Submission No 13

INQUIRY INTO GAY AND TRANSGENDER HATE CRIMES BETWEEN 1970 AND 2010 - 57TH PARLIAMENT

Organisation: Australian Hate Crime Network

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SUBMISSION TO:

The NSW Legislative Council Standing Committee on Social Issues: Inquiry into Gay and Transgender Hate Crimes between 1970 and 2010.

FROM:

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The contents of this submission represent the views of non-government and academic members of the Australian Hate Crime Network. It does not represent the views of representatives of any NSW government agency or department.

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1. EXECUTIVE SUMMARY

The Australian Hate Crime Network ("the Network") commends the NSW Legislative Council Standing Committee on Social Issues (Committee) for conducting inquiries into these important issues. The Network is acutely aware of the painful impacts of hate crime and congratulate the Committee for providing NSW LGBTIQ+ communities with hope for healing, protection and justice.

This current *Parliamentary Inquiry, Gay and Transgender hate crimes between 1970 and 2010*, was called in response to reports published by ACON and NSW Police Force who published findings from separate reviews into 88 alleged gay and transgender hate killings that took place in NSW between 1975 and 1999:

- In Pursuit of Truth and Justice (ACON)
- Strike Force Parrabell Final Report (NSW Police Force)

ACON concluded that up to 50% of these cases involved elements of homophobia and the NSW Police Force concluded that 60% of cases were either confirmed as bias crimes or had some level of bias. Furthermore, both ACON and NSW Police Force acknowledge that the list of 88 killings is not exhaustive, and that LGBT people experienced potentially thousands more non-fatal attacks during this period:

> We acknowledge that the list of killings is by no means comprehensive, and that this report does not address the hundreds if not thousands of violent assaults that did not result in death. Many have suffered for decades after these brutal assaults, both from

> the physical and psychological trauma as well as from the sense of helplessness from a lack of institutional response to these crimes.[1]
>
> It is clear and beyond question that levels of violence inflicted upon gay men in particular were elevated, extreme and often brutal. The victims of these crimes fell outside the scope of Strike Force Parrabell due to their survival. Many of these people were fortunate to live.[2]
>
> The Gay and Lesbian Rights Lobby and later, the AIDS Council of NSW (now ACON) kept records, usually comprising self-reported incidents of gay-hate violence that on several occasions amounted to more than 20 entries per day.[3]

Evidence relating to further potential LGBT hate crime related deaths was presented throughout the first phase of the Inquiry.

The title of the Inquiry is *Gay and Transgender hate crimes between 1970 and 2010*, and the terms of reference are inclusive of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) hate crimes particularly as they relate to current developments in policy and practice.

In its submission, the Network has paid attention to issues affecting all LGBTIQ+ communities and acknowledges that the list of 88 hate crimes does not include reports of lesbian and bisexual deaths, which are likely to have been lost within general reports of homicide; most likely, domestic and family violence reports.

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1 ACON, 2018 In Pursuit of Justice: Documenting Gay and Transgender Prejudice Killings in NSW in the Late 20th Century. Sydney: ACON. See also: Tomsen, S. and Kirkengast, T 2019, Victimhood truth and criminal justice failure in relation to anti-homosexual violence and killings in New South Wales, *Current Issues in Criminal Justice,* 31(2) 181-193.

2 NSW Police Force 2018 *Strike Force Parrabell – Final Report*. Sydney: NSWPF.

3 NSW Police Force 2018 *Strike Force Parrabell – Final Report*. Sydney: NSWPF. See also: Tomsen, S. (2002) *Hatred, Murder and Male Honour: Anti-Homosexual Homicides in New South Wales, 1980-2000*, Australian Institute of Criminology.

In addressing the challenging area of responses to current and historical hate crimes, our Network's submission outlines responses to hate crimes broadly, to include all vulnerable communities (race, religion, disability, homelessness and so forth), as well as specific responses for LGBTIQ+ hate crimes.

Following our brief outline of the work of the Australian Hate Crime Network, we first discuss the legal context of hate crimes in Australia by examining national and international responses to law reform on hate crimes, and underscoring the varying statutory approaches and their advantages and disadvantages. This is followed by an explanation of the organisational context of the NSW Police Force specialist unit and the policing of hate crime in NSW. We then examine more directly the issues facing the LGBTIQ+ population: police training, hate crime recording and reporting and victim support. We conclude by urging the Committee to examine the treatment of LGBTIQ+ hate crimes alongside the wider issue of hate crime reform, making 29 recommendations to improve NSW approaches for all vulnerable communities.

2. LIST OF RECOMMENDATIONS

These recommendations are discussed in context and at length throughout the submission.

NSW LAW REFORM

NSW POLICE FORCE ENGAGEMENT AND HATE CRIMES UNIT

POLICE INVESTIGATION MODELS

TRAINING ON HATE CRIME

HATE CRIME REPORTING & RECORDING

3. ABOUT THE AUSTRALIAN HATE CRIME NETWORK

The Australian Hate Crime Network ('the Network') is a partnership of non-government agencies, academics and government agencies working to develop priorities and outcomes that address and prevent hate crime and hate incidents in Australia. The Network was formally established in 2019.

The Network aims to improve understanding, reduce incidence and minimise the impact of hate crime and hate incidents in Australia. Hate crime may be committed on the grounds of, but is not limited to, race, religion, ethnic/national origin, sexuality, gender, age, disability, and/or homelessness status.

Membership

Membership of the Network is comprised of non-government agencies, academics, and government agencies with experience, expertise, responsibility, or commitment to the problem of hate crime and hate incidents in Australia. This submission to the Parliamentary Inquiry into Gay and Transgender Homicides has been written and submitted on behalf of non-government agencies and academic members only. The views contained in this submission do not reflect the views of government members of the Network.

Terms of Reference

Following are the functions of the Network in relation to hate crime and hate incidents:

- Provide leadership, advocacy and support for state and national government responses to hate crime and hate incidents
- Provide an educative and advisory role to key agencies and services on preventing and responding to hate crime and hate incidents
- Enhance community awareness of hate crime and hate incidents, and encourage reporting, help seeking and access to available resources
- Monitor and review patterns in hate crime and hate incidents

- Advocate for improvement in data collection, law enforcement and criminal justice responses
- Collect and distribute relevant current research and knowledge on hate crime and hate incidents
- Identify and apply for sources of funding to support the strategies of the Network

Following are the main priorities of the Network as endorsed by our members:

1. Conduct state and national advocacy with relevant agencies to support a coordinated policy, project, and reform agenda for the government and non-government sectors to address the problem of hate crime and hate incidents.
2. Establishment of an effective and well-resourced hate crime unit in the NSW Police Force based on international evidence of good practice in policing hate crime and hate incidents.
3. Provision of resources for data collection capable of advancing current understanding of and responses to hate crime and hate incidents in NSW.
4. Investigation into the establishment of third-party reporting systems including an online reporting facility for victims to report hate crime and hate incidents in NSW, hosted by an independent organisation in partnership with the NSW Police Force.
5. Provision of strategic support to build community capacity to understand and address hate crime and hate incidents in NSW.

The report was prepared by the ad hoc Parliamentary Inquiry into Gay and Transgender Hate Crimes Working Group, and the Law Reform Working Group, on behalf of the Network.

4. LGBTIQ+ HATE CRIMES IN AUSTRALIA: WHAT DO WE KNOW?

Recent research has shown that of the 1,050 cases NSW Police Force recorded as a 'bias' crime or incident from 2013-2016, only 14 per cent related to victimisation on the basis of sexuality or gender. In the years leading up to the marriage equality plebiscite in 2017, when the LGBTIQ+ community regularly described being harassed and vilified, NSW Police Force recorded only 147 reports of hate crimes against the LGBTIQ+ community.[4]

By contrast, in victimisation surveys, more than 70 per cent of LGBTIQ+ people report having experienced bullying, harassment, and violence at some point during their lives because of their sexuality and gender identity.[5] The stark differences between recorded data for the LGBTIQ+ population and their self-reported experiences of violence shows that officially recorded crime does not match the community's lived experiences of victimisation. These stark differences indicate the lack of trust in police and policing processes by LGBTIQ+ communities in Australia, which is consistent with international research.[6] It also illustrates that these experiences are not just a matter of historically bad relationships between the police and the LGBTIQ+ community; concerns with reporting experiences of hate crimes continue to the present day.

Recent research has shown that part of this challenge in the identification of hate crime is recognising the multiple vulnerabilities of the LGBTIQ+ population. This is a community not only vulnerable to street harassment or abuse by strangers (which we may associate with the traditional profile of a hate crime), but it is a community, by the nature of their marginalisation, that also experiences hate crimes perpetrated by those closest to them.

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4 Mason, G. 2019, A Picture of Bias Crime in New South Wales, *Cosmopolitan Civil Societies*, 11(1), 47-66.

5 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity, & Intersex Rights* (2015), National Consultation Report, p. 15; Berman, A. & Robinson, S. 2010, *Speaking Out: Stopping Homophobic and Transphobic Abuse in Queensland*, Bowen Hills: Australian Academic Press.

