, dignity and respect before the law.⁴

2.2 The Preamble to the *Universal Declaration of Human Rights (UDHR)*⁵ relevantly provides:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law (emphasis added).”

2.3 Relevant articles of the UDHR include:

Article One

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

² See for example International Commission of Jurists, *Yogyakarta Principles +10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, adopted on 10 November, 2017 to supplement the Yogyakarta Principles and Principle 32, Charter of Fundamental Rights of the European Union, Article 3 (‘Yogyakarta Principles+10’).

³ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) (‘UDHR’).

⁴ UDHR, Article 2; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Articles 2 and 26 (‘ICCPR’); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) Article 2(2) (‘ICESCR’); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Article 2 (‘CRC’); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) Article 7 (‘CMW’); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008) Article 5 (‘CRPD’); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) Article 8 (‘ECHR’).

⁵ UDHR, Preamble.

Article Three

“Everyone has the right to life, liberty and security of person.”

Article Six

“Everyone has the right to recognition everywhere as a person before the law.”

Article Seven

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

- 2.4 Australia played a key role in drafting the provisions of the UDHR as expressions of fundamental values widely accepted by the international community and these should inform the interpretation of Australian law and policy in the period 1970-2010 as well as today.
- 2.5 The *International Covenant on Civil and Political Rights (ICCPR)*⁶ relevantly provides:

Article 2(1)

“Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 6

“(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

Article 9

“(1) Everyone has the right to liberty and security of person. ...”

Article 14

“(1) All persons shall be equal before the courts and tribunals. ...”

Article 26

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any

⁶ ICCPR.

discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

- 2.6 Australia signed the ICCPR in 1972 and ratified it in 1975, undertaking to implement the articles of the ICCPR throughout Australia by ‘Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise’. *Toonen v Australia* was a landmark complaint brought before the United Nations Human Rights Committee (**UNHRC**) by a Tasmanian resident Nicholas Toonen in 1994. The Committee held that sexual orientation was included in the anti-discrimination provisions as a protected status under the ICCPR.⁷
- 2.7 The right to non-discrimination on the basis of sexual orientation has also been recognised by the United Nations treaty bodies monitoring the implementation of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, the *Convention on the Rights of the Child (CRC)* and *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*.⁸ The Committee on Economic, Social and Cultural Rights has specifically stated that gender identity is recognised as a prohibited ground of discrimination.⁹
- 2.8 In the period under review, as today, LGBTIQ members of the Australian community were entitled to expect that NSW laws would:
- a. contain measures to protect their right to life, bodily integrity and security and freedom from fear;
 - b. grant them equal protection, respect and dignity before the law;
 - c. not discriminate against them because of their status as LGBTIQ;
 - d. not tend to amplify or reinforce sentiments or stereotypes that were contrary to the values of fundamental human rights; and
 - e. that the institutions charged with enforcing those laws such as NSW Police would do so in a way that would tend to protect those rights and secure such equality of protection and treatment.
- 2.9 The International Commission of Jurists’ *Yogyakarta Principles*,¹⁰ which were developed in 2007 as a guide to the application of international human rights law in relation to sexual

⁷ Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) (*Toonen v Australia*).

⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 20 – Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009); Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC.2003/4 (1 July 2003); Committee on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Kyrgyzstan*, UN Doc A/54/38 (5 February 1999)..

⁹ Law Council of Australia, Comment 132.

¹⁰ International Commission of Jurists, *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) (*Yogyakarta Principles*).

orientation and gender identity, stress the State's duty to protect people from violence and persecution, regardless of their sexual orientation.¹¹ This includes taking all feasible steps and to provide due diligence through policing and other means to ensure this protection and not to allow sexual orientation or gender identity to be used as means of mitigating, justifying or excusing such violence.¹²

2.10 In 2011, the United Nations Human Rights Council (**UNHRC**) passed a resolution on Sexual Orientation and Gender Identity that was supported by 85 States.¹³

2.11 The September 2015 Joint UN statement on Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People¹⁴ is an unprecedented joint statement by 12 United Nations entities (ILO, OHCHR, UNAIDS Secretariat, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO) calling for an end to violence and discrimination against lesbian, gay, bisexual, transgender and intersex people. The statement is a powerful call to action to Governments to do more to tackle homophobic and transphobic violence and discrimination, and an expression of the commitment on the part of UN entities to support Member States to do so. It specifically addresses States' obligations to protect individuals from violence:

"States should protect LGBTI persons from violence, torture and ill-treatment, including by:

- *Investigating, prosecuting and providing remedy for acts of violence, torture and ill-treatment against LGBTI adults, adolescents and children, and those who defend their human rights;*
- *Strengthening efforts to prevent, monitor and report such violence;*
- *Incorporating homophobia and transphobia as aggravating factors in laws against hate crime and hate speech;"*

2.12 In 2016, the UNHRC passed a resolution and appointed an Independent Expert as it was concerned about human rights violations against individuals due to their sexual orientation or gender identity.¹⁵

2.13 In addition to the above, in July 2013, the Office of the United Nations High Commissioner for Human Rights (**OHCHR**) launched *UN Free & Equal*, an unprecedented global UN public information campaign aimed at promoting equal rights and fair treatment of LGBTIQ people.

¹¹ *Yogyakarta Principles*, Principle 5.

¹² *Ibid.*

¹³ United Nations Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, GA Res 17/19, UN GAOR, 17th sess, Agenda Item 8, UN Doc A/HRC/RES/17/19 (17 June 2011).

¹⁴ United Nations, *Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People* (September 2015).

¹⁵ United Nations Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN GAOR, 32nd session, Agenda Item 3, UN Doc A/HRC/Res/32/2 (30 June 2016) [2].

3. Term of Reference (a)(i): Impediments within the criminal justice system that impacted the protection of LGBTIQ people and the delivery of justice in NSW

3.1 ALHR acknowledges that Term of Reference 1(a) requests reference to specific case studies. ALHR has taken a broader perspective in answering this question through a human rights framework as that is the expertise which we can offer to the Inquiry. Three main impediments within the criminal justice system are identified below.

Prevailing social attitudes and their influence on policing

3.2 The historical prevailing attitudes towards sexuality, and perceived deviance, were reinforced by an institutional framework that entrenched discriminatory perspectives into the legal architecture of New South Wales during the period under review. The criminalisation of homosexual acts, the different treatment in the application of the criminal law (such as different ages of consent) and the existence of the homosexual advance defence (the so-called 'gay panic defence') all contributed to a culture that unquestionably influenced the policing of crimes involving LGBTIQ persons. During the period under review, homosexuality was decriminalised, but social attitudes and institutional discrimination endured and this was not helped by the AIDS epidemic in the 80s and 90s.

3.3 The problem, however, is that it is impossible to fully appreciate the extent to which bias and prejudice influenced decision-making during this period unless a full reinvestigation of each hate crime takes place. Such an analysis was beyond the scope of the research conducted as part of Strike Force Parrabell and is clearly outside of the scope of this Inquiry.

Reluctance towards the specific regulation of hate crimes in Australia

3.4 One potential impediment that existed, and to a certain extent continues to exist, is a reluctance in Australia to explicitly and comprehensively regulate hate crimes. As Mason points out, while the US and the UK (among other jurisdictions) brought in suites of hate crime legislation, in Australia, the laws emerged gradually, 'with a minimum of fanfare and appear to have been taken up with far less enthusiasm by police and prosecutors.'¹⁶ While an offence of serious vilification on the grounds of homosexuality was added to the *Anti-Discrimination Act 1977* (NSW) in 1993,¹⁷ it was not until 2003 that laws were introduced to recognise that crimes motivated by prejudice or bias constituted an aggravating factor in sentencing.¹⁸

3.5 Recognising crimes as hate crimes is a means of recognising the violation of human rights involved in discriminatory abuse. It acknowledges the right to equality owed to all, and

¹⁶ Gail Mason, 'Hate Crime Laws in Australia: Are They Achieving Their Goals?' Legal Studies Research Paper No 10/46 (May 2010) 3.

