

**Submission
No 39**

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

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Submission to NSW Parliamentary Inquiry into Gay and Transgender Hate Crimes Between 1970 and 2010 – 57th Parliament

Standing Committee on Social Issues
NSW Legislative Council
via email: socialissues@parliament.nsw.gov.au

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To the Committee

Submission re Gay and Transgender Hate Crimes Between 1970 and 2010

Thank you for the opportunity to provide this submission on the subject of ‘Gay and Transgender hate crimes between 1970 and 2010’ in NSW.

I do so further to my original submission to the inquiry into the same subject, held in the previous Parliament.

I welcome the decision by the NSW Legislative Council to re-establish an inquiry into this important topic, and continue this work, this term.

In this submission, I endorse the submissions already made to the re-established inquiry by organisations that represent the LGBT community in NSW. This includes the submission made by ACON.

Specifically, I endorse ACON’s comments relating to Recommendation 3 of the Interim Report (‘That the NSW Police Force ensure that all officers have the skills and knowledge to engage with lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people respectfully and equally’), namely:ⁱ

The recommendation of the Interim Report relating to the responsibility of the New South Wales Police Force fails to recognise the historical context that this Inquiry examined. We would assert that the NSW Police Force also needs to consider the impact of their policing and its effect on our communities in the past. It is only in conjunction with ongoing reflection on these issues that skills and knowledge will have any effect on the relationship between our communities and the Police.

I also endorse ACON’s comments about the disappointing response to the Interim Report provided by the Minister for Police, the Hon David Elliott:ⁱⁱ

ACON believes the response does not adequately take into consideration the overall content of the Committee’s Report on the Inquiry, focusing only on a singular recommendation. The work of the Committee in putting together the Report reflects, to a degree, the personal stories and experiences of community members and organisations. While the Report goes some way to frame these stories in the context of problems with policing and our

communities, the response from Minister Elliott downplays these experiences. The brevity of the response, and its ignorance of the full subject matter of the Report, is disappointing...

The crimes that occurred in the past are abhorrent, and the police response to these crimes was negligent at best. These facts are known by our communities. ACON was extremely disappointed that no such acknowledgement was included in Minister Elliott's response.

Finally, I endorse the call made by ACON for the Committee to seek evidence from NSW Police to assess the four measures that are proposed in the one-page response by Minister Elliott, including how they are being implemented in practice:ⁱⁱⁱ

1. Revised bias crime indicator assessment tools supported by appropriate training packages
2. A review of internal policies ensuring open-mindedness regarding motive
3. Ongoing internal ethical and cultural training to specifically include LGBTIQ experiences
4. Ongoing improvements to ensure bias crimes are centrally captured for state-wide investigations.

I also endorse the submission to the re-established inquiry made by the NSW Gay & Lesbian Rights Lobby. This includes their comments that:^{iv}

The trust to which our community can place in the NSW Police Force will continue to suffer as long as the Force continues to come to grips with its culture of homophobia. As per our previous submission, we want to see ongoing education modules relating to LGBTIQ people as a standard of employment for every employee of NSW Police Force, from the Commissioner down. It is no longer good enough to have a handful of 'trained' GLLOs, unevenly distributed across the state...

An individual living in any corner of this state should be able to deal with any NSW Police Officer or any other public service employee with confidence, knowing they will be treated equally and respectfully.

I also endorse the NSW Gay & Lesbian Rights Lobby's submission on the need for anti-discrimination law reform to help address homophobia and transphobia in NSW:^v

[T]he tacit approval of discrimination must be avoided. Anti-discrimination laws, and their exemptions, have been the subject of wide-spread consideration in recent years. The swift public backlash to exemptions which permit discrimination by religious schools against LGBTIQ people are heartening. However, as yet, the GLRL eagerly awaits the removal of these exemptions. The research and lived experiences ... demonstrate how discrimination permitted by laws such as the Anti-Discrimination Act 1977 (NSW) contribute to a culture which sees hate crimes committed against LGBTIQ people.

Finally, I support the submission made by the Pride History Group (submission number 15), and draw the Committee's attention to the personal accounts of homophobia and transphobia, including homophobic and transphobic violence, which it contains.

In terms of my own substantive comments, I have two criticisms of the Interim Report which I would like to make to the Committee.

The first concerns observations, both in the Chair's foreword, and in evidence provided by Assistant Commissioner Anthony Crandell of the NSW Police Force, that appears to frame NSW Police as passively reflecting the homophobia and transphobia of NSW society, rather than being an active contributor to this discrimination and intolerance.