6 Dwyer, A., Ball, M., Bond, C., Lee, M., & Crofts, T. 2017, *Exploring LGBTI Police Liaison Services: Factors Influencing Their Use and Effectiveness According to LGBTI People and LGBTI Police Liaison Officers.* Report to the Criminology Research Advisory Council; Leonard, W. & Fileborn, B. 2018, *Policing for Same Sex Attracted and Gender Diverse (SSASGD) young Victorians,* Monograph Series No 110, GLHV@ARCSHS, La Trobe University: Melbourne; Fileborn, B. 2019, Policing youth and queerness: the experiences and perceptions of young LGBTQ+ people from regional Victoria, *Current Issues in Criminal Justice*, 31(3), 433-451; Pickles, J. 2019, Policing hate and bridging communities: a qualitative evaluation of relations between LGBT+ people and the police within the North East of England, *Policing and Society,* DOI: 10.1080/10439463.2019.1588269.

Hate crimes and incidents can be perpetrated by LGBTIQ+ people's partners, family and friends. For example, in Greater Western Sydney, 45 per cent of participants in a study of LGBTIQ+ people from culturally and linguistically diverse backgrounds reported having experienced family violence as a result of their sexuality and gender identity.[7] A significant challenge in policing hate crime in the LGBTIQ+ community, much like hate crimes in the disability community, is that these hate crime incidents may well be masked as family and domestic violence within police recording practices.

[7] Asquith, N.L., Collison, A., Lewis, L., Noonan, K., Layard, E., Kaur, G., Bellei, F., & Yigiter, E. 2019, Home is where our story begins: CALD LGBTIQ+ People's Relationships to Family, *Current Issues in Criminal Justice*, 31(3), 311-332.

5. NSW LAW REFORM

The Network strongly supports initiatives aimed at inquiring into and reporting on historical hate crimes and improving hate crime policing capabilities of NSW Police Force. However, we do not believe the hate crime problem can be addressed solely by police policy reforms. Broader legislative and institutional reforms are needed to reinforce NSW Police Force policy changes flowing from this inquiry.

To this end, government should develop a coordinated policy, project and reform agenda for the public sector to better address the growing problem of hate crimes and hate incidents.[8] The proposed reform process should consider the approaches adopted in other jurisdictions to inform legislative and institutional reform across the state.

The Network submits that the issue of law reform is within scope of this inquiry. As statutory bodies, the NSW Police Force, judiciary and other institutions in the criminal justice system engage with hate crimes against their respective legislative frameworks. Consequently, the availability of legislation, or lack thereof, has a direct influence on how the police, courts and other institutions interact with hate crimes. Thus, whilst law reform may not be particularised in the terms of reference, the issues of law and police policy are inextricably and incontrovertibly linked.

The task of examining an existing legislative framework and making law reform recommendations requires a significant amount of time and resources. Given these practical considerations, the Network has not developed a suite of concrete law reform recommendations for submission to this inquiry; instead, a range of options that demand consideration has been offered. These limitations underscore the need for government to implement a coordinated reform agenda to improve the public sector's response capability to hate crimes.

In these submissions, the Network will provide a snapshot of:

- Available legislative models

[8] Australian Hate Crime Network 2019, 5 Point Action Plan, Point 1: https://sydney.edu.au/law/our-research/research-centres-and-institutes/australian-hate-crime-network.html

- Criminal offences and penalty provisions
- Protected characteristics/categories of people protected
- Civil rights injunctions
- Diversionary programs

The law reform component of these submissions has been informed by the Network's Parliamentary Inquiry and Law Reform Working Groups. We reserve the right to provide supplementary submissions in areas that are not sufficiently addressed.

Available legislative models

Broadly, there are two legislative hate crime models that have been introduced in other jurisdictions; namely, the (a) discriminatory model, and; (b) animus model.

Discriminatory model

Under the discriminatory model, a hate crime is committed when the victim is deliberately targeted by reason of a protected characteristic or their membership of a protected group.[9] The prosecution does not need to prove that the crime was motivated by animus or hatred. Rather than proving hate motivations, discriminatory model provisions only require proof that a crime was committed 'because of' or 'by reason of' the victim's protected characteristic/group membership. A discriminatory model only requires a causal link between the crime and the victim's protected characteristic/group membership.

The discriminatory model is best illustrated by an example, such as, an offender who deliberately targets a victim of Asian ethnicity for a robbery. In this example, the motivation of the offender is not hatred of Asians. Instead, the offender targeted the victim based on a pre-conceived notion that people of Asian background have more valuables and are more likely to have cash. Under the discriminatory model, this attack would still be considered a hate crime despite the lack of a 'hate'

[9] Chalmers, J. & Leverick, F. 2017, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review*. Scottish Government, Edinburgh.

motivation. Under this model, the 'hate' component is not required; the prosecution only needs to prove the targeting of a victim based on perceived/actual group membership.

Many jurisdictions, including France, Bulgaria and Denmark, have adopted the discriminatory model. It offers several advantages to hate crime policing. Hate crimes under this model are easier for law enforcement and prosecutors to prove in court. The prosecution only needs to prove that the offender deliberately targeted the victim because of their protected characteristic/group. As such, in matters where there is insufficient evidence to prove hate but a clear intent by the offender to discriminate, the prosecution may file hate crime charges. No evidence of hatred/hostility is required. However, evidence of 'hate' and 'motive' can still be used to prove discrimination. The prosecution only needs to satisfy the court that the offender deliberately targeted the victim because of their protected characteristic/group membership. Accordingly, discriminatory model hate crimes are broader, easier to identify by police and less difficult to prove in court.

Proponents of the discriminatory model argue it is more effective at addressing the societal harms caused by hate crimes. If a victim is being deliberately targeted because of their personal characteristics or group membership, the harm and trauma caused to the victim is the same irrespective of whether hatred exists in the mind of the offender. Hate crimes are distinguishable from other criminal offences as the aftershock of a single hate crime often extends across communities. It can cause significant damage to social order and police-community relations.[10] The discriminatory model is therefore said to be an effective tool at minimizing the societal harms caused to communities.

Animus/hate model

Conversely, under the animus model, a hate crime simpliciter can only be prosecuted if an offender is motivated by prejudice and/or demonstrates prejudice towards a protected characteristic/group.[11] Accordingly, for a successful hate crime prosecution under the animus model, evidence of both 'motive' and 'hate' must be available. While not enshrined in legislation, the now-defunct NSW Police Force policy on bias crimes (based on the International Association of

10 Chalmers, J. & Leverick, F. 2017, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review*. Scottish Government, Edinburgh.

11 Chalmers, J. & Leverick, F. 2017, *A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review*. Scottish Government, Edinburgh.

Chiefs of Police) adopted the animus model to define hate crimes. The animus model has also been widely adopted in many jurisdictions including the United States and United Kingdom.

An analysis of animus model jurisdictions globally reveals two sub-types;

1. 'Subjective' Animus Model' – requires proof of the offender's hate motivation at or around the time of the offence; and

2. 'Objective' Animus Model' – requires a 'demonstration of hostility' test whereby the prosecution must provide evidence of hate toward the victim's characteristic/group generally.

The threshold required to prove motive and hate varies across jurisdictions. Should government adopt the animus model, both 'hate' and 'motive' must be clearly defined in the legislation. In hate crime legislation, the test for 'hate' is often expanded to include 'hostility' or 'ill will/malice'. To prove 'motive', the prosecution often relies on evidence which demonstrates the offender's hatred. The most common sources of evidence as regards hate motivation include:

- Comments made at the scene;
- Admissions to police;
- Statements from witnesses to the offence or the offender's character;
- Documentary evidence including as a result of search warrants on a suspect's residence, information requests to telephone, social media and internet service providers, and CCTV; and
- Indirect evidence such as an attack being unprovoked or occurring between two strangers.

Proponents of the animus model argue that the discriminatory model's definition for hate crimes is too broad. As the discriminatory model does not require a 'hate' motivation, critics argue that it fails to fulfil the intent of hate crime legislation and criminalises discriminatory conduct which would otherwise not be considered a hate crime.

The animus model is also not itself without criticism. As mentioned above, it is uncontroversial that hate crime prosecutions under the animus model are significantly harder to prosecute. From the outset, frontline police officers must be well trained to identify a potential hate crime during first

response and gather sufficient evidence to prove hate and motive elements. If police fail to identify and investigate an incident as a hate crime, crucial evidence required under the animus model as to the hate motivation will be missed. Consequently, the hate crime prosecutions would fail.

Furthermore, in circumstances where it is patently obvious that an offence is a hate crime but there is insufficient evidence as to motive or hate, the prosecution is doomed to fail. By way of example, the hate crime prosecution for an assault against a victim clothed in religious garments will fail under the animus model unless admissible evidence is available which proves 'hate' and 'motive'. In this scenario, an otherwise random attack on the victim could only be classified as a hate crime under the discriminatory model. Thus, under the animus model, there is a higher risk of failed prosecutions unless clear evidence of hate motivation is available. If law enforcement and prosecutorial agencies do not coordinate effectively to identify, investigate and prosecute hate crimes, the animus model is unable to fulfil the intent of hate crime legislation. This underscores the need for NSW Police Force to improve its hate crime policing capabilities.