¹⁷ *Anti-Discrimination (Homosexual Vilification) Amendment Act 1993* (NSW).

¹⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21(2)(h).

recognises the impact felt by having one's personal identity attacked. Moreover, treating hate crimes as an aggravated form of offence recognises that the harm is felt not only by the individual but by the group to which that individual belongs. Thus the hate crimes committed against the gay and transgender community in the period in question affected not only the victims, but the LGBTIQ community as a whole, enhancing feelings of vulnerability and alienation. The institutional failures to appropriately police and prosecute such crimes only reinforce those feelings.

Right to remedies and the truth

3.6 Access to justice includes the right to effective, adequate and appropriate remedies. It also includes the the right to equal treatment, protection, dignity and respect before the law by justice agencies to ensure compliance with Australia's human rights obligations. The failure to take the crimes in question seriously demonstrates that serious failings existed preventing any possibility of appropriate and timely justice.

Some examples include:

- a. Alan Rosendale (1989): Lack of care and attention in Alan Rosendale's case. Assistant Commissioner Crandell has publicly said Mr Rosendale was attacked at a time when police culture and societal attitudes were different and that the case would be handled differently in terms of the attention given if it had occurred now. An independent witness Paul Simes says he witnessed Mr Rosendale's bashing and recorded the number plate of the vehicle carrying the assailants. That number plate was a NSW Police Force number plate and Mr Simes says he met with top ranks of the NSW Police Force to discuss the bashing. In that meeting the NSW Police Force confirmed that the number plate matched one of its vehicles and represented to Mr Simes that it would handle the matter. But now the NSW Police Force says there is no evidence that Mr Rosendale was bashed by police officers.
- b. Scott Johnson (1988): The delays in investigation and inquiries into the death of Scott Johnson including reluctance to see or investigate the location of the death, North Head, as a spot for "gay bashings" as had been suggested.¹⁹ The additional failures of investigators to interview local youths known for violence and the subsequent suicide narrative that was pursued by the NSW Police Force in coronial inquiries has greatly affected the Johnson matter.
- c. John Russell 1989: It is believed that John Russell had his murderer's hair in his hands when his body was discovered at the base of cliffs close to Marks Park, Bondi. However, this evidence was lost. In a subsequent coronial inquiry, Her Honour Deputy State Coroner Milledge said the investigation was "lacklustre".²⁰

¹⁹ Rick Feneley, 'The Gay Hate Decades', SBS, <www.sbs.com.au/gayhatedecades/>.

²⁰ Ibid.

- d. Ross Warren (1989): Newsreader Ross Warren has never been found and his mother's letters to the NSW Police Force after he went missing were largely ignored. In 2005, Her Honour Deputy State Coroner Milledge said that the investigation by police officers was "grossly inadequate and shameful" and concluded Mr Warren was murdered.²¹
- e. William Rudney (1986): The death of William Rudney led to a coronial inquest. The NSW Police Force were asked if they had any coronial records on this individual and they noted to the Coroner that they did not. It was later discovered that the NSW Police Force had mistakenly searched for "William Rooney" and not the victim's actual name of "William Rudney". The NSW Police Force did in fact have coronial records for the deceased. Further, detectives in the 1980's had doubted that Mr Rudney had died due to a drunken fall as claimed however this information was never followed up or given to the inquiry. There are three other instances in which the Coroner was similarly given mistaken information by the NSW Police Force where information was not verified.²²
- f. Raymond Keam (1987): Raymond Keam was ruthlessly beaten. His family was subsequently advised by NSW Police Force officers that it would be of no use to press charges against the offender because he had been caught bashing him in a "gay beat".²³

3.7 Clearly the above-mentioned prevailing social attitudes and their influence on policing, the reluctance towards the specific regulation of hate crimes in Australia, and obstacles to the right to remedies and the truth, are inconsistent with the human rights obligations that Australia is bound under international law to uphold, including under the UDHR and ICCPR as outlined in Section 2 of this submission. They are also inconsistent with the Joint UN Statement on Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People and the Yogyakarta Principles. The 2017 Yogyakarta Principles+10 also hold that all victims of human rights violations have a right to the truth.²⁴ Principle 37 states:

"Every victim of a human rights violation on the basis of sexual orientation, gender identity, gender expression or sex characteristics has the right to know the truth about the facts, circumstances and reasons why the violation occurred. The right to truth includes effective, independent and impartial investigation to establish the facts, and includes all forms of reparation recognised by international law. The right to truth is not subject to statute of limitations and its application must bear in mind its dual

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Yogyakarta Principles+10, Principle 37.

nature as an individual right and the right of the society at large to know the truth about past events.”

3.8 This right requires that States:

“Adopt legal provisions to provide redress to victims of violations on the basis of sexual orientation, gender identity, gender expression and sex characteristics, including public apology, expungement of relevant criminal convictions and records, rehabilitation and recovery services, adequate compensation and guarantees of non-recurrence.”²⁵

4. Term of Reference (a)(ii): How effectively have past impediments been addressed by current policy and practice

4.1 Since the end of the period under review (and to a certain extent during it) both law and policy in the area have seen some considerable changes. This submission will acknowledge a few of note.

‘Hate’ as an aggravating factor in sentencing

4.2 In 2003 changes to the *Crimes (Sentencing Procedure) Act 1999* (NSW) were brought in, introducing a new element of aggravation to be taken into consideration when sentencing. Section 21(2)(h) was introduced, stating that the following factor was a relevant consideration of aggravation during a determination of sentence:

(h) 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).

4.3 While the introduction of the provision is an important step in recognising the seriousness of the offence, it has rarely been effectively applied in cases related to prejudice on the ground of sexual orientation (despite sexual orientation being one of the grounds specifically listed in the provision).²⁶ Too often, more focus has been placed on the victim’s behaviour rather than bias of the offender – the idea of provocative behaviour of unwanted sexual advances – reflective of the homosexual advance defence discussed below.²⁷ Thus in *R v El Masri*, Shillington ADCJ rejected that the motivations of the offender were proven beyond reasonable doubt, and went on to state:

“I am disposed to deal with the matter on the basis of the account given by the prisoner in his interview, that is that he struck him once outside the toilet, having been,

²⁵ Ibid.

²⁶ Gail Mason and Andrew Dyer, “‘A Negation of Australia’s Fundamental Values’: Sentencing Prejudice-Motivated Crime’ (2012)

³⁶ *Melbourne University Law Review* 871.

²⁷ Ibid.

according to him, somewhat provoked by his conduct in the toilet and also by a somewhat aggressive attitude outside.”²⁸

- 4.4 Such attitudes reflect an ongoing mentality within the judiciary (that may be reflective of attitudes in the broader system) that continues to hinder the effective realisation of the rights of the LGBTIQ community.