For example, the Hon Shayne Mallard MLC wrote on page vii that:

*For many decades, pervasive prejudices against LGBTIQ people ran deeply in society. Even with legislative change following the decriminalisation of homosexuality in 1984, bias attitudes were still being perpetuated within the broader community with a legacy that is still keenly experienced today. The ensuing violence and crime against gay and transgender people, particularly in the 1970s, 1980s and 1990s, was shocking, abhorrent and all too common. **Amidst this stood a NSW Police Force and a broader criminal justice system with a culture influenced by the social values of the time** [emphasis added].*

Similarly, on page 8, the Interim Report noted that:

While Assistant Commissioner Anthony Crandell, Police Education and Training, NSW Police Force acknowledged that the 'police force reflected the community and was no different, with culture and values taking far longer to evolve.'

And again on page 45:

In evidence to the inquiry, Assistant Commissioner Crandell acknowledged that historically, the 'NSW Police Force accepted a culture and society that marginalised people who happened to be sexually or gender diverse.'

He made further comments along the same lines on page 69:

Assistant Commissioner Crandell observed that at no stage had the NSW Police Force indicated that there was 'no more homophobia, transphobia or that sort of sentiment' within the force. Rather, he stated: 'We reflect the community.' He explained: 'If we can say that about the community then perhaps I could say that about the police force, but you cannot say that about the community and I cannot say that about the police force...'

The overall impression of these comments is that NSW Police was only ever a 'mirror' reflecting society's homophobia and transphobia back to itself, rather than an organisation with agency that itself generated homophobia and transphobia through its own culture, policies and operational decisions.

I would dispute this 'mirror' characterisation in at least two ways. First, the police force is a key shaper of societal attitudes. It plays a role in deciding those rules that are actively enforced, and those that are not (because there will always be far more 'crimes' committed

than are investigated or prosecuted at any one time) – and this sends a signal to ordinary community members about what are serious breaches of the law versus minor infractions. In this way, the law enforcement actions of police carry a ‘normative’ value.

Indeed, this can be seen in prioritisation of anti-homosexual policing described on page 7 of the Interim Report:

Societal views and attitudes of the time were said to have been compounded by the leadership approach taken by senior policy officers. For example, during the 1950s, the then NSW Police Commissioner Colin Delaney voiced personal views regarding homosexuality that encouraged vigilant detecting and prosecution of homosexual acts and homosexual men by police. In 1958, Commissioner Delaney described homosexuality as “Australia’s greatest menace”; that homosexuals were a “cancer in the community”, who threatened to damage society’s “moral welfare.”

I submit it is impossible to argue that these comments, from the ‘top cop’ in the biggest jurisdiction in Australia, did not have an impact on societal homophobia – especially when it was reinforced by police entrapment and harassment of gay and bisexual men.

The second way in which NSW Police contributed to homophobia and transphobia in society (rather than the other way around), was by failing to properly investigate crimes against gay, bisexual and transgender victims of crime.

While I concede many people at the time may have considered LGBT people to be ‘lesser’ than other members of the community, the actions of NSW Police actually *made them so* under the law, and therefore actively encouraged others to treat them in the same way.

As noted by the Committee itself on page 35:

Throughout the inquiry the committee heard that police investigations into a number of suspected gay hate crimes during the 1980s and 1990s were inadequate, ineffective and in some cases absent almost entirely, with victims and loved ones never receiving adequate justice.

As described by Mr Larry Galbraith on page 32:

[E]fforts to encourage victims to report were often ‘undermined by the police themselves’, which in turn impacted on the willingness of victims to report crimes. Mr Galbraith recounted a sentiment expressed to him, that going to the police was like a ‘lucky dip – expect it was a lucky dip that too many gay men were not prepared to risk’. He explained: ‘For many gay men, it was sheer luck if the cop you saw took your matter seriously and was willing to do something about it.’

By failing to do their jobs and investigating crimes committed against anyone, irrespective of who they were, NSW Police sent a message to the community that crimes committed against gay and bisexual men, and transgender people, were less serious than crimes

committed against cisgender and heterosexual people. That reflects the special role of police in law enforcement, and goes far beyond simply ‘mirroring’ intolerant attitudes.

For these reasons, it was incredibly disappointing to see on page 94 that key sections of the draft Interim Report were removed by Committee members prior to its publication.

This includes the [now deleted] observation that:

The committee accepts the view put forward by a number of inquiry participants that the homophobic culture within NSW Police during the time period examined has significantly obstructed the delivery of justice for members of the LGBTIQ community subjected to violence and hate crimes, in addition to further marginalising a community that already felt ‘rejected’ by many in society’.

Most disappointingly, it involved removing Finding 2:

That the NSW Police Force failed in its responsibility to properly investigate cases of historic hate crime and this has undermined the confidence of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) communities in the NSW Police Force and the criminal justice system more broadly.

I strongly urge the committee to make this finding as part of the re-established inquiry.