As briefly outlined above, there are compelling arguments for government to adopt either the discriminatory model or animus model. Each model has its distinct strengths and weaknesses. There has never been a comprehensive review in NSW as regards the need for hate crime legislation, or the relative merits of the discriminatory or animus models. In determining the best model for NSW, the NSW Government should consider all models. The review should consider the extent to which each model fulfils the core intent of hate crime legislation, and addresses the needs of vulnerable communities and the demands of law enforcement.

Recommendation 1: **That the NSW government initiate a comprehensive investigation into the current gaps in law and law enforcement that hinder effective responses to hate crime and the most appropriate legal mechanisms for addressing these gaps**

Criminal offences and penalty provisions

We have explained above the different models used to address hate crime. The discriminatory and animus models can be incorporated into the criminal law in different ways. There are three main types of hate crime laws:

1. *Substantive offences*: these are separate offences that usually include bias or animus as an element of the offence itself. Typically, they punish incitement to hatred. In NSW, for example, section 93Z of the *Crimes Act 1900* criminalizes threats or incitements to violence towards another person or group of persons on the grounds of race, religious belief or affiliation, sexual orientation, gender identity, intersex status or having HIV/AIDS.[12] Substantive offences also operate in the UK and US, amongst other jurisdictions.

2. *Penalty enhancement laws*: these laws increase the penalty for a base offence when it is motivated or aggravated by bias or animus. The phrase 'base offence' relates to existing criminal offences which are not specific 'substantive' hate crime offences. Under penalty enhancement laws, an offender is convicted and punished for this more serious form of the offence (example: the offender is convicted of a 'racially aggravated assault'). These types of hate crime laws are the most common. They exist in the UK, US and Europe. Western Australia is the only Australian jurisdiction to have penalty enhancement laws; however, they apply only to race.[13]

3. *Sentence aggravation laws*: under these laws an offender's animus or bias is taken into account as an aggravating factor at sentencing. This happens after the offender has been convicted of the base offence. For example, the offender is convicted of an 'ordinary' assault base offence, but the magistrate or judge must take his or her biased motive into account when determining the appropriate sentence. This type of law has been in operation in NSW since 2003.[14] There are similar sentencing laws in Victoria and the Northern Territory. These sentencing laws have been used by the courts to aggravate the sentences of offenders who were motivated by bias on the basis of race, religion and gender.[15]

The main differences between these three types of hate crime laws are:

1. The offender is convicted of a hate crime (or something similar) under the substantive offences and penalty enhancement approaches. This helps to publicly denounce the conduct.

12 s93Z *Crimes Act 1900* (NSW)
13 *Criminal Code 1913* (WA) s 313
14 *Crimes (Sentencing Procedure) Act 1999* (NSW), s21A(2)(h)
15 Mason, G. & Dyer, A. 2013, "A Negation of Australia's Fundamental Values": Sentencing Prejudice-Motivated Crime', *Melbourne University Law Review* 36(3), 871-914.

This is not the case under the sentencing approach, where the offender's animus or bias may only be discussed at sentencing.

2. The punishment is likely to be harsher under the penalty enhancement and sentencing aggravation approaches. This is not necessarily the case under the substantive offence approach.

3. The penalty enhancement approach specifies the degree of increased penalty. The sentencing approach leaves that decision to the discretion of the judge or magistrate.

As mentioned above, substantive hate crime offences are distinguishable from the other two categories. Substantive offence laws are standalone offence provisions that criminalise a particular type of hate crime. On the other hand, penalty enhancement and sentence aggravation laws utilise existing criminal offences as 'base' offences.

Standalone substantive offences are less common in hate crime legislation. Noting most hate crimes take the form of 'volume crime' including assaults, malicious damage to property and public order offences, volume hate crime offences are better targeted by penalty enhancement and sentence aggravation laws.

Only a handful of countries have introduced substantive hate crime offences, including (Western) Australia, Canada, US and UK. These substantive offences are usually introduced with a suite of other hate crime laws including penalty enhancement and sentence aggravation laws. Examples of substantive offences include:

- Incitement of hatred/violence
- Advocating genocide
- Mischief to religious property
- Racially/religiously aggravated assault, malicious damage, harassment, public order, etc. offences

In Australia, the existing substantive offences include:

- *Publicly threatening or inciting violence*: section 93Z *Crimes Act 1900* (NSW)
- *Urging violence against groups*: section 80.2A *Criminal Code Act 1995* (Cth)
- *Serious vilification*: section 750 *Criminal Code 2002* (ACT)
- *Inciting racial animosity*: sections 77-80 *Criminal Code Amendment (Racial Vilification Act) 2004 (*WA)
- *Serious racial and religious vilification*: section 131A *Anti-Discrimination Act 1991* (QLD)
- *Serious race and religious vilification*: sections 24 and 25 *Racial and Religious Tolerance Act 2001* (VIC)

In 2018, the NSW government introduced section 93Z of the *Crimes Act 1900* (NSW) to criminalise the threat or incitement of violence against specific protected groups. The introduction of section 93Z has had almost no effect in assisting law enforcement and courts in hate crime prosecutions. The key criticisms against section 93Z include:

- It only applies to the specific hate crime of intentionally or recklessly threatening or inciting violence. It fails to deal with volume hate crimes which, while objectively less serious, are far more common;
- The threshold of 'incitement' in NSW is too high; and
- The need for NSW Police Force to obtain approval from the Director of Public Prosecutions prior to filing charges has caused an administrative bottleneck

Due to these limitations, *there has not been a successful prosecution under section 93Z to date*.

To address the scarcity of hate crime laws, the NSW government should consider the relative merits of legislating substantive offences and/or penalty enhancement/sentencing aggravation provisions. Once government determines whether it will adopt the discriminatory or hostility model, it can introduce specific substantive offence provisions to offset the disadvantages of the model selected. By way of example, introducing a substantive offence for property damage of a place of worship can

assist in the prosecution of hate crime offences under the hostility model where limited evidence is available as regards the hatred motivation. This interplay between the legislative models and specific substantive offences underscores the complexity of introducing hate crime legislation and the need for a comprehensive review process in NSW.

Recommendation 2: That the NSW government should implement a reform process to respond to the current gaps in hate crime laws and introduce the most appropriate offence provisions to fill these gaps

Punishing hate crime offenders

As we explain above, a common feature of most hate crime laws are harsher punishments on offenders for their animus or bias. The existence of hate/bias/discrimination in the mind of an offender renders a crime objectively more serious vis-à-vis the parallel crime simpliciter. As hate crimes are more serious, hate crimes carry increased penalties.

There are several other arguments as to why hate crimes are more serious and therefore warrants harsher punishment:

- Hate crimes are said to inflict greater harm upon the individual victim, the targeted community and society at large because it infringes values of dignity, respect, equality and human rights.

- The harsher sentence imposed upon the offender is said to be proportionate to the seriousness of the crime and thus consistent with the purposes of sentencing in NSW.

- The NSW government has a responsibility to denounce the bias and animus that drives hate crimes while supporting the safety and security of groups who are targeted because of prejudice and hatred. To support targeted communities, hate crimes must therefore be distinguished from base offences, explicitly labelled and carry harsher penalties.

While hate crime laws often increase penalties, this approach has also received considerable criticism. The most common arguments against harsher sentences include:

- Most behaviour covered by hate crime law are already criminalised under the traditional criminal law.

- There is no evidence that harsher punishments are an effective form of deterrence of crime including hate crime.
- The escalating social and economic costs of rising imprisonment in NSW.
- The need to prioritise more efficient and effective ways of sentencing hate crime offenders, such as restorative justice and other diversionary responses.
- The harm of hate crimes can be publicly recognised and denounced by the law of NSW without imposing harsher penalties upon offenders, for example, through the enactment of substantive hate crime offences to target gaps at law.

These debates highlight the complex considerations that lawmakers should have regard to whilst undertaking hate crime reforms.

Protected characteristics

Hate crimes are distinguishable from other criminal offences because they target a victim's individual or group identity. All hate crime laws stipulate which characteristics or groups of people are protected from hate. The characteristics are often fundamental to the protected person or group's identity and identifiable to the offender. The characteristics that ought to be included in NSW hate crime legislation should be mapped out against our national and international counterparts.

In NSW, the recent introduction of a substantive hate crime offence against serious vilification pursuant to section 93Z *Crimes Act 1900* protects six categories of people: "race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status".

Recommendation 3: The Network encourages the NSW government to expand the list of protected persons under section 93Z and all future hate crime legislation to include:

1. **Age (excluded from s93Z);**
2. **Disability (excluded from s93Z);**
3. **Homelessness (excluded from s93Z);**

4. **Race;**
5. **Religious belief or affiliation;**
6. **Gender**
7. **Intersex status;**
8. **HIV/AIDS status; and**
9. **Sexuality**

Civil Rights Injunctions

Historically, the response of lawmakers to new 'types of crime' has involved the introduction of new offences and greater penalties. While this approach may have resulted in increased convictions and harsher penalties, there is little research that proves increased penalties reduces rates of offending or recidivism.