The introduction of s 93Z of the Crimes Act 1900 (NSW)

- 4.5 In June 2018, the NSW Parliament passed the *Crimes Amendment (Publicly Threatening and Inciting Violence) Bill*. This Bill replaced the never-used provisions of serious vilification in the *Anti-Discrimination Act 1977* (NSW). The purposes of the Bill were outlined in the Second Reading speech:

“First, replace the existing serious vilification offences with a single indictable offence in the Crimes Act to demonstrate the seriousness of threatening and inciting violence. Secondly, it will broaden the current grounds of protection to include religious belief or affiliation and intersex status in addition to the existing grounds of serious racial, homosexual, transgender and HIV/AIDS vilification, while updating the existing terminology of “homosexual” and “transgendered” with “sexual orientation” and “gender identity” to reflect modern terminology. Thirdly, it will remove the existing disparity between maximum penalties for serious vilification of different protected groups. And, fourthly, it will reflect community standards through an increased maximum penalty. The bill will also clarify that it is not necessary to adduce evidence of the state of mind of any other person apart from the accused or that any other person has acted as a result of the accused's alleged act.”²⁹

- 4.6 Those successfully prosecuted under the provision face a penalty of up to three years imprisonment and/or a fine of \$11,000 for individuals.³⁰
- 4.7 The provision is in line with obligations contained within the ICCPR, and in fact extends the prohibition of incitement to hatred to sexual orientation and gender identity, going further than the language of the ICCPR in Article 20.
- 4.8 It remains to be seen whether this new provision will see more use than the serious vilification laws.

The NSW Police Force has adopted policy changes aimed at addressing the needs of the LGBTIQ community

- 4.9 The NSW Police Force has adopted an official policy on sexuality and gender diversity. It has also taken practical steps such as setting up the role of the LGBTI (formerly ‘Gay and Lesbian’) Liaison Officers (**GLLO**) at Local Area Commands.

²⁸ [2005] NSWCCA 167 (29 April 2005) [164].

²⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 June 2018, 42 (Mark Speakman, Attorney-General).

³⁰ *Crimes Act 1900* (NSW) s 93Z.

4.10 The wording of the NSW Police Force Handbook is telling in terms of impediments that have existed in the past and continue to endure:

“People who identify as Gay, Lesbian, Bi-sexual, Transgender, Queer and Intersex may experience sexual assault as a form of homophobic or prejudice related violence. Sexual assault also happens within these communities and is very much a hidden crime. People who identify from any of these communities may experience heightened fear in reporting to sexual assault to the police because of fear of not being believed or being judged because of their sexuality. The Gay & Lesbian Liaison Officer (GLLO) at the Local Area Command may be able to provide valuable advice about investigating sexual assaults involving people who identify as Gay, Lesbian, Bi-sexual, Transgender, Queer or Intersex.”³¹

4.11 The current NSW Police Force Strategy on sexuality and gender identity (**the Strategy**) is the fourth iteration of the policy, with the first instituted in 1997. ACON has endorsed the policy and noted that members of the LGBTIQ community have demonstrated a greater willingness to approach GLLOs than ‘regular police’.³² The emphasis in the strategy of engagement and dialogue between police and the community is an important step in protecting and promoting LGBTIQ rights.

4.12 The Strategy is also reflective of a strong emphasis in the United Nations’ Global Campaign Against Homophobia and Transphobia,³³ the Joint UN Statement on Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People and the Yogyakarta Principles on awareness-raising, training and education. This is found across the Yogyakarta Principles, such as in Principle 1, on the universality of human rights which says that States should:

c) Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity,³⁴

4.13 Principle 2 on the right to equality and non-discrimination also provides that States should:

f) Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.³⁵

³¹ NSW Police Force, *NSW Police Force Handbook* (2017) 393

<www.police.nsw.gov.au/_data/assets/pdf_file/0009/197469/NSW_Police_Handbook.pdf>.

³² NSW Police Force, *Strategy on Sexuality, Gender Diversity and Intersex 2016-2020* (June 2016) 15

<www.police.nsw.gov.au/_data/assets/pdf_file/0012/478794/Sexuality_Gender_Diversity_and_Intersex_Policy_2016-2020_July_Intranet.pdf>.

³³ See United Nations Office of the High Commissioner for Human Rights, *UN Free & Equal*, <www.unfe.org/about/>.

³⁴ Yogyakarta Principles, Principle 1.

³⁵ *Ibid*, Principle 2.

4.14 The Strategy is to be welcomed, but it is essential to recognise that such policies alone do not acquit the State of its responsibility to protect the rights of all individuals irrespective of sexual orientation or gender identity.

4.15 Moving forward, and translating this Inquiry into a positive and meaningful response to the human rights violations committed, due attention should be given to the actions recommended in:

(1) The Joint UN Statement on Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People:

“States should protect LGBTI persons from violence, torture and ill-treatment, including by:

- *Investigating, prosecuting and providing remedy for acts of violence, torture and ill-treatment against LGBTI adults, adolescents and children, and those who defend their human rights;*
- *Strengthening efforts to prevent, monitor and report such violence;*
- *Incorporating homophobia and transphobia as aggravating factors in laws against hate crime and hate speech;”*

(2) Principle 37 of the Yogyakarta Principles+10, calling on States to:

A. Adopt legal provisions to provide redress to victims of violations on the basis of sexual orientation, gender identity, gender expression and sex characteristics, including public apology, expungement of relevant criminal convictions and records, rehabilitation and recovery services, adequate compensation and guarantees of non-recurrence;

B. Ensure, in cases of violations of the right to mental and bodily integrity, effective access to remedies, redress, reparation and, where appropriate, psychological support and restorative treatments;

C. Protect individuals’ right to know the truth about their medical histories, including through full access to accurate medical records;

D. Adopt and fully implement procedures to establish the truth concerning violations based on sexual orientation, gender identity, gender expression and sex characteristics;

E. Establish a truth-seeking mechanism and process in regard to human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics;

F. Ensure that, in addition to individual victims and their families, communities and society at large can realise the right to the truth about systemic human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics, while respecting and protecting the right to privacy of individuals;

G. Preserve documentary evidence of human rights violations based on sexual orientation, gender identity, gender expression and sex characteristics, and ensure adequate access to archives with information on violations based on sexual orientation, gender identity, gender expression and sex characteristics;

H. Ensure that the facts and truth of the history, causes, nature and consequences of discrimination and violence on grounds of sexual orientation, gender identity, gender expression and sex characteristics are disseminated and added to educational curricula with a view to achieving a comprehensive and objective awareness of past treatment of persons on grounds of sexual orientation, gender identity, gender expression and sex characteristics;

I. Commemorate the suffering of victims of violations on the basis of sexual orientation, gender identity, gender expression and sex characteristics through public events, museums and other social and cultural activities.³⁶

5. Term of Reference (b)(i) and (ii): What role the so-called ‘gay panic’ defence played in the culture of LGBTIQ hate crimes between 1970 and 2010 and impacted the delivery of justice

5.1 The so-called ‘gay panic’ defence, more usually referred to in Australian academic analysis as the ‘homosexual advance defence’, has never been a formal legal defence to any crime. Rather, it is a concept that encapsulates a range of issues and attitudes that have affected the conviction of offenders for violent crimes especially against GBTQ persons,³⁷ and the reporting and investigation of such crimes, and which may still affect the content of law and its enforcement today.

5.2 The first matter that underpins the evolution of the concept in Australia is the previous criminalisation of male homosexuality in NSW. As the Committee will be aware, in the period from 1951 to 1984,³⁸ consensual male homosexual acts were criminalised by ss 79,

³⁶ Yogyakarta Principles+10, Principle 10.