My second substantive criticism of the Interim Report relates to how it dealt with the issue of the gay panic, or ‘homosexual advance’, defence – or, more accurately, how it failed to properly address this topic.

The terms of reference specifically included the following:

(b) in relation to LGBTIQ hate crimes more generally:

- i. what role the so-called ‘Gay panic’ defence played in the culture of LGBTIQ hate crimes between 1970 and 2010,*
- ii. how the so-called ‘Gay panic’ defence impacted the delivery of justice and the treatment of Gay men during LGBTIQ hate crime investigations and court proceedings*

However, despite this term of reference, and Chapter 4 of the Interim Report discussing this issue at some length, the Interim Report does not include any findings or recommendations on this subject.

Even worse, once again strong statements on this subject, including a proposed Recommendation, were removed by the Committee prior to the public of the Interim Report (as noted on page 99 of the Report). These deleted paras stated:

While the Crimes Act 1900 has been amended to finally reflect the recommendations of both the 1995 NSW Attorney-General’s Working Party on Homosexual Advance Defence and the

parliamentary inquiry into the partial defence of provocation, the committee acknowledges that there is a 'gay panic' defence legacy.

The committee supports the NSW Government's 2013 directive for the NSW Law Reform Commission to conduct a comprehensive review of the law of homicide and homicide defences, as initially recommended by the 2013 Legislative Council Select Committee on the Partial Defence of Provocation to ensure that recent legal reforms have effectively removed any potential for further injustice to occur. The committee therefore recommends that the NSW Attorney General issue a reference to the NSW Law Reform Commission to require it to undertake a comprehensive review of the law of homicide and homicide defences in New South Wales.

Recommendation 10

That the NSW Attorney General issue a reference to the NSW Law Reform Commission to require that it undertake a comprehensive review of the law of homicide and homicide defences in New South Wales to ensure that recent legal reforms have effectively removed any potential for injustice to occur.

I believe that these paras, and the proposed Recommendation 10, were justified on the basis of evidence provided to the inquiry by ACON, Mr Larry Galbraith,^{vi} and Mr Nathan Johnstone,^{vii} among others.

I strongly urge the Committee to incorporate these comments, and to make a similar recommendation to the deleted Recommendation 10, in its Final Report.

This would highlight the deleterious impact of the gay panic defence, not just on the individual victims whose lives were treated as somehow being less worthy by the criminal justice system, but also the entire LGBT community because crimes against them were seen as less serious than crimes committed against others.

My final comment in relation to the Interim Report is to express my support for the position of the NSW Young Lawyers Human Rights Committee, as summarised on page 50:

The NSW Young Lawyers Human Rights Committee argued that there are limitations to the current GLLO program that need to be addressed. These include:

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

Given the perceived limitations of the GLLO program, the NSW Young Lawyers Human Rights Committee put forward three recommendations to improve its accessibility and effectiveness. These were:

- *Changing the name of the program to the LGBTIQ Liaison Officer program*
- *Increasing the number of LGBTIQ liaison officers particularly in areas where gaps exist*

- *Regularly evaluating the performance of LGBTIQ liaison officers and ensuring adequate support is provided for such officers to perform effectively in their roles.*

I urge the Committee to adopt these suggestions in its Final Report. In this way, and provided they are subsequently adopted by NSW Police, it would help to strengthen this program – and, most importantly, to prevent some of the historical injustices heard by the Committee from being repeated in the future.

Thank you for taking this submission into consideration as part of this important inquiry. Please do not hesitate to contact me, at the details provided, should you require additional information.

Sincerely

Alastair Lawrie

Footnotes:

ⁱ Submission Number 12, ACON, page 11.

ⁱⁱ Submission Number 12, ACON, pages 12-13.

ⁱⁱⁱ Submission Number 12, ACON, pages 14-15.

^{iv} Submission Number 14, NSW Gay & Lesbian Rights Lobby, page 6.

^v Submission Number 14, NSW Gay & Lesbian Rights Lobby, page 8.

^{vi} From page 61 of the Interim Report:

Mr Galbraith was of the view that the ‘gay panic’ defence ‘helped perpetuate the idea that... somehow the crime was lesser and therefore... should not be treated as seriously’. He added it was likely that the ‘gay panic’ defence fed ‘into a culture where other crimes against gay men should not be treated as seriously.’

^{vii} Noting that the following para, describing Mr Johnstone’s evidence, was also removed from the final report: *Mr Nathan Johnstone, Committee member, NSW Gay and Lesbian Rights Lobby summarised for the committee the legacy of the “gay panic” defence:*

I certainly think that it feeds into the level of distrust or the damage to the relationship between perhaps our community and not just police but perhaps the whole criminal justice system. You have got at least, I think it was, 13 people in about a three- or five-year period... who successfully used this before it was abolished. This is remarkable... That will still breed that culture and fuel that culture of distrust.