In recent times, legislators have recognised the benefits of coordinating this historical approach with civil remedies and diversionary programs. By way of example, the domestic violence legislative framework in NSW introduced a civil remedy in the form of apprehended domestic violence orders (ADVOs) simultaneously with the introduction of substantive criminal offences and penalty enhancement provisions.

Recommendation 4: That the NSW Government adopts an approach in legislating against hate crimes by utilising civil remedies to reinforce conventional criminal laws

In other jurisdictions, the introduction of a comparable civil law response to hate crimes has been successful in improving victim protection. 'Civil injunctions' are similar to ADVOs in the way they operate. A civil injunction is placed on hate crime offenders to deter recidivism with the risk of punishment for breaching conditions of the injunction. Unlike ADVOs, however, injunctions are designed to protect the victim and their entire community instead of being limited to the individuals named in the order.

Another distinction between civil injunctions and ADVOs arises during the sentencing process. Civil injunctions can be made available to offenders as a diversionary alternative to sentencing at law. If the offender chooses to accept the issuing of a civil injunction, sentencing is stayed against the

offender for the duration of the injunction and subject to compliance with the conditions of the injunction.

Whereas AVOs generally have a maximum enforcement period of two years, civil injunctions generally last up to ten years. The conditions included on an injunction are usually specific to community protection. Standard conditions include preventing behaviour which incites, promotes or expresses bias, or discriminates. It also prevents the offender from assaulting, threatening, intimidating or discriminating against members of the protected community or attending certain buildings/locations or approaching certain individuals.

Another major difference between civil injunctions and ADVOs is the punishment for non-compliance. Civil injunctions have proved to be an effective tool to reduce recidivism due to the significant penalties for non-compliance. To deter non-compliance with civil injunctions, harsh penalties are utilised. In the US state of Massachusetts, non-compliance carries a mandatory 10-year gaol sentence. The mandatory sentence is said to be justified because it not only serves as strong deterrent but also ensures equality in sentencing, with all offenders receiving the same sentence, irrespective of the hate motive being based on race, gender, sexuality, etc.

Recommendation 5: That the NSW Government consider the implementation of civil injunctions together with substantive hate crime laws to effectively reduce recidivism whilst achieving victim protection outcomes

Diversionary programs

As discussed above, the legislative response to hate crimes is a balancing exercise between the traditional needs for 'justice' in the criminal justice system and the needs for threat management to reduce recidivism. However, threat management extends beyond civil remedies such as civil injunctions. Another key tool in threat management utilises diversionary rehabilitation programs to reduce rates of recidivism.

While protection of the victim and community are paramount, the purposes of sentencing in NSW have significant scope to consider offender rehabilitation. It is believed that offenders who engage in the criminal justice system, and particularly the prison system, with loosely held biases are more

likely have their biases entrenched further. This presents a significant problem for hate crime legislators.

Considerations of rehabilitation are entrenched in the principles of sentencing. Where appropriate, the courts and police should ensure offenders who are disrupted are rehabilitated and de-radicalised to reduce risks of recidivism.

Recommendation 6: That the NSW Government investigates diversionary programs for suitable hate crime offenders in lieu of offences being dealt with at law

6. NSW POLICE FORCE ENGAGEMENT & HATE CRIME UNIT

Origin

In 2006, a proposal was submitted to develop a hate crime capability for the NSW Police Force following the Cronulla Riots. In 2007, the position of Hate Crime Coordinator was created; the position was attached to the then Community Contacts Unit at Counter Terrorism and Special Tactics Command. The position was established to develop the hate crime capability and capacity of the NSW Police Force through education, training and engagement with at risk communities as well as an intelligence capability to track and monitor hate crimes and organised hate groups and supply intelligence to commands about hate crimes and hate crime activity within their respective areas. The position was created as a 12-month trial as an over-strength position (non-permanent) with no budget or resources. After 12 months the position was extended for an additional 12 months but was moved from Counter Terrorism and Special Tactics Command to the then Policy and Programs Command. Again, the position was over-strength and had no resources or budget. The reason for the move was that Counter Terrorism argued the work undertaken did not fit within their charter, which relates to race, religion and extremism, and does not consider other protected groups, including sexuality, gender identity, or disability.

In 2009, attempts were made to formalise the position, however the position was de-established until the position was revisited in 2012 when it was re-established as the Bias Crimes Coordinator with the Operational Programs Command. During the period between 2009 and 2012, a policy officer position was created that had dual portfolios: hate crime and vulnerable communities. This position related to policy only and no work was undertaken with respect to training, development or intelligence. On the re-establishment of the Bias Crimes Coordinator position, the policy officer remained, however continued to have dual portfolios of bias crime and vulnerable communities. Again, the position was a sub-unit of another unit being the Program Development Team and had no resources or budget. In 2012/13, a Corporate Spokesperson was given the portfolio of bias crimes to support the role and advocate for bias crimes within the NSWPF.

It was not until 2015 that a project officer and intelligence officer was added, creating the Bias Crimes Unit. In 2017, following a restructure the unit was moved under the newly created Fixated Persons Investigations Unit, again as a sub-unit with no additional resources or budget. As a result

of this move, the staff attached to the Bias Crimes Unit were redeployed to other duties. The Bias Crimes Unit was later moved into the Engagement and Intervention Unit at Counter Terrorism, without the expert knowledge acquired by the original team.

This organisational history of hate crime response in NSW is evidence of a culture that undervalues the importance of an effective hate crime response. The perceived failure of the policing response to hate crimes is a visible example of a lack of priority and understanding by governments.

Role

The Hate Crime/Bias Crimes Coordinator role and later the Bias Crimes Unit was established to develop the capability and capacity of the NSW Police Force in relation to the identification, investigation and response to hate crimes. Additionally, the unit provided subject matter expertise for the NSW Police Force, assisting commands with hate crime investigations and response as well as supplying expert advice to the Senior Executive of the NSW Police Force. Although it could review investigations, the unit was expressly directed that it would not have an investigative role, and was not allowed to investigate hate crimes.

Obstacles and Advancement

From the initial creation of the Hate Crime Coordinator role, the ability to develop a hate crime capability for the NSW Police Force was hampered by the unit's lack of resourcing. Several attempts were made to increase the resourcing of the unit, which were not actioned. The positions/unit were always a sub-unit of another larger unit, which diminished its profile and its perceived role.

Organisational resistance to the concept of hate crimes was another obstacle the positions/unit had to contend with. This resistance created a hostile environment that made driving organisational change difficult. Over 40 years of selling an image of Australia as a multicultural exemplar has created an environment of cognitive dissonance when it comes to hate crimes. When a hate crime happens, it is met with denial and distancing; the offender does not represent Australian society, it is an aberration that is minimised and distanced. Considering this context, it is not surprising that an organisational culture has developed with police and government where the issue of hate crime is minimised, and the positive outcomes of an effective hate crime response are ignored.

The pervasive policing thought in Australian law enforcement is that *a crime is crime*, they have the same impact and therefore the same response. This culture ignores that *not all crime is the same* and the reality is we do not respond the same way to crimes. Some crimes have a further reach and impact, including driving negative behaviours like radicalisation and extremism, and making society unsafe.

A lack of understanding around hate crimes, including the impact in communities and the potential opportunities for community resilience that an effective hate crimes response offers, has created a culture that is reluctant to a) accept hate crimes exist and pose a problem and b) accept that hate crimes have a devastating impact on individuals, communities and society in general.

Examples from around the world show that ignoring hate crimes can have dramatic impacts, not only on communities but also police/community relationships and society in general. Policing agencies that acknowledge hate crimes, their impact on communities and society, and respond effectively to the issue not only build stronger police/community relations but also impact other crime categories through the strengthened community support.

Despite the obstacles the Bias Crime Unit faced in the NSW Police Force, between 2007 and 2017 the unit made notable advancements including;

- The creation of Bias Crime Standard Operating Procedures
- Holding the inaugural Organised Hate Group forum involving all Australian law enforcement agencies and security services as well as representation from New Zealand Police
- Development of a world first threat management approach to hate crimes and investigations
- Development of strong relationships with state and international law enforcement agencies with respect to hate crimes and organised hate groups
- Developed strong working relationships with Non-Government Organisations both in Australia and overseas.
- Raised the profile of hate crimes within the NSW Police Force
- Rolled out hate crime specific training as well as integrated training

- Hosted several professional development days around hate crimes
- Developed and ran interactive hate crime training (Hydra exercise) for Senior Police leaders (Superintendents)
- Presentations at both national and international conferences

Organisational Structure

Currently, the former Bias Crimes Unit (now known as the Engagement and Hate Crime Unit) is attached to Counter Terrorism and Special Tactics Command. The attachment of the unit to this command is not the best organisational fit. Counter Terrorism is primarily focused on terrorism and not hate crimes. The focus of counter terrorism is primarily religiously and racially motivated incidents. As explained in the opening, the organisational and cultural focus of hate crimes is on incidents perpetrated by extremists, which is simply not the reality of most anti-LGBTIQ+ bias crimes, nor of the vulnerabilities faced by other minority groups.