³⁷ While criminal laws in NSW did not target lesbian sexual intimacy in the same way as male or trans relations, it could not be assumed that legal constructs adversely affecting GBTQ persons did not also adversely affect lesbian women or intersex persons, for example by reinforcing or condoning hateful attitudes towards LGBTIQ persons, generally; traumatising a cultural community of LGBTIQ persons or otherwise acting as additional deterrent to the reporting of crime against any person who did not conform to heteronormative expectations. See for example Barbara Baird, ‘The Role of the State in the Regulation of Sexuality: The Police and Violence against Lesbians and Gay Men’ (1997) 2 *Flinders Journal of Law Reform* 75, 80–86. In the period under review, significant trends in violence and other hate crimes were noted against LGBTIQ persons. See Gail Mason, ‘Violence against Lesbians and Gay Men’ (1993) *Violence Prevention Today* 2. Intersex persons continue to face significant legal, medical and cultural discrimination apart from the specific issues under review.

³⁸ *Crimes (Amendment) Act 1984* (NSW) Sch 1, cl 1(a).

80, 81, 81A and 81B of the *Crimes Act 1900* (NSW), which described them as “unnatural offences”, “abominable crime[s]” and “outrages on decency”. The effect of those provisions was to substantially criminalise male homosexuality and to authorise police to investigate, arrest and prosecute homosexual males or males perceived to be homosexual suspected of breaching the then law. Further, the effect of the provision was by legislation to sanction and authorise private and public condemnation of homosexual males or males perceived to be homosexual as “abominable” or “abhorrent” that is to foster and condone hatred of persons perceived as likely to engage in the criminalised acts.

- 5.3 In the period from 8 June 1984 to 5 June 2003,³⁹ the unequal treatment of consensual male homosexual acts remained a feature of the criminal law in New South Wales by reason of a higher age of consent than that which applied to sexual acts with or between females. The effect of this inequality was to legislatively reinforce an attribution of deviance to such acts from which males were deemed to require special protection. The terms of the unequal treatment were not limited to a mechanical description of the prohibited acts (although this was also provided) but included a general prohibition of acts of gross indecency. Again, use of such language may be considered as fostering or condoning moral outrage against and hatred of persons perceived as likely to engage in such criminalised acts.
- 5.4 Decriminalisation of homosexuality, when legislated, was prospective. It was not until 24 November 2014 that past convictions could be expunged;⁴⁰ however, as this operates only on individual application, it still provides for less than full decriminalisation.
- 5.5 As the overwhelming acceptance of marriage equality showed most profoundly and positively in 2017, Australian community standards have very substantially changed since 1970. Legislation has tended to follow rather than lead such change. As discussed above, anti-discrimination legislation was eventually introduced in NSW to criminalise serious vilification (hate speech) towards homosexual or transgender persons, however, there were no prosecutions under these provisions.⁴¹ The *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) has recently replaced this regime with an offence of threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status (violence is defined to include violent conduct towards a person or group including damage to property of the person).⁴²
- 5.6 Having regard to the legislative history in the period 1970 to 2010, it is a sad but unsurprising result that the criminalised status and statutory denunciation of intimate consensual relations between LGBTIQ persons as indecent, unnatural or abominable also adversely affected the treatment of LGBTIQ persons before the law as *victims of crime* and

³⁹ *Crimes (Amendment) Act 1984* (NSW) Schedule 1, cl 4; *Crimes Amendment (Sexual Offences) Act 2003* (NSW) s 66C.

⁴⁰ *Criminal Records Amendment (Historical Homosexual Offences) Act 2014* (NSW).

⁴¹ *Anti-Discrimination Act 1977* (NSW) ss 38T, 49ZTA; New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 June 2018, 42 (Mark Speakman, Attorney-General).

⁴² This legislation has been criticised for failing to address gendered hate speech against women and not clearly addressing anti-lesbian hate speech: Laura Griffin and Nicole Shackleton, ‘The Gender Gap in Australia’s Hate Speech Laws’, *The Conversation*, 20 August 2018, <<https://theconversation.com/the-gender-gap-in-australias-hate-speech-laws-100158>>.

that this marked inequality has persisted decades after the process of decriminalisation began.

Provocation

- 5.7 The concept of a 'homosexual advance defence' in Australia has its origins in the common law of provocation.
- 5.8 As it was developed at common law, the defence of provocation could be relied on by a person accused of murder to reduce the charge of which the accused would be convicted from murder to manslaughter, if the defence was made out. The success of such a defence affected both the range of sentence expected to be imposed and the degree of disapprobation of the conduct expressed by the state in the recording of the conviction. The defence of provocation was also available at common law in cases of attempted murder and serious assault, at least where the assault involved an intent to kill (in some codified jurisdictions, such as Western Australia, provocation was available as a defence to assault not involving an intention to kill).⁴³
- 5.9 The elements of provocation at common law were physical acts and/or words by the deceased (victim) constituting a triggering incident which, subjectively, caused the accused to suddenly and temporarily lose self-control and which, objectively, *could* have caused an ordinary person in the position of the accused to lose self-control so as to act similarly.
- 5.10 Overwhelmingly, in the period under review, both offenders and victims of homicide in Australia were male.⁴⁴ While not legally essential, male heteronormative ideas of sex, sexuality, sexual status, sexual entitlement and sexual jealousy were frequently at the heart of a provocation defence.
- 5.11 At common law, the objective standard was 'ordinary' but not 'reasonable'.⁴⁵ Over time, the case law developed such that the 'ordinary man' was invested with all of the characteristics of the accused except intoxication or exceptional pugnaciousness.⁴⁶
- 5.12 Unlike the defence of self-defence, it was not necessary that the acts of the accused were proportionate to the act of provocation.⁴⁷ Indeed, *disproportion* appears to have been sometimes evidence of the loss of self-control.

⁴³ *Howe v The Queen* (1980) 32 ALR 478.

⁴⁴ Jenny Morgan, 'Who Kills Whom and Why: Looking beyond Legal Categories' (2002) Occasional Paper 1, 7 citing Australian Institute of Criminology (AIC) statistics that in the period from 1 July 1989 to 30 June 1999 seven out of eight homicide offenders in Australia were male (Australian Institute of Criminology, *Indigenous and Non-Indigenous Homicides in Australia: A Comparative Analysis, Trends and Issues Paper No 210* (2001)). In the AIC study more than 63% of the victims were male. In the period 1968–1981 85% of NSW homicide offenders were male: Alison Wallace, *Homicide: The Social Reality*, NSW Bureau of Crime Statistics and Research (1986).

⁴⁵ *R v Enright* [1961] VR 663, 669.

⁴⁶ *DPP v Camplin* [1978] AC 705, 718.

⁴⁷ *Johnson v The Queen* (1976) 136 CLR 619, 636.

- 5.13 In the period 1970 to 1982, the defence of provocation in respect of murder in New South Wales was provided for by the common law and by s 23 in the *Crimes Act 1900* (NSW) in the form originally enacted, which was substantially similar to the common law test except that it excluded cases where the accused intended to kill the deceased.
- 5.14 In April 1982, s 23 of the *Crimes Act 1900* (NSW) was modified to broaden its application, to reverse the onus proof (so that it conformed with the common law and other Australian states, which required the Crown to negative provocation once raised) and to remove the requirements of suddenness and lack of intent to kill. This amendment was passed in the *Crimes (Homicide) Amendment Act 1982* (NSW) with an amendment to s 19 of the *Crimes Act 1900* (NSW) to introduce a concept of diminished culpability permitting the sentencing judge to impose less than a mandatory life sentence.
- 5.15 The intent of both the amendments in that Act was to be reformatory. They were made in response to significant public and academic concern that the strictures of the previous law unduly discriminated against women and children or young persons who were victims of severe, often long-term, domestic abuse and who eventually struck back against their abusers.
- 5.16 The Attorney General referred in his second reading speech to the case of *Hill v The Queen*⁴⁸ as one in which the NSW Court of Criminal Appeal was ‘moving in the direction’ of the amended provision by considering almost the whole relationship between the deceased and the accused to find the relevant provocation in the case of a woman who had been subjected to prolonged abuse by her male partner.⁴⁹ However, another example referred to by the Attorney-General as a case that required the availability of the defence showed that the male response to criminal or unwanted sexual advances remained an important part of the concept of the provocation defence:

“The deceased man had visited the wife of the accused some eighteen months before the killing. The deceased had suggested intercourse to her, been rebuffed, and had then masturbated in front of her. She told her husband, who became very angry and, four days later, beat up the deceased. The accused's wife had a miscarriage which both she and her husband believed, rightly or wrongly, was the result of the psychological impact of the incident upon her. Five months later, the deceased again visited the wife of the accused, at night when the accused was away. The deceased made sexual advances but was rejected. The wife complained to the husband about the incident. The accused was again upset by it, but he did not suddenly rush out and attack the other man. He brooded about it. Five days later, he went to the other man's house, slightly drunk, with a gun, after the wife had again complained to him about the other man. The accused shot the deceased.”⁵⁰

⁴⁸ (1981) 3 A Crim R 397.

