The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000
lacsc@parliament.qld.gov.au

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Dear Committee,

Submission re Criminal Law Amendment Bill 2016

Thank you for the opportunity to provide a submission regarding the Criminal Law Amendment Bill 2016.

In this submission I will be focusing exclusively on the proposed amendments to section 304 of the Queensland *Criminal Code*, as contained in clause 10 of the Bill.

Overall, I welcome these proposed amendments, given the stated intention of the Queensland Government that they will give effect to their election commitment to repeal the homosexual advance defence, or 'gay panic' defence.

As noted by Attorney-General the Hon Yvette D'Ath in her second reading speech:

"The amendment to section 304 provides that the partial defence is excluded if the sudden provocation is based on an unwanted sexual advance, other than in circumstances of an exceptional character. I know that there has developed a reference to this amendment as removing the 'gay panic' defence – that is, a situation where the defendant claims to have been provoked to murder by a homosexual advance by the deceased. I absolutely acknowledge this amendment's importance to the lesbian, gay, bisexual, trans and intersex community – as it is to all Queenslanders who have voiced their criticism that such an advance could establish the partial defence."

Indeed, the abolition of this defence, in the two Australian jurisdictions where it remains in place (Queensland and South Australia) is a priority for the LGBTI community nation-wide.

That is because the idea that a lesser level of criminal punishment – manslaughter rather than murder – should apply where a man kills another man because of an unwanted sexual advance is, to put it simply, abhorrent.

This point was made eloquently by Justice Kirby in his dissent in the High Court's decision in *Green v The Queen [1997] HCA 50*:

"If every woman who was the subject of a "gentle", "non-aggressive" although persistent sexual advance... could respond with brutal violence rising to an

intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended... Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this Court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones sexual violence by people who take the law into their own hands."

The truly offensive nature of the homosexual advance defence is revealed by asking why it invariably applies to non-violent sexual advances by a man to another man. As Kirby asks, rhetorically, if a non-violent sexual advance from one man to another was sufficient to justify forming the intention to kill or seriously wound, why should this not also apply to a non-violent sexual advance by a man to a woman? Further, why shouldn't a woman who receives an unwanted non-violent sexual advance from another woman have access to the partial defence of provocation? Why doesn't it also apply to a man who receives an unwanted non-violent sexual advance from a woman?

The answer is that in all of these cases society justifiably expects the recipient of the unwanted sexual advance to exercise self-control. A violent response to an unwanted non-violent sexual advance, to the extent that the recipient forms the intention to kill or seriously wound, is so beyond the pale, or so far out of the ordinary, that we do not extend any reduction in culpability to the offender in these circumstances.

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

To have a separate legal standard apply to these cases is homophobic because it implies there is something so objectionable about a non-violent sexual advance by a man to another man that a violent reaction is almost to be expected, and at least somewhat excused. This does not reflect the reality of contemporary Australia, where, with the exception of marriage, gay men enjoy (most of) the same rights as other men, and are accepted as equals by the majority of society.

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

The above discussion outlines why the homosexual advance defence is wrong in principle. What should not be forgotten is that the homosexual advance defence is also wrong in practice, or in the outcomes which it generates. After all, the

defence does not simply exist in the statute books, ignored and unused. Instead, it has been argued in a number of different criminal cases, sometimes successfully.

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

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

For all of these reasons, I strongly support the abolition of the homosexual advance defence, or 'gay panic' defence, in any jurisdiction where it remains.

Therefore, I commend the Queensland Palaszczuk Labor Government for its commitment to remove this abhorrent law from the statute books via the Criminal Law Amendment Bill 2016.

It does so through the inclusion of clause 10, which would amend section 304 of the Queensland *Criminal Code*, the provision that establishes the partial defence to murder of provocation.

Specifically, I welcome the proposed insertion of new sub-section 304(3A):

"Further, sub-section (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person."

Prima facie, the inclusion of this new sub-section substantively removes the partial defence of provocation for circumstances where the 'provoking conduct' was an unwanted, non-violent sexual advance.