Hate crimes cover a wide range of protected groups. The placement of the unit within a command with a pre-defined area of responsibility risks that other protected groups do not receive the same attention, support or coverage as those that might fit the counter terrorism remit. The focus of counter terrorism is on extremism and although hate groups can be classified as extremist groups, the majority of hate crime offenders have no association or links to hate groups.

Recommendation 7: That the NSW Police Force's Engagement and Hate Crimes Unit is moved from the Counter Terrorism Command and placed within an organisational structure in the NSW Police Force as a stand-alone unit with adequate resources and staffing

7. POLICE INVESTIGATION MODELS

In investigating hate crimes there have two main approaches internationally. The first is the *single tier model,* where the reporting officer is responsible for the identification, investigation and response to the incident. In this model there is no oversight or review, and the effectiveness of the investigation as well as the response rests with the reporting officer. The outcome of the response is dependent on the level of training the officers receive, departmental procedures and the drive of officers.

The second model is the *two-tier model*. This model has two levels, the report taken by the initial reporting officer who identifies and flags the incident, with a second level of review and oversight by a specialist unit. The reviewing unit has specialised knowledge and expertise and is dependent on departmental procedures. It can also have an investigative role, either taking carriage of all investigations or selectively investigating cases that require in depth and specialised knowledge and skills.

The single tier model has benefits and disadvantages. Dependent on departmental approaches, training can be resource intensive as all officers need to be trained to a high level, but this training removes the need for a specialised unit, which may not be feasible for agencies. One drawback to the single tier approach is the consistency of the hate crimes responses as it is dependent on individual officers.

The two-tier approach is less dependent on the individual knowledge of frontline officers, and includes a review component and a second level to ensure consistency across all hate crimes. One drawback with the two-tier model is the requirement to not only train front line officers but also to train a unit to a high standard, which may impact on departmental resources in the initial stages.

A variation on the two-tier model is that instead of having a specialist unit, *liaison officers* are utilised at the command level to perform the role of oversight and review and to engage communities around hate crimes. The use of liaison officers does not prevent the establishment of a specialised unit and in fact can enhance the process as all commands have a local specialised capability.

When both models are considered, *best practice is the use of the two-tier model*. Both in the United Kingdom and the United States, the two-tier model has been adopted and works successfully, with

two examples being the New York Police Department Hate Crime Taskforce and the London Metropolitan Police Service Hate Crime Liaison Officers and Unit. The key to all policing approaches is to have dedicated officers who respond to hate crimes.

Recommendation 8: That the two-tier investigation model is adopted by the NSW Police Force within the Engagement and Hate Crime specialist unit

Recommendation 9: That the NSW Police Force consider the development of a Hate Crime Liaison Officer program within local commands

Hate Crime Scrutiny Panels

As discussed above, hate crimes are unique offences that involve the targeting of a victim due to their identity. The societal harm caused by a hate crime is magnified by the sense of fear and danger that permeates through the victim's community group following an attack.

It follows, therefore, that concepts such as police legitimacy and community-police relations play an integral role in any successful hate crime policing program. This is especially the case given the high rates of under-reporting of hate crimes, which we later discuss in relation to the LGBTIQ+ community.

For any government hate crime strategy to succeed, it is not sufficient for police to provide an effective law enforcement response to hate crimes. The police must be *seen* by the community to provide an effective law enforcement response.

Hate crime policing relies on the community to report crimes and attend court to give evidence. Accordingly, police must ensure community groups can trust police to take their reports seriously and that a thorough investigation will follow. Police transparency and accountability is paramount in maintaining public trust.

Given the sensitivities around hate crimes and the raw emotions it invokes, community consultation and involvement in developing and reviewing the police responses to hate crimes is paramount. To

this end, Hate Crime Scrutiny Panels have been created to involve communities with the government hate crime response and strengthen law enforcement/community relations.[16]

Generally, hate crime scrutiny panels are a forum for communities to be briefed on hate crime investigations and to discuss and raise any questions, concerns or issues with either the investigation or the response to the hate crime. Similarly, the panels allow police to engage the community around hate crime incidents or hate crimes in general. This allows police to seek assistance from the community either for a specific investigation or for general issues around hate crimes. Scrutiny panels also involve a community audit of a 'dip sample' of de-identified and finalised police hate crime investigations to obtain community feedback.

Scrutiny panels can be made up of either specific community groups or representation from all communities. Advocacy groups and government departments with a role in hate crime response and recovery can also have representation on scrutiny panels. The composition of panel members would vary for each policing area and vary according to its demographics.

Scrutiny panels can operate in various ways. However, there are two main approaches;

- Local based panels that engage police commands or patrols directly; and
- Panels that engage directly with specialised hate crime units.

In NSW, neither approach can be readily implemented given the status of NSW hate crime laws and police hate crime response capabilities, as explained above. NSW Police Force Commands/Police Districts do not have the hate crime awareness or specialised investigative capacity to effectively identify and respond to hate crimes and community issues around hate crime investigations. Furthermore, given the geographic nature of NSW and the limited investigative capabilities of the Engagement and Hate Crime Unit, it is unlikely that a centralised scrutiny panel would be effective. Significant reforms are needed to NSW law and police policy to accommodate scrutiny panels. Ultimately, the effectiveness of hate crime scrutiny panels in NSW is entirely dependent on whether

[16] Asquith, N.L. 2012, Vulnerability and The Art of Complaint Making, in I Bartkowiak-Théron & NL Asquith, (eds), *Policing Vulnerability* (pp.147-164). Sydney: Federation Press; UK College of Policing 2014, *Hate Crime Operational Guidance*. London: College of Policing.

the Engagement and Hate Crime Unit (or equivalent) is well resourced and trained to respond to hate crimes.

Recommendation 10: That the NSW Government should provide careful consideration to implementing hate crime scrutiny panels to improve its hate crime response capabilities

Noting NSW is too large and diverse for a single hate crime scrutiny panel, the Network recommends a tiered approach as originally proposed by the NSW Police Force Bias Crimes Unit in 2014. Under the two-tier model, hate crime investigations would be primarily the responsibility of the command in which the crime occurred. The Engagement and Hate Crime Unit would be responsible for oversight of all investigations and offering expert knowledge and support to the command's investigations. High profile, complex or large-scale investigations would be the responsibility of the Engagement and Hate Crime Unit. This approach allows both local scrutiny panels and an Engagement and Hate Crime Unit scrutiny panel for higher-level, strategic decision making.

Scrutiny panels are sometimes criticised as a platform that enables hostility against the police. The Network rejects these criticisms. To the contrary, scrutiny panels exist to maintain trust, and a positive and productive dialogue, between police and the community: a key principle of community-oriented policing. Scrutiny panels are not there to criticise or interfere with ongoing investigations – panels have no role in investigations. Scrutiny panels create an environment conducive to the free flow of information between communities and police with the purpose of demystifying investigations and building trust between police and communities through accountability and transparency.

Recommendation 11: That the NSW Police Force implements hate crime scrutiny panels at both a Local Command and Engagement and Hate Crime Unit levels (or equivalent)

Recommendation 12: That the NSW Government consider legislating the operation of hate crime scrutiny panels in NSW

8. TRAINING ON HATE CRIME

Police Training

As identified by many hate crime scholars, hate crime laws or provisions are toothless if they are not matched with a policy of increasing the knowledge and cultural capability of police officers to recognise and respond to hate crimes. When the definitional approach is one that relies on police officers making the decision about whether an incident is a hate crime or not, it is critical that frontline officers are aware of the situational, individual, policy and legal factors that constitute an incident as a hate crime or hate incident.

Preparing frontline officers for this task is not easy. If the training comes too early in an officer's skills development, they may lose this knowledge before it is applied. But if we wait until they have encountered their first hate crime, they may not register it as such and the incident will be integrated into the general crime reports. As noted below in our section on hate crime reporting and recording, some of the concerns raised about preparedness of police officers to manage hate crime reports could be ameliorated by prompts and pop-ups in the COPS (police reporting) system. However, this alone will not be sufficient to address the gaps in officers' knowledge.

Currently, NSWPF recruits are introduced to vulnerable populations by way of dedicated training sessions that outline the key issues some communities face in relation to crime and policing. In these sessions, recruits may be exposed to some information about hate crime as it directly relates to the showcased community (EG LGBTIQ+, disabled, ATSI, CALD etc). However, these sessions aim to cover the whole field for these communities and hate crime is one small component of this awareness raising.

Recommendation 13: That the NSW Police Force allocate time and resources during recruit training to provide an overview of all forms of hate crime, the barriers to reporting hate crimes, the additional harms caused by hate crimes, and the additional victim support that may be required by hate crime victims

In this session, recruits should also be informed about the differential motivation underpinning hate crimes, and the unique hate crime

forensics that need to be collected (such as hate speech used during the incident)

Additionally, too often the training provided to recruits about vulnerable or victimised communities is not integrated into their assessment activities, and as such, it not taken as seriously by recruits as knowledge/skills that are assessed. As such, we suggest that in assessed scenario activities in recruit training, hate crime incidents (using a variety of victimised communities and types of victimisation) are used to evaluate recruits' knowledge of hate crime law/policy, investigation, offender management, and victim support

We suggest that as with other specialised crimes, such as Domestic and Family Violence (DFV), there is a need to manage hate crimes in a specialist unit that is staffed by officers with a deeper knowledge of hate crimes, and that all officers' work on investigating hate crimes is guided by policy and Standard Operating Procedures. Members of the recently renamed Engagement and Hate Crime Unit should be offered additional, in-depth training on hate crimes.