⁴⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 March 1982, 2486 (Frank Walker, Attorney-General).

⁵⁰ *Ibid* 2485.

- 5.17 At the same time as this amendment was made, petitions and counter-petitions were being received and considered by the NSW Parliament on the issues of decriminalisation of male homosexuality and legislating equality for LGBTIQ persons. A bill for decriminalisation and equality had been brought forward by the NSW Government in November 1981 and debated but defeated on a conscience vote, and a further, narrower bill was debated in the same month as the provocation amendment.
- 5.18 In the second reading debate of the *Crimes (Homosexual Behaviour) Amendment Bill 1982*, the Deputy Premier, who had strongly supported the previous failed bill and supported the bill then under consideration despite expressions of great regret at its limited and still discriminatory operation, read with approval from a letter received from the President and General Secretary of the Uniting Church, which shows that both government and community attitudes had significantly liberalised by that time and that they supported the amendments of the law to remove from criminal prosecution homosexual acts in private between consenting adults.⁵¹
- 5.19 It was clearly not the intention of the government in reforming the provocation defence to excuse or to create a new impetus for violence against homosexual men or trans women or persons who were identified by their attackers as potentially sexually nonconformist. However, at least on retrospective assessment, the reform may be seen to have intersected with social circumstances encouraging such use of the defence.

American concept of homosexual panic defence

- 5.20 Golder distinguishes between the concepts of 'homosexual panic defence' and 'homosexual advance defence'.⁵²
- 5.21 He identifies the so-called homosexual panic defence as an American term based on a psychiatric diagnosis posited by Edward Kempf in 1920 of 'acute homosexual panic', used by Kempf to diagnose cases of self-harm attributed by Kempf to feelings of self-loathing or self-disgust said to be felt by men whom he described as 'latent homosexuals' after their experience of close confinement in an all male environment during World War I.⁵³
- 5.22 This contestable diagnosis, Golder says, was used by American defence attorneys to create a medical basis for a claim of temporary insanity or diminished responsibility as a defence to charges of murder or other violent conduct by ascribing latent homosexuality to their clients; a 'disorder' said to induce violent panic or irrationality in the accused when confronted with a homosexual proposition.⁵⁴ As Golder notes, such an argument

⁵¹ New South Wales, Parliamentary Debates, Legislative Assembly, 31 March 1982, 3084 (Jack Ferguson, Deputy Premier).

⁵² Ben Golder, 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004) 11(1) *Murdoch University Electronic Journal of Law* [40] <<http://classic.austlii.edu.au/au/journals/MurUEJL/2004/8.html>>.

⁵³ *Ibid* [5].

⁵⁴ *Ibid* [6].

attributes the cause of the violence to the 'pathologically confused sexuality of the accused'.⁵⁵

- 5.23 Golder distinguishes this medicalised 'defence' from the arguments of self-defence and provocation later identified in Australia.

Homosexual advance defence

- 5.24 The homosexual advance defence as discussed in the Australian literature is an argument typically of provocation, but also possibly of self-defence, propounded to excuse or partially excuse homicide or other violent conduct by an alleged reaction of violent outrage to a homosexual advance alleged to have been made, or anticipated to be made, by the victim towards the accused. Golder suggests the first reported Australian cases invoking such a defence were *R v Murley*⁵⁶ in 1992, *R v McKinnon*⁵⁷ in 1993 and *R v Bonner*⁵⁸ in 1995.

- 5.25 In the period 1989 to 1995, the issue of such a defence was examined in a growing body of academic critiques considering the relationship of law and homophobia, gender and sexual discrimination in law, hate crimes, male violence and male honour.

- 5.26 In 1993, the Australian Institute of Criminology reported violence against LGBTIQ people to be rising, although reporting was then patchy and inadequate. As observed by Tomsen:

*"low levels of official reporting and monitoring reflect histories of general community indifference and police and legal hostility towards [LGBTIQ] victims."*⁵⁹

- 5.27 In July 1995, the NSW Attorney-General directed a Working Party to review cases in which a homosexual advance defence was raised to identify any difficulty with the operation or application of the criminal law and to identify community education strategies. At the same time, the NSW Law Reform Commission was continuing work on a 1993 reference on provocation (and other defences) more broadly.

- 5.28 In its August 1996 Discussion Paper, the Working Party identified 13 cases tried in NSW between 1993 and 1995 in which an allegation of homosexual advance had been made.⁶⁰ The earliest facts in the cases reviewed occurred in 1991. Of those 13 cases (involving 16 accused), two resulted in acquittals, two resulted in verdicts of manslaughter, there was one plea of guilty to murder, four pleas of guilty to manslaughter and three pleas to lesser crimes and there was one no bill.⁶¹ Six of the cases involved allegations of violence

⁵⁵ Ibid [15].

⁵⁶ (Unreported, Supreme Court of Victoria, Teague J, 28 May 1992).

⁵⁷ (Unreported, Supreme Court of New South Wales, Studdert J, 24 November 1993).

⁵⁸ (Unreported, Supreme Court of New South Wales, Dowd J, 19 May 1995).

⁵⁹ Stephen Tomsen, "'He Had to be a Poofter or Something": Violence, Male Honour and Heterosexual Panic' (1998) 3 *Journal of Interdisciplinary Gender Studies* 44, 46.

⁶⁰ Working Party on the Review of the Homosexual Advance Defence, Attorney-General's Department (NSW), *Review of the 'Homosexual Advance Defence'* (1996). The Discussion Paper notes that the review excluded District Court and Local Court matters and cases heard before 1993.