In principle, then, the homosexual advance defence, or 'gay panic' defence, would be abolished in Queensland by the passage of this Bill.

However, I do have two concerns about the drafting of the amendments to section 304, and their potential operation.

First, by including the phrase 'other than in circumstances of an exceptional character', I am concerned that this leaves the door slightly ajar to at least some cases where the homosexual advance defence may be sought to be used.

I note that, for the purposes of new sub-section 3A, there is no *restriction* on what might constitute 'circumstances of an exceptional character' (with proposed new sub-section 6A merely providing that regard may be had to any history of violence, or of sexual conduct, between the offender and the victim).

This leaves room for judicial interpretation, and the possibility, albeit remote, that the homosexual advance defence may still be successfully raised.

For this reason, I suggest that the operation of the reforms to 304 be reviewed after a period of five years, to assess whether these amendments have operated as intended.

Recommendation 1: The operation of the proposed reforms to section 304 should be reviewed after five years, to assess how they have operated in practice, including how the term 'circumstances of an exceptional character' has been applied in cases where a defendant has sought to invoke what would be described as the homosexual advance defence.

The second concern I have about the proposed amendments is the inclusion of the definition of 'unwanted sexual advance' in new sub-section 9:

"In this section-
unwanted sexual advance, to a person, means a sexual advance that-
(a) is unwanted by the person; and
(b) if the sexual advance involves touching the person – involves only minor touching.
Examples of what may be minor touching depending on all the relevant circumstances-
patting, pinching, grabbing or brushing against the person, even if the touching is an offence against section 352(1)(a) or another provision of this Code or another Act."

The attempt to provide clarity of what forms an unwanted sexual advance, as a means to prevent the successful use of the homosexual advance defence, is clearly welcome.

The reference to section 352(1)(a) is also useful because, as the Attorney-General noted in her second reading speech "the spectrum of conduct that falls within the offence of sexual assault is very broad", and this should not automatically result in an increased ability of a murderer to seek to have their charge downgraded.

However, the creation of a definition of unwanted sexual advance creates the risk, and arguably the incentive, for the perpetrator of these types of offences to

exaggerate the 'touching' that was involved in the unwanted sexual advance that preceded the murder.

Given the nature of these cases, there will necessarily be no ability for the victim to provide any evidence disputing this exaggeration.

It would obviously be disappointing if, in attempting to remove the homosexual advance defence, the Government introduces a provision that instead allows its continued use, in certain circumstances, with the defendant induced to increase their claims about the unwanted sexual advance by the deceased.

It is difficult to see how this particular risk can be completely excluded – other than by adopting the approach of some other states and territories (including Victoria, Western Australia and Tasmania) to abolish the partial defence of provocation entirely.

As with the definition of 'circumstances of an exceptional character' above, I suggest that the operation of these provisions generally, and the definition of 'unwanted sexual advance' specifically, be reviewed after five years, to determine whether there have been any unintended or unforeseen consequences of these amendments.

If there have been, then at that point it may be appropriate to consider abolishing the partial defence of provocation altogether, and replacing it with specific defences or partial defences for a limited range of scenarios (for example, in the context of family violence).

<u>Recommendation 2:</u> The operation of the proposed reforms to section 304 should be reviewed after five years, to assess how they have operated in practice, including how the definition of 'unwanted sexual advance' has been applied, and whether it has simply induced defendants to exaggerate their claims about the unwanted sexual advance by the deceased.

Thank you again for the opportunity to provide this submission regarding the Criminal Law Amendment Bill 2016, and specifically about clause 10, a provision that is intended to finally abolish the homosexual advance defence, or 'gay panic' defence, in Queensland.

As indicated above, I welcome these reforms in principle. The above two recommendations are offered in order to help ensure that the intention of the Bill is reflected in practice.

I can be contacted at the details provided with this submission, should the Committee have any questions about this submission, or require any additional information about the matters raised.

Sincerely
Alastair Lawrie