Recommendation 14: That the NSW Police Force works with members of the Australian Hate Crime Network to develop an in-house training program to enable officers to specialise in hate crime policing

Further, to ensure that frontline officers' knowledge and skills are maintained, we recommend that:

Recommendation 15: That the NSW Police Force works with members of the Australian Hate Crime Network to develop an online refresher course for officers to access when required

Finally, without frontline leadership on the issues relating to hate crime, it will be difficult to change the culture in relation to hate crimes.

Recommendation 16: That the NSW Police Force works with members of the Australian Hate Crime Network to develop a training program for frontline supervisors to strengthen their oversight of hate crime case management

Other Criminal Justice Training

In addition to the critical training required at the front end of the criminal justice process, it is also important to provide a hate crime context and expertise at each point in the criminal justice process, including *prosecutorial and defence lawyers and barristers, victim support services, and prison and rehabilitation workers*. This training is important to the life course of hate crime cases.

International research has clearly demonstrated that even when a hate crime case is recognised and reported as such by the police, the hate crime aspects of the case are often minimised in case deliberation, and in some cases where penalty enhancement provisions are in place or provisions are made for aggravating circumstances in sentencing, these are the first aspects to be pled away in bargaining.[17] Bargaining of this nature undermines the symbolic aspects of these laws and policies, and results in no general deterrence impact given that the consequences of these types of crimes are not publicised or are removed from the cases in total. Given the introduction of 'early appropriate guilty pleas' in NSW, this aspect is particularly important to ensure community trust in hate crimes protections and prosecutions.

Recommendation 17: That the Office of the Director of Public Prosecutions, and Australian Bar Association (and its state-based affiliates) work with the Australian Hate Crime Network to develop a training program for increasing the skills and capacities of lawyers and barristers to prosecute and defend hate crime cases

Similarly, without adequate training for victim support organisations, staff in these organisations (government and non-government) may be unaware of the unique, ongoing and rippling impact of these crimes to the primary and vicarious victims and wider targeted community. Increasing the skills of counsellors and victim support intake officers to identify these unique characteristics are critical in providing culturally competent support.

[17] Phillips, N.D. 2009, The Prosecution of Hate Crimes: The Limitations of the Hate Crime Typology, *Journal of Interpersonal Violence*, 24(5), 883–905; McPhail, B., & Jenness, V. 2005, To Charge or not to Charge?-That is the question: The pursuit of Strategic Advantage in Prosecutional Decision-Making Surrounding Hate Crime. *Journal of Hate Studies*, 4(1), 89–119; Byers, B. D., Warren-Gordon, K., & Jones, J. A. 2012, Predictors of Hate Crime Prosecutions: An Analysis of Data From the National Prosecutors Survey and State-Level Bias Crime Laws. *Race and Justice*, 2(3), 203–219.

Recommendation 18: That the Department of Communities and Justice's Victim Services work in conjunction with the Australian Hate Crime Network to develop a professional development package for victim support workers and counsellors to assist in building their skills and knowledge to assist hate crime victims

Finally, if rehabilitation and change behaviour are goals of sentencing and punishment, then prison and rehabilitation officers play an instrumental role in long term desistance from these criminal behaviours. In the UK, prison officers are trained in managing hate crime offenders, and prison services provide bespoke education programs to assist hate crime offenders in transitioning out of their aberrant behaviour. [18]

Recommendation 19: That the NSW Department of Communities and Justice, and Corrective Services NSW work in conjunction with the Australian Hate Crime Network to develop a training program to address the knowledge gaps in prison and rehabilitation workers in relation to hate crime offending

Recommendation 20: That the NSW Department of Communities and Justice, and Corrective Services NSW begin developing an education program to assist hate crime offenders to build the capacity to desist from this type of offending

[18] Davis, E. 2015, Helping offenders to "think again": A practitioner's perspective on developing an intervention for hate offenders. In Hall et al (eds), *The Routledge International Handbook on Hate Crime* (pp391-399). London & New York: Routledge; McDevitt, J., Levin, J., Nola, J., & Bennet, S. 2010, Hate crime offenders. In Chakraborti, N (ed), *Hate Crime, Concepts, Policy and Future Directions*. Willan Publishing; Iganski, P. & Smith, D. 2011, *Rehabilitation of hate crime offenders: Research Report*. Equality and Human Rights Commission (Scotland).

9. HATE CRIME REPORTING & RECORDING

Effective reporting and recording systems are critical if we are to get a better sense of hate crime, its prevalence, and impacts. We know from national and international research that hate crime victims are less likely to report a hate crime than other comparable crimes, in large part, due to existing and historically estranged relationships between these communities and the police.[19] Understanding hate crime reporting and recording involves:

- the relationship between citizens and policing or third-party organisations to whom they may report hate crimes or incidents, and
- training and practical experience of police and third-party organisations in recognising the event as reported as a hate crime.

These issues in addressing hate crime recording and reporting affect many marginalised communities. Attention to the recording and reporting practices of hate crimes for all communities offers the opportunity to evaluate how hate crimes are being dealt with, and how they may affect very large cross-sections of the community.

Reports to Police

There are seven critical steps to ensure the successful reporting and recording of hate crime:

1. The victim understands a crime has been committed
2. The victim recognises prejudice may have been a motivating (or aggravating) factor
3. The victim (or another person) solicits police

[19] Iganski, P. and Lagou, S. 2015, The personal injuries of hate crime. In Hall et al (eds), *The Routledge International Handbook on Hate Crime* (pp34-46). London & New York: Routledge; Christmann, K., & Wong, K. 2010, Hate crime victims and hate crime reporting: some impertinent questions. In Chakraborti, N (ed), *Hate Crime, Concepts, Policy and Future Directions*. Willan Publishing; Craig-Henderson, K. & L. Ren Sloan 2006, After the Hate: Helping Psychologists Help Victims of Racist Hate Crime, *Clinical Psychology: Science and Practice*, 10(4); McDevitt, J., Balboni, J., Garcia, L., & Gu, J. 2001, Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated Assaults, *American Behavioral Scientist*, 45(4), 697–713; Iganski, P. 2001, Hate Crimes Hurt More, *American Behavioral Scientist*, 45(4), 626–638; Wong, K. and Christmann, K. 2008, The role of victim decisionmaking in reporting of hate crimes, *Safer Communities*, 7(2), 19-35.

4. The victim (or another person) informs police of the prejudicial motivating factor

5. Police acknowledge/recognise the prejudicial motivating factor

6. Police document the prejudicial motivating factor, and apply appropriate human rights/hate crime charges

7. Police successfully record the incident of hate crime to the appropriate record-keeping authority[20]

An additional step in this process is that police collect and archive appropriately hate crime forensic artefacts to ensure that evidence of the hate crime motivation is recorded and used in any further criminal justice processes.

At each of these steps, the capacity and willingness to report/record a hate crime can be forestalled, especially when the victim (or person reporting) encounters a police officer who is unaware of the characteristics of hate crimes and/or is unwilling to record the incident as a hate crime.

As "hate crime" is not a legislated crime in NSW and not explicitly noted in the *Crimes Act*, the NSWPF has not created fields in COPS to adequately document reports of hate crime. However, there has been, for over 20 years, provision for officers to note in COPS that they believe an incident was motivated by hate or prejudice. This field in COPS is only available to those who know where to look for this information.[21]

Recommendation 21: That the NSW Police Force reform the current reporting system (COPS) to enable compulsory or prompted reporting fields for nominating an incident as a hate crime

Compelling an officer to consider whether an incident is motivated by hate/prejudice will impact on (a) cultural capability of officers to recognise and respond to hate crimes, and (b) more appropriately

[20] Thorneycroft, R.M. & Asquith, N.L. 2015, The Dark Figure of Disablist Violence, *Howard Journal of Criminal Justice,* 54(5), 489-507

[21] NSWPF have recently mooted the development of a hate crime section in COPS

record incidents that may be motivated by hate/prejudice. However, simply asking an uninformed officer about whether they believe it is a hate crime or not may be result in better reporting.

Recommendation 22: That the NSW Police Force works with members of the Australian Hate Crime Network to develop a short, online decision tool that enables officers to better assess whether an incident may be a hate crime

Further, as the COPS system is currently programmed, the unique forensic artefacts of hate crimes are not currently or appropriately captured.

Recommendation 23: That the NSW Police Force amend the current reporting system to enable the collection and documentation of the unique hate crime forensic artefacts (such as hate speech used before, during or after an incident)

Reports to Third Parties

Most often these issues with reporting/recording hate crime are addressed within victimised communities by a range of strategies, including the development of community-led third-party reporting systems. Third-party reporting systems enable communities to increase community awareness of these crimes, and provide a vehicle through which victims can report safely and to a person/organisation that has their interests at heart. Trust building between victimised communities and the police is also facilitated through the intermediary of the third-party reporting system.