⁶¹ Ibid [14] and Appendix 1.

by the victim towards the accused (although in some of the cases such allegation was dubious and contested by the prosecution).⁶²

- 5.29 In four cases, a history of the accused having suffered sexual assault or other severe familial abuse was taken into account in considering the availability of provocation or other defence or otherwise as a mitigating factor in sentencing.⁶³
- 5.30 At least six of the cases involved stealing by the accused from the victim or evidence of other conduct undermining of the defence and highly suspicious for the accused having targeted the victim for an intentionally homophobic attack.⁶⁴
- 5.31 Some of the cases identified by the Working Party tended to confirm evidence of a wider, predominantly youth, culture of violent hate crimes towards LGBTIQ persons captured in the nastiness of descriptions used by the offenders themselves such as “poofter-bashing” and “rolling a fag” involving violent, sometimes murderous, assaults and robberies, whether perpetrated on victims in their own homes, by luring the victims to an isolated spot or seeking out victims by patrolling known beats for gay connection.⁶⁵
- 5.32 However, each of the cases identified by the Working Party was highly fact-specific and involved individual complications, including identifying the dynamic between victim and accused where it was alleged the victim had initiated violence and assessing the role of a history of abuse in the conduct of the accused.⁶⁶
- 5.33 The Working Party rightly pointed out the difficulty of countering accusations about the conduct of the victim where the victim could no longer speak for himself or herself.⁶⁷
- 5.34 As an interim measure, the Working Party recommended jury instructions to combat homophobic prejudice and to draw a distinction between self-defence or a disproportionate response to a violent sexual attack on the one hand and a violent response to a non-violent sexual advance on the other.⁶⁸
- 5.35 A particular concern of the Working Party was the quality of the police investigation when confronted with an alleged homosexual advance defence, especially whether sufficient enquiry was made to obtain the real facts and expose any fictitious allegations and dispel a false image of the victim as predatory. However, the view of the Working Party at the time was that the police work in the identified cases had been of a high standard.⁶⁹ Of course that study (and the operation of the ‘defence’ itself) was focussed on cases that had come to trial.

⁶² Ibid [19]–[32] and Appendix 1.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid [11].

⁶⁸ Ibid, Executive Summary.

⁶⁹ Ibid [75]–[77].

- 5.36 In 1997, the NSW Law Reform Commission published a report 'Partial Defences to Murder: Provocation and Infanticide'.⁷⁰ The Commission referred to the issue of the 'homosexual advance defence' and the question of whether non-violent homosexual advances should be capable of constituting provocation.⁷¹
- 5.37 The Commission noted the case of *R v Green* was then yet to be determined by the High Court and expressly deferred to the outcome of the Working Party's consideration but concluded that categories of conduct should not be specifically excluded from the defence:
- "In our view, non-violent homosexual advances should not generally be regarded as conduct sufficient to amount to provocation under the defence of provocation. However, for the same reasons as those given in relation to domestic killings of women, we do not consider that there should be any legislative restrictions on the types of conduct that can give rise to the defence of provocation."*⁷²
- 5.38 The Commission did recommend reformulation and codification of s 23 of the *Crimes Act 1900* (NSW) and removal of acting under self-induced intoxication from its scope but did not recommend any amendment specific to hate crimes or alleged homosexual advances.
⁷³
- 5.39 The case of *Green v The Queen*⁷⁴ was a point of high publicity for and criticism of the homosexual advance defence in Australia. It was an appeal from one of the cases discussed by the Working Party in 1996 in which the partial defence of provocation had not been accepted at trial.
- 5.40 The facts of the case were highly contested and the prosecution and defence facts were diametrically opposed. On the prosecution case, the defendant, a friend of the deceased who was staying the night with him, came into the deceased's bedroom after the deceased had gone to bed intoxicated and assaulted him in the bed causing severe head injury then stabbed the deceased with scissors ten times, possibly while the deceased was trying to get away. A savage, unprovoked and seemingly inexplicable attack. There was some evidence that the defendant had been contemplating a homicide the previous day but not specifically that of the deceased.
- 5.41 On the defence case, the deceased was a family friend who had stood in a fatherly role to him. The defendant had suffered an abusive childhood with his own father who was violent towards him, his mother and siblings, including by violently raping his sisters. On the defence case, this trauma had preyed on the defendant's mind. The defendant stated in interview that, after he had gone to bed alone, the deceased slid in next to him uninvited and began sexually groping him. The defendant said he pushed the deceased

⁷⁰ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997).

⁷¹ *Ibid* 62.

⁷² *Ibid* 63.

⁷³ *Ibid* 67.

⁷⁴ (1997) 191 CLR 334.

away and told him the contact was unwelcome but the deceased persisted and the accused again pushed him away but the deceased again persisted harder (with insistent force although not frank violence). The defendant said he then started hitting the deceased and the image of his sisters being abused by his father came into his mind and he lost control. At trial, direct evidence of the defendant's family circumstances was not admitted as evidence of provocation (although evidence of his belief was admitted on another ground) and the jury was not directed to consider it in relation to a defence of provocation.

- 5.42 On appeal to the Court of Criminal Appeal,⁷⁵ the majority considered that the jury should have been directed to consider the evidence of the defendant's beliefs as to the family abuse relevant to his state of mind but that no miscarriage of justice had occurred because no ordinary person could have been provoked to kill or inflict grievous bodily harm by the deceased's conduct. The majority considered that the evidence was that the advance by the deceased was 'amorous, not forceful'.⁷⁶
- 5.43 On this basis, Priestley JA concluded that a jury properly instructed could not have accepted a provocation defence in the sense that an ordinary person was induced by the deceased's conduct to the point of losing self-control and forming an intent to kill.⁷⁷
- 5.44 Smart J, who dissented, considered that the direct evidence of the defendant's abusive family history should have been admitted (as more powerful than mere uncorroborated assertion of belief) and took a different view on the issue of provocation:

"Some ordinary men would feel great revulsion at the homosexual advances being persisted with in the circumstances and could be induced to so far lose their self control as to form the intention to and inflict grievous bodily harm. They would regard it as a serious and gross violation of their body and their person. I am not saying that most men would so react or that such a reaction would be reasonable. However, some ordinary men could become enraged and feel that a strong physical re-action was called for. The deceased's actions had to be stopped. Stingel at 329 and 332 recognises that there is a range within the description of 'ordinary'. The lowest level of self control which falls within that range is that which is required. It is important to appreciate the immediacy of the situation. There was no time for reflection. Delay meant that the sexual assaults and advances in the groin area would continue. Probably, the amount of liquor consumed by the deceased made it hard to get him to stop. The deceased had lost his sensitivity and propriety and determined to press on.

To use the words of Stingel at 329 the wrongful acts of the deceased were of such a nature as to be sufficient (or capable of being regarded as sufficient) to provoke an ordinary person to lose his self control to an extent that he does the

⁷⁵ *R v Green* (Unreported, New South Wales Court of Criminal Appeal, Priestley JA, Smart and Ireland JJ, 8 November 1995).

⁷⁶ *Ibid* 25.

⁷⁷ *Ibid* 26.

unreasonable and extraordinary, that is, an act, which, were it not for the provocation, would constitute the crime of murder.”⁷⁸

5.45 The dissenting judgment of Smart J has been criticised as condoning homophobia, in particular by describing the events of the sexual advance made by the deceased as (objectively) ‘revolting’ and that the defendant should not have been expected to just walk away, rather ‘the deceased’s actions had to be stopped’. There is substantial merit to concerns raised about those passages. His Honour did not suggest, however, that an ordinary man could be provoked by *any* homosexual advance to a homicidal loss of control, instead limiting his opinion to persistent coercive physical advances from a physically superior male causing a loss of control in particular circumstances that included a betrayal of the filial trust of a defendant whose trust had already been grossly abused by his father.

5.46 The appeal to the High Court resulted in the appeal being allowed by a majority and a re-trial ordered. The minority, Gummow and Kirby JJ, framed the essential issues in much the same way as the majority of the NSW Court of Criminal Appeal:

“[A]ny jury, acting reasonably, could not have failed to be satisfied beyond reasonable doubt that the nature of the conduct of the deceased was insufficient to deprive any hypothetical, ordinary 22-year-old male in the position of the appellant of the power of self-control to the extent that he would have formed an intent to kill or to inflict grievous bodily harm upon the deceased.”⁷⁹

5.47 Kirby J referred to the Working Party’s Discussion Paper and considered the facts of the case in the context of a non-violent advance:

“For the law to accept that a non-violent sexual advance, without more, by a man to a man could induce in an ordinary person such a reduction in self-control as to occasion the formation of an intent to kill, or to inflict grievous bodily harm, would sit ill with contemporary legal, educative, and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear...

