



'ENDING AN EXCUSE FOR MURDER': REVIEWING THE PARTIAL DEFENCE OF PROVOCATION IN QUEENSLAND

SUBMISSION TO THE QUEENSLAND LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE ON THE CRIMINAL LAW AMENDMENT BILL 2016

JANUARY 2017

## ABOUT THE GAY & LESBIAN RIGHTS LOBBY

Established in 1988, the NSW Gay & Lesbian Rights Lobby (GLRL) is the leading organisation for lesbian and gay rights in NSW. Our mission is to achieve legal equality and social justice for lesbians, gay men and their families. The GLRL has a strong history in legislative reform.

In NSW, we led the process for the recognition of same-sex de facto relationships, which resulted in the passage of the *Property (Relationships) Legislation Amendment Act 1999* (NSW) and subsequent amendments. The GLRL was also successful in campaigning for an equal age of consent in NSW for gay men in 2003 and the equal recognition of same-sex partners in federal law in 2008.

The rights and recognition of children raised by lesbians and gay men have also been a strong focus in our work for over ten years. In 2002, we launched *Meet the Parents*, a review of social research on same-sex families. From 2001 to 2003, we conducted a comprehensive consultation with lesbian and gay parents that led to the reform recommendations outlined in our 2003 report, *And Then ... The Bride Changed Nappies*. The major recommendations from our report were endorsed by the NSW Law Reform Commission's report, *Relationships* (No. 113), and enacted into law under the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW). In 2010, we successfully lobbied for amendments to remove discrimination against same-sex couples in the *Adoption Act 2000* (NSW) and in 2013 we were instrumental in lobbying to secure the passage of anti-discrimination protections for LGBTI Australians, through amendments to the *Sex Discrimination Act* (1984). We also campaigned successfully for the removal of the "homosexual advance" defence from the *Crimes Act 1900* (NSW) and the extinguishment of historical homosexual sex convictions, both in 2014.

## INTRODUCTION

The New South Wales Gay and Lesbian Rights Lobby (GLRL) welcomes the opportunity to provide comment on the *Criminal Law Amendment Bill 2016*. We are strongly supportive of proposals to restrict the partial defence of provocation, particularly in cases involving a non-violent advance.

In this brief submission, we intend to focus on a specific section of the bill, providing detailed commentary in our area(s) of expertise and interest, noting findings and recommendations of previous reports into this matter. We limit our comments to the common law formulation of the 'homosexual advance defence'. Our submission provides **one recommendation: prioritising the passage of this legislation, to avoid future instances where the defence of provocation can be invoked.**

## THE PARTIAL DEFENCE OF PROVOCATION AND THE 'HOMOSEXUAL ADVANCE DEFENCE'

Provocation is a partial defence under s304 of the *Criminal Code 1899* (QLD) (hereafter referred to as 'the Act') that, if established, can be used to reduce a charge of murder to manslaughter. It sits alongside other partial defences to murder, including excessive self-defence and substantial impairment by abnormality of the mind.

Provocation is established where an act, or omission, is the result of loss of control on the part of the accused that was occasioned by any conduct on the part of the deceased that affected the accused and could have induced an ordinary person, in the position of the accused, to have lost control to such an extent that they formed an intent to kill or inflict grievous bodily harm upon the deceased.

Critically, the defendant does not have to prove provocation. In cases where there is evidence of provocation, the onus is on the Crown to prove beyond reasonable doubt that the defendant was not, in fact, provoked.

The 'homosexual advance defence' is a common-law formulation that operates within the partial defence of provocation established by the Code. It effectively functions as a partial defence in murder cases where an unwelcome sexual advance from someone of the same-sex is established. It is important to note that acts constituting 'provocation' need not have immediately preceded an act where grievous bodily harm was inflicted on the deceased.

The successful use of the homosexual advance defence in criminal trials, including in the case of *R v Meardink and Pearce*<sup>1</sup> in QLD, effectively renders non-violent sexual advances by someone of the same-sex as necessarily provocative for the 'ordinary person', and thereby represents an extremely homophobic creature of the common law. It effectively renders a gay, or bisexual, victim who is alleged to have made a sexual advance as being 'lesser' than another victim; or a person possessing different sexual desire(s) as necessarily threatening to, and thereby provocative for, the 'ordinary person', a seemingly hetero-normative 'common sense' construction that nonetheless belies a deep-seated homophobia.

There are important differences between the 'homosexual advance defence' relied on in Australian jurisdictions and the 'homosexual panic defence,' which predates it and arose in the United States. Whilst the homosexual advance defence relies on the homophobic, and potentially bi-phobic, construction of an 'ordinary person' as being repelled and disgusted by a same-sex advance, to the extent it leads them to lose control and to form an intent to kill or inflict grievous bodily harm, the homosexual panic defence relies on a different logic. It refers to a case where a defendant relies on a plea of insanity, or diminished responsibility, in instances where a same-sex advance was involved due to their own inability to negotiate their 'latent homosexuality,' as well as the expectations associated with heterosexuality. It is based on an interpretation of the largely discredited clinical psychological notion of 'acute homosexual panic', developed by psychologist Edward J. Kempf in 1920.<sup>2</sup>

Reviews in QLD have called for the restriction of the partial defence of provocation, particularly in cases involving a non-violent sexual advance, including in 2008 from the Queensland Law Review Commission, as well as a Committee review conducted in 2011 at the request of the Queensland government, which recommended an amendment to Section 304, specifying "the goal of having a

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<sup>1</sup> R v Meardink and Pearce (2010) QSC 158

<sup>2</sup> Golder, B. (2004). 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004) 11(1) *E Law – Murdoch University Electronic Journal of Law*, paras 1-67.

Criminal Code which does not condone or encourage violence against the lesbian, gay, bisexual, trans\* or intersex (LGBTI) community” as a reason for supporting the amendment.<sup>3</sup>

Action on this recommendation would signal the end to a law that has reduced the charge of murder to manslaughter in the past and effectively placed the lives of many gay and bisexual men in danger. Historically, the use of provocation in the case of a non-violent sexual advance has only ever been invoked in cases involving an advance from a male to another male. For this reason, we strongly support amendments to the law that would consign the partial defence of provocation, in cases involving a non-violent sexual advance, to history.

## CONCLUSION

The NSW GLRL welcomes legislation to remove the partial defence of provocation in cases involving a non-violent sexual advance. This provides assurance to members of our community that they are equal in the eyes of the law and removes excuses for barbarous acts committed in the name of so-called ‘provocation.’ Laws that legitimate, and effectively condone, violence directed at lesbian