Recommendation 24: That the NSW Government invest in a third-party reporting system to enable victims to report hate crimes to a supportive organisation, and that this information can be shared with NSWPF to ensure that hate crime prevalence and patterning is monitored by NSWPF

The LGBTIQ+ community, especially young people, have low levels of trust in police. Evidence suggests that Australian LGBTIQ+ young people believe their reports of interpersonal violence and hate crimes will not be taken seriously by police – although there are positive signs that the presence

of liaison officers can help rebuild community trust in policing.[22] Some sections of the LGBTIQ+ population, for example, transgender people and sex workers, may well have even lower levels of trust in police. A third-party reporting system, that is community-led with positive relationships with police, will ensure that the most vulnerable are not left behind by current systems of recording and reporting.

As explained at the outset of this submission, it is vitally important that police are trained to recognise the features of hate crimes as they affect the LGBTIQ+ community, recognising the intersecting vulnerabilities of that community. That is, that those that perpetrate hate crime are often not external threats from organised extremist groups. They are often those intimately known to LGBTIQ+ victims, including their family and partners. It is important that police and third-party bodies are trained to recognise how hate crimes manifest in each community, and that a crime can be *both* a hate crime and an incident of family violence. At present police may recognise these incidents as domestic or family violence, but not identify these same events as hate crimes. Recognising the nature of LGBTIQ+ hate crime goes to the heart of reporting, recording, dealing appropriately with violent crime including diversionary programmes, and providing adequate victim support services.

Recommendation 25: That the NSW Government considers how reporting, recording, diversionary programmes and victim support services are all tailored to the issues affecting each vulnerable community

[22] Dwyer, A., Ball, M., Bond, C., Lee, M., & Crofts, T. 2020 (*in press*) What stops LGBTI people from seeking support from LGBTI police liaison officers?, *Trends and Issues in Criminal Justice*; Richards, K., Cross, C., Dwye,r A. 2018, Police perceptions of young people: a qualitative analysis, *Police Practice and Research* 20(4), 360-375; Dwyer, A. 2015, Teaching young queers a lesson: How police teach lessons about non-heteronormativity in public spaces, *Sexuality and Culture*, 19(3), 493-512.

10. VICTIM SUPPORT

The NSW Standing Committee on Social Issues *Gay and Transgender Hate Crimes between 1970 and 2010 Interim Report* (February 2019) speaks to the extent of historical violence against LGBTIQ+ communities. While there were calls for a corresponding need for support, little detail was provided:

> Also, while inquiry participants spoke anecdotally of the need for support for victims of historic crime, little evidence was received on what this support would involve and who would provide such support.[23]

This section of the Network submission provides detail on the impact of LGBT hate crimes and recommends a model of support that includes implementation of a redress scheme to support the ongoing recovery of people who lost a loved one or survived historical LGBT violence.

In acknowledgment of the alarmingly high rates of fatal and non-fatal violence experienced by LGBTIQ+ people in NSW between 1970 and 2010, the suffering endured because of this violence, and in recognition that NSW Public Service institutions neglected to adequately protect or support LGBT communities against this scourge of violence, despite possessing intelligence and capability, the Australian Hate Crime Network strongly recommends that:

Recommendation 26: That the NSW Government establish an effective and funded victim support services for survivors of historical LGBT hate crimes and people who lost a loved one to historical LGBT hate crimes

Impact of LGBTIQ+ Violence

Evidence collected during the first round of this Parliamentary Inquiry provides insight into the experiences and support needs of survivors of LGBTIQ+ violence and people who lost a loved one. The evidence is compelling and reflects contemporary knowledge of the impacts of hate crime and support needs.

[23] NSW Standing Committee on Social Issues 2019, *Gay and Transgender hate crimes between 1970 and 2010 – Interim Report*. Sydney: NSW Government.

Impact of losing a Loved One to LGBTIQ+ Hate Crime

Available information on the nature of the 88 listed deaths reviewed by ACON and the NSW Police Force reveals that, "Many were brutal, including stabbings, strangulation, bludgeoning, shooting, sexual assaults and frenzied attacks". Evidence reveals learning that a loved one has been killed in such brutal circumstances can result in Post-Traumatic Stress Disorder (PTSD).[24] For example, based on findings from their study, Zinzow et al (2009), conclude that losing a loved one to homicide significantly increases susceptibility to PTSD. Further:

> Homicide survivors were almost twice as likely to experience past year PTSD, depression, and drug abuse/dependence. Earlier researchers have typically applied a grief framework to understand the impact of homicide survivorship. Our finding of an association between homicide survivorship and PTSD is consistent with more recent research positions that propose reactions to losing a loved one to murder may be better described by PTSD than a typical grief response.[25]

Furthermore, losing a loved one to hate related homicide can result in further impacts on loved ones due to issues relating to the victims' sexuality and/or gender. For example, if the victim was not 'out' it can result in exacerbated shock to learn of this at the time of being told your family member has been killed. As well, knowledge that a loved one was brutally targeted due to their identity can also result in a variety of stressful emotions.

Impact of surviving LGBT violence

In their report, ACON emphasised the lasting impact of violence for survivors and people who lost a loved one:

> The deaths and disappearances of gay men and transgender women and the epidemic of violence during these decades have left a legacy. Hate crimes hurt both physically and

[24] Zinzow, H.M., Rheingold, A.A., Hawkins, A.O., Saunders, B.E., & Kilpatrick, D.G. (2009). Losing a loved one to homicide: prevalence and mental health correlates in a national sample of young adults, *Journal of traumatic stress*, 22(1), 20–27.

[25] Hertz, M.F., Prothrow-Stith, D., & Chery, C. 2005, Homicide survivors: research and practice implications, American Journal of Preventative Medicine, 5(2), 288-295.

> emotionally, individually and communally and have – for some – resulted in isolation, vulnerability and internalised stigma.[26]
>
> Violence is a major contributor to premature death, injury and disability and has consequences for people who experience it, and those who perpetrate it. In addition, there are significant mental health and wellbeing related morbidities related to violence. ACON is committed to ameliorating these health impacts.[27]

There is a strong body of evidence to show that violent hate crimes result in greater impacts for the victim than other violent crimes. According to the American Psychological Association[28]:

- Victims of violent hate crimes are more likely to experience post-traumatic stress, safety concerns, depression, anxiety and anger than victims of crimes that are not motivated by bias.
- Hate crimes send messages to members of the victim's group that they are unwelcome and unsafe in the community, victimizing the entire group and decreasing feelings of safety and security.
- Witnessing discrimination against one's own group can lead to psychological distress and lower self-esteem.

Referring to the specific impacts of homophobic hate crimes, Herek et al state that "…by attacking the victim's gay identity and their community as well as their person or property, can inflict psychological distress and damage above that associated with non-bias crimes".[29] Referring to the support needs of people who survive homophobic violence, Goodwin states: "Homophobic violence can have a deep and lasting impact on survivors and in many instances people do not fully recover instead learn how to cope with trauma".[30] Goodwin advocates for recovery approaches that are

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26 ACON, 2018 In Pursuit of Justice: Documenting Gay and Transgender Prejudice Killings in NSW in the Late 20th Century. Sydney: ACON.

27 ACON, 2018 In Pursuit of Justice: Documenting Gay and Transgender Prejudice Killings in NSW in the Late 20th Century. Sydney: ACON.

28 American Psychological Association 2020, The Psychology of Hate Crimes. Retrieved from: https://www.apa.org/advocacy/interpersonal-violence/hate-crimes

29 Herek, G. M., Gillis, J. R., Cogan, J. C., & Glunt, E. K. 1997, Hate crime victimization among lesbian, gay, and bisexual adults, *Journal of Interpersonal Violence*, 12(2), 195–215.

30 Goodwin, E.L.., 2014, *The Long-Term Effects of Homophobia-Related Trauma for LGB Men and Women*. MA Thesis, State University of New York, US.

tailored to the individual. Similar impacts are experienced by transgender people; however, due to their precarious position within social life, the impacts may last longer and impact a wider range of social activities. Walters et al found that transgender victims of hate crime were more likely to experience repeated incidents of violence than their cisgender peers, and that these elicited emotional reactions such as threat, vulnerability, anxiety, shame and anger.[31] And while participants in Walters et al research indicated that their primary behavioural response to these repeated incidents of hate crime was increased activism, it also led trans people to improve their security, avoid risky people and places, and for a small proportion of participants, retaliation.

It is common for survivors of hate crimes to carry shame and other complex feelings relating to their sexuality and/or gender. During the time period covered by the Inquiry (1970 – 2010), hate crimes against LGBTIQ+ people were pervasive and it was common for people who were beaten to feel shame, or blame themselves, for the violence, which often resulted in many victims not reporting their crimes or seeking medical or psychosocial assistance.