In my view, ... the notion that the ordinary 22 year-old male (the age of the accused) in Australia today would so lose self-control as to form an intent to kill or grievously injure the deceased because of a non-violent sexual advance by a homosexual person is unconvincing. It should not be accepted by this Court as an objective standard applicable in contemporary Australia.”⁸⁰

5.48 His Honour reasoned that the law should be interpreted consistently with the principle of equality before the law (itself a fundamental human right).⁸¹

⁷⁸ Ibid 23.

⁷⁹ *Green v The Queen* (1997) 191 CLR 334, 337 (‘Green’).

⁸⁰ Ibid 408-409.

⁸¹ Ibid 401.

5.49 However, there are three caveats to full agreement. Firstly, 1993 was less than ten years after partial decriminalisation of consensual male homosexual conduct in New South Wales. To consider that an ordinary person as a matter of law *could not* be provoked by conduct that had so recently been described by the law itself in terms redolent of outrage and severity of disapprobation was perhaps to work an opposite injustice of retrospectively applying an ideal rather than a realistic standard: a jury properly instructed usually being the arbiter of what is or is not ordinary. To say so is not to approve either homophobia or the previous state of the law, merely to recognise that law has, and is intended to have, normative consequences. Secondly, the coda to his Honour's judgment:

*"If every woman who was the subject of a "gentle", "non-aggressive" although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended."*⁸²

might be considered differently under a more modern (#MeToo) lens re-examining the extent to which law and society privilege male sexual desire and sense of entitlement to sex and giving greater recognition to the trauma caused by domestic and childhood abuse and to coercive sexual exploitation short of frank violence. Thirdly, the facts of the case were not necessarily encapsulated in the 'factual context' his Honour described.

5.50 The majority, Brennan CJ, Toohey and McHugh JJ, each considered the issue of provocation should have been left to the jury.

The Attorney-General's Working Party, ACON Report and Strike Force Parrabell

5.51 The Attorney-General's Working Party provided its final report on the homosexual advance defence in 1998.⁸³ The Working Party noted that:

*"[B]etween 1990 and 1996 there were 26 [cases of anti-gay and anti-lesbian homicide] in NSW alone (constituting roughly 20% of stranger homicides). In 16 of these cases, the offender was under 25 years of age at the time of the offence. The Police Service, in its study of anti-gay and lesbian violence in 1995, found that lesbians were at least six times more likely, and gay men four times more likely, than heterosexual women and men to suffer a physical assault in a 12 month period."*⁸⁴

⁸² Ibid 415.

⁸³ Working Party on the Review of the Homosexual Advance Defence, Attorney-General's Department (NSW), *Homosexual Advance Defence: Final Report of the Working Party* (1998).

⁸⁴ Ibid [2.5] citing NSW Police Force, *Out of the Blue: A Police Survey of Violence and Harassment Against Gay Men and Lesbians* (1995). See also Committee on the Monitoring and Implementation of the Anti-Discrimination Board, Attorney-General's Department (NSW), *Report on HIV and AIDS Related Discrimination: Fighting the Other Epidemic* (1993).

- 5.52 The Working Party proposed a theory to explain the development of the homosexual advance defence in Australian cases:

“It is also noted that cases involving HAD appear to have only surfaced in more recent years. It is not possible to determine the reasons for this trend; however, a number have been suggested. One is that the publicity generated by particular HAD cases in NSW, Victoria and South Australia in which the accused was acquitted has made HAD an “attractive” defence. Another may be that, as there is now increased community acceptance of homosexuality, less stigma will attach to an accused if he or she alleges a homosexual advance. It is arguable that such acceptance has, at the same time, also been attended by increased anti-gay sentiment.”⁸⁵

- 5.53 The Working Party disagreed with the NSW Law Reform Commission, considering that the proposed simplified test for provocation did not give juries sufficient instruction on difficult issues and did not address the problem of persistent societal homophobia.⁸⁶
- 5.54 The Working Party criticised the majority in *Green*, adopting the view of the facts taken by Priestley JA and Kirby J that the case was one of a non-violent sexual advance and analysing how the defendant’s history of familial abuse should have been addressed.⁸⁷ The Working Party, fairly, considered that the majority did not address the concerns they had raised (the Discussion Paper had been provided to the Court).
- 5.55 The Working Party did not propose the abolition of the provocation defence but proposed an amendment to s 23 of the *Crimes Act 1900* (NSW) to exclude a non-violent homosexual advance from forming the basis of provocation and other measures including jury directions, police and community education and broader anti-discriminatory law reform.⁸⁸
- 5.56 After *Green*, and the publicity which attended that decision and three other high profile murder trials, Sewell identified 15 cases (some with multiple accused) in which the homosexual advance defence was raised in NSW in the period 1999 to 2000.⁸⁹ In four of these cases the defence was successful, resulting in acquittal or conviction of manslaughter, one case was dealt with as diminished responsibility and one as unfit to plead and in six cases murder convictions were entered. Nine of the defendants were under 18 years of age at the time of the offence. The graphic facts and savage violence of the cases cited by Sewell reinforced the previous identification by the Working Party of a youth culture of violent hate crimes against LGBTIQ persons, especially crimes carried out by multiple youths targeting, ‘catfishing’ or otherwise luring men ostensibly for sex and then violently assaulting, robbing and, in the worst cases, killing them.

⁸⁵ Ibid [3.5].

⁸⁶ Ibid [5.38]–[5.40].

⁸⁷ Ibid [5.12]–[5.26].

⁸⁸ Ibid, Summary of Findings.

⁸⁹ Jef Sewell, “‘I Just Bashed Somebody Up. Don’t Worry About it Mum, He’s Only a Poof’: The Homosexual Advance Defence and Discursive Constructions of the “Gay” Victim’ (2001) 5 *Southern Cross University Law Review* 47.

- 5.57 In 2002, Thompson compiled a list of 88 suspicious deaths in New South Wales between 1976 and 2000 for which there was significant media coverage of facts associated with possible gay-hate motivation for these deaths.⁹⁰ Thompson did not represent that this list was an exhaustive list of LGBTQ murders during the period. The list was submitted to the Australian Institute of Criminology and became the eventual basis for a NSW Police Strike Force Parrabell Review.⁹¹
- 5.58 In June 2014, s 23 of the *Crimes Act 1900* (NSW) was repealed and replaced by a partial defence of ‘extreme provocation’, confined to conduct of the deceased that was a serious indictable offence and specifically excluding conduct of the deceased that ‘was only a non-violent sexual advance to the accused’.
- 5.59 The new form of s 23 does not exclude the common law defence of provocation and does not, in any event, apply to a charge of murder alleged to have been committed before 13 June 2014, so would not be considered in the context of the prosecution of any historic crimes.
- 5.60 From 2015 to 2018, the NSW Police Strike Force Parrabell (**the Strike Force**) reviewed 88 cases of suspicious deaths in NSW in the period 1976 to 2000 with potential gay-hate motivations. The Strike Force reported that of the 63 cases that were solved, police charged 96 people (84 with murder) and in relation to 15 of those murder charges homosexual advance defences were raised. Overall, 80 offenders were convicted: 38 of murder, 33 of manslaughter and 9 of other charges. The Strike Force report does not identify whether any of the homosexual advance defences raised were successful (there is some overlap with the series identified by the Working Party and Sewell).⁹²
- 5.61 In 2018, ACON produced its report ‘In Pursuit of Truth & Justice: Documenting Gay and Transgender Prejudice Killings in NSW in the Late 20th Century’ which has prompted the present Inquiry.⁹³ The ACON report confirms the earlier reporting by the Working Party and others of a significant youth culture in the period under review of hate crimes targeting LGBTIQ persons but particularly homosexual men and transwomen, including by group attacks, both in the victim’s own home and in social spaces, especially at well known beats for sexual connection. ACON confirms the previous reporting of the savagery and ferocity of many of the reviewed homicides.
- 5.62 There is now a substantial body of critical academic literature on the homosexual panic defence and homosexual advance defence in Australia and overseas. In all but one Australian state, reform of statutory provocation law has excluded such a defence where the advance alleged is non-violent.