This is illustrated in a submission to the first phase of this Inquiry where the survivor of an attack revealed he had not spoken to anyone about the incident until the Inquiry due to feelings of shame:

> I never spoke to anyone about the attack because I felt ashamed that I was unfaithful to my wife. I learned that the attack had caused my ribs to crack. However, I didn't go to see a doctor or hospital because I could not tell them what had happened. I didn't seek counselling either, because I didn't trust anyone at that time. So I kept this a secret until now, after I heard of this NSW Parliamentary inquiry. I was angry with my attackers, and I was angry with myself too. I was angry that I couldn't tell anyone my story without fear of humiliation, shame, judgement and ridicule. With the inquiry, I come to realise that my thinking was that I deserved this. I come to realise that this incident should never have happened and should have been handled differently. So my hope is the inquiry will

[31] Walters, M. A., Paterson, J., Brown, R., & McDonnell, L 2017, Hate Crimes Against Trans People: Assessing Emotions, Behaviors, and Attitudes Toward Criminal Justice Agencies. *Journal of Interpersonal Violence*. DOI: 10.1177/0886260517715026.

> bring about the necessary changes for the protection of the LGBT+ community. When a crime is committed, justice must be served.[32]

It is understood that there is a large number of people in the same position as the above victim, who would benefit from support programs if implemented today. As such the Network recommends:

Recommendation 27: That the NSW Government creates a support package involving individual and group support, in consultation with people who survived sexuality and gender related hate crimes

Institutional Betrayal

There is a growing body of evidence affirming that victims of crime experience increased levels of trauma if institutions 'betray' them by adversely responding to their crimes. This is referred to as Institutional Betrayal and occurs when victims of crime, who hold trust in an institution, experience an interaction that contravenes their expectation.

Research conducted by Parnitzke Smith and Freyd confirmed that institutions have the power to cause additional harm to assault survivors. Parnitzke Smith and Freyd state that "Consistent with betrayal trauma theory, sexually assaulted women who also experienced institutional betrayal experienced higher levels of several posttraumatic symptoms".[33]

In their report, ACON reported findings of homophobia within the NSW justice system which impacted the response of justice officials:

> Prevailing societal attitudes about homosexuality and systemic homophobia across public institutions were also noted in police and legal professions. This impacted on if, and how, gay hate crimes were identified, investigated, prosecuted and sentenced.[34]

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32 NSW Standing Committee on Social Issues 2019, Submission 11, *Gay and Transgender hate crimes between 1970 and 2010 – Interim Report*. Sydney: NSW Government.

33 Parnitzke Smith, C. & Freyd, F.J. 2013, Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma, *Journal of Traumatic Stress*, 26(1), 119-124.

34 ACON, 2018 *In Pursuit of Justice: Documenting Gay and Transgender Prejudice Killings in NSW in the Late 20th Century*. Sydney: ACON.

Evidence collected during the first round of this Inquiry provides insight into a range of negative interactions between loved ones and survivors with police which can be considered as forms of Institutional Betrayal:

> One man who was bashed in June/July 1989 in Ryde by a group of young people in a public toilet that was a well-known beat, was mocked and humiliated by police when he sought their help.[35]

> …the friend of a victim made the following observations in relation to the police handling of the crime, "I felt the Police were genuinely unhelpful about it. It was a terrible embarrassment to them and they did not want to know anything about it.[36]

> …the victim was badly beaten by a large group of young people at Marks Park, Bondi, a well-known beat, but managed to break free as his attackers were about to throw him over the cliff.[37]

In his submission and during the hearing, the victim speaks about police belittling him:

> I report this assault to the NSW Police at Bondi by phone when I got back to my unit at Bondi Beach. The Police turned up and said are you ok, then laughed at me when I said a friend was coming to take me to the Hospital.[38]

According to the hearing transcript of this witness, when he went to the police station to give his report, he was locked in a prison cell for three hours:

> I asked for help and I was locked in a cell in a police station despite the fact that I was the victim. To this day, I have never been able to understand why they did that to me. I really do not… I felt I did something wrong. I could not get that out of my head, and it was making me very upset. I was young and naive and I thought I was going to be

35 NSW Standing Committee on Social Issues 2019, Submission 11, *Gay and Transgender hate crimes between 1970 and 2010 – Interim Report*. Sydney: NSW Government.

36 NSW Standing Committee on Social Issues 2019, Submission 36, *Gay and Transgender hate crimes between 1970 and 2010 – Interim Report*. Sydney: NSW Government.

37 NSW Standing Committee on Social Issues 2019, Submission 26, *Gay and Transgender hate crimes between 1970 and 2010 – Interim Report*. Sydney: NSW Government.

38 NSW Standing Committee on Social Issues 2019, Submission 26, *Gay and Transgender hate crimes between 1970 and 2010 – Interim Report*. Sydney: NSW Government.

> arrested for being gay… I still had not got over that night because of what they did to me.[39]

While it is not possible to make formal conclusions about these particular cases, these interactions are indicative of Institutional Betrayal and it is possible they could have impacted the victim emotional state and trust in police.

Findings in the Strike Force Parrabell Report reveal that 23 of the 88 cases remain unsolved and evidence from the first round of the Inquiry indicates some of the 'solved' cases were not properly investigated leaving a large number of families and loved ones without answers. Following are two relevant examples provided via submissions during the first round of the Inquiry:

> This submission reveals that the investigation into the victim's death lasted just 24 hours. However, thirty years and three coronial inquests later, it was ruled by the State Coroner that the victim's death was most likely due to a hate crime perpetrated by two or more assailants. This submission speaks to the significant impact on the family of the victim created by the impediments to justice.[40]

> In submission 8 to the inquiry, the informant noted the inconsistency of the bias classification for one of the victims on the original list of 88 crimes. The NSW Police Force classified the crime as "no evidence of hate crime" while the Independent Reviewer, Flinders University, classified the crime as a "gay bias related (anti-gay)". It is apparent from Submission 8 and evidence provided by the witness during the hearing that this inconsistent classification has caused significant stress and lead the individual to go to great lengths to gain clarification from NSW Police Force.[41]

It is on this basis that the Network recommends:

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39 NSW Standing Committee on Social Issues 2019, Submission 26, *Gay and Transgender hate crimes between 1970 and 2010 – Interim Report*. Sydney: NSW Government.

40 NSW Standing Committee on Social Issues 2019, Submission 29, *Gay and Transgender hate crimes between 1970 and 2010 – Interim Report*. Sydney: NSW Government.

41 NSW Standing Committee on Social Issues 2019, Submission 8, *Gay and Transgender hate crimes between 1970 and 2010 – Interim Report*. Sydney: NSW Government.

Recommendation 28: That the NSW Government establish a LGBTIQ+ community engagement program that works to heal the impact of Institutional Betrayal for loved ones and survivors of historical violence, rebuilds the relationship between the community and NSW Police Force and facilitates further justice outcomes

Recommendation 29: The NSW Government supports the development of a pilot study currently being developed by ACON and UNSW to trial the use of LGBTIQ+ justice/healing conferencing program to support victims and loved ones heal the impacts of historical LGBT hate crimes

Support Options

It is the view of the Network that the required victim support services for loved ones and survivors of historical LGBT hate crimes are best packaged within a redress scheme similar to:

- Australian Defence Abuse Response Taskforce (DART)[42]
- National Redress Scheme[43]

Both schemes were developed in recognition of the widespread occurrence, the impact and the need for comprehensive support for victims.

> The DART restorative engagement program showed that a process for 'restoring right relations' could align the work of promoting individual post-traumatic growth while improving the governance and culture of a large organisation.[44]

42 Australian Government 2016, *Defence Abuse Response Taskforce – Final Report*. Canberra: Australian Government.

43 Australian Government 2020, *National Redress Scheme*. Retrieved from: https://www.nationalredress.gov.au/

44 Moore D. 2019, 'Restoring Right Relations': With Oneself, with a Place, with the Past. In Collins P., Igreja V., & Danaher P. (eds) *The Nexus among Place, Conflict and Communication in a Globalising World*. Palgrave Macmillan, Singapore

Following is a suggested model for development of a community led Survivors of Historical LGBT Violence redress scheme. The activities contained within the redress scheme can be delivered separately but are likely to have greater effect if delivered in combination:

- Up to 6 free counselling sessions to be determined at intake
- Peer-based self-help support for the creation of 'communities of care'
- Program Coordination to establish referral networks, provide capacity building to existing support programs to enhance their capacity to provide localised counselling and group support in regional settings
- Provide alternative access options including phone, skype and online supports
- Development of a Restorative Engagement Program
- Referral to police for possible criminal investigation and prosecution

Who can access the scheme?

- Immediate family members of deceased
- Friends and partners of deceased
- People who survived violence
- Friends and partners of people who survived violence
- LGBT community who lived through violent decades
- People who experienced neglect or abuse by authorities

11. CONCLUDING REMARKS

The Australian Hate Crime Network commends the Committee for conducting inquiries into these important issues. The need to enhance responses to hate crimes has become a global priority in response to such heart-breaking attacks experienced by our close neighbours in Christchurch, New Zealand.

The NSW Government has provided national leadership on responses to 'bias crime'. The Network encourages ongoing leadership to repair the wide-reaching harms associated with historical LGBTIQ+ hate crimes and to continue to adapt to cotemporary hate crime related trends and needs.

The Network is made up of more than 80 people and organisations with varying expertise. We aim to improve understanding, reduce incidence and minimise the impact of hate crime and hate incidents in Australia. We welcome all approaches and future collaborations with the NSW Government to meet mutual objectives.