⁹⁰ Jenny Mouzos and Sue Thompson, ‘Gay-Hate Related Homicides: An Overview of Major Findings in New South Wales’ (Trends & Issues in Crime and Criminal Justice Paper No 155, Australian Institute of Criminology, 2000); NSW Police Force, *Strike Force Parrabell: Final Report* (2018) 20.

⁹¹ NSW Police Force, above n 90, 20.

⁹² *Ibid* 33–35.

⁹³ ACON, *In Pursuit of Truth & Justice: Documenting Gay and Transgender Prejudice Killings in NSW in the Late 20th Century* (2018).

- 5.63 However, there is still little analysis of the extent to which the defence was ever successful in New South Wales and the extent to which any such success in particular cases was productive of injustice to those victims, their families and the community and involved the infringement of fundamental human rights as discussed above. The early report series suggest that the defence was not very successful at trial.
- 5.64 What has not been identified, however, is:
- a. the extent to which publicity of the defence, whether successful or not, may have encouraged hate crimes against LGBTIQ persons in the period from the early 1990s to date;
 - b. the extent to which publicity of the defence, whether successful or not, may have discouraged reporting of hate crimes by LGBTIQ persons in the period from the early 1990s to date;
 - c. the extent to which, if at all, the availability of the defence influenced investigations, charging decisions and plea acceptances in the period under review (and to at least 2014); and
 - d. the extent to which, if at all, the availability of the defence influenced prosecutors' submissions in respect of the aggravated nature of any offences where there was evidence of hatred for LGBTQ people and an correlation between that hatred and the crime the subject of proceedings.

The Strike Force's Final Report does not answer these questions.

- 5.65 Importantly, there has also been relatively little examination of the effect of the availability of the defence in cases of violence against lesbian women or reporting of crime by lesbian women.⁹⁴

6. Conclusion

- 6.1 There is clear, increasing international concern and awareness over human rights violations perpetrated against the LGBTIQ community. Noting our discussion above and the international human rights framework outlined in Section 2, this concern is warranted. There remains significant anguish that the rights afforded to the LGBTIQ community under the UDHR, ICCPR and the ICESCR have not been fully realised as a result of the hate crimes between 1970 and 2010.

- 6.2 It is in that context that ALHR makes the following recommendations:

⁹⁴ See Barbara Baird, 'The Role of the State in the Regulation of Sexuality: The Police and Violence against Lesbians and Gay Men' (1997) 2 *Flinders Journal of Law Reform* 75, 81.

Recommendation 1:

- 6.3 **That the NSW Government establish a Royal Commission reviewing violent crimes committed in New South Wales between 1970 and 2010 (or to date) where the victim of that crime was a member of the LGBTIQ community. A Royal Commission should consider the reporting, investigation and prosecution of, and the institutional and community responses to such crimes and, as appropriate, would encourage the victims of crime, particularly crimes that were not reported or solved, to disclose their experiences and identify past and current barriers to reporting.**
- 6.4 ALHR submits that a Royal Commission is the necessary next step as the ability to call for witnesses and evidence and thus verify facts is critical if the Government is to fully determine the extent of hate crimes against LGBTIQ communities historically and today and whether there were institutional failures in responding to such crimes.
- 6.5 A Royal Commission would specifically allow detailed consideration of the following non-exhaustive list of issues:
- a. Whether amendments to the Anti-Discrimination Act 1977 (NSW) may be required as a result of this Inquiry and whether stronger protections are needed against vilification and discrimination of the LGBTIQ community;
 - b. Whether the Grim Reaper HIV/AIDS campaign contributed to institutional and societal alienation, discrimination, vilification and hatred towards the LGBTIQ community;
 - c. Whether a Gender and Sexuality Commissioner should be established;
 - d. The issue of broader cultural training for the justice sector;
 - e. Whether the Victims Compensation Act 1996 (NSW) should be amended to remove time limits for victims of historical LGBTIQ hate crimes.
- 6.6 ALHR notes that the prosecution today of historic crimes may raise a difficult but important application of the human rights principle against retrospectivity of criminalisation if the ordinary person test in provocation law were to apply current community values and expectations that may differ from those prevailing in the late 20th century. It is also noted that recognition must be given to victims of sexual crime and exploitation or coercion falling short of criminal assault, including those victims who themselves become offenders, and of the long-lasting effects of physical and sexual trauma which may impair a person's judgment or self-control or otherwise diminish culpability for acts done under the effects of trauma and the very real evidentiary difficulties raised in some of the reported cases of identifying genuine versus specious and factitious allegations of trauma or threat. These issues would need to be considered in any Royal Commission.

- 6.7 While the terms of reference of any Royal Commission should be formulated in consultation with the LGBTIQ community and LGBTIQ organisations, and noting the broad suggestions above, ALHR specifically recommends that as a part of this Royal Commission, two of the terms of reference ought to be that:
- a. There is a further review of the cases considered by Strike Force Parrabell, and any additional relevant cases identified in the period under review and up to at least 2014, to consider whether investigations and prosecutions were affected by the availability of the homosexual advance defence and, if so, whether such decisions resulted in injustice to the victims of crime and infringement of their fundamental human rights. We refer to our discussion above in that there is no information on how successful the defence was (if at all), the extent to which the defence encouraged hate crimes or discouraged reporting and the way investigations were conducted. Consideration should also be given to the impact of the defence on lesbians.
 - b. Consideration of s 23 of the Crimes Act 1900 (NSW) and whether further amendments are required particularly whether it is of significance that this section does not exclude the common law defence of provocation and does not apply to a charge of murder before 13 June 2014. Also in this context, it needs to be considered as to whether South Australia represents a separate case study as it is the only Australian state not to exclude the homosexual advance defence in legislation.
- 6.8 The community awareness a Royal Commission would bring would also be consistent with the Government's duty to 'provide effective remedies to victims, including reparations' as outlined in 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*⁹⁵ and the recommendations of the UN High Commissioner for Human Rights in the 2011 report 'Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity.'⁹⁶

Recommendation 2:

- 6.9 **That the NSW Government create a special independent taskforce dedicated to investigating outstanding cases of hate crimes against LGBTIQ people and to building upon the limitations of the Final Report of Strike Force Parrabell.**
- 6.10 There have been numerous task forces into the deaths of certain men such as Strike Force Welsford and Strike Force Macnamir, and Operation Taradale. While these

⁹⁵ *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*, GA Res 147, UN GAOR, 60th sess, 64th plen mtg, UN Doc A/RES/60/147 (21 March 2006).

⁹⁶ Navi Pillay, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity: Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/19/41 (17 November 2011).

investigations were limited to certain individuals, Strike Force Parrabell took a much broader (but high level) approach. Strike Force Parrabell was a review, not a reinvestigation. It was also limited to the 88 deaths which were the subject of its brief. It was further limited in the sense that it was essentially a review by police officers, of police officers.

If you would like to discuss any aspect of this submission, please email me at:

Yours faithfully

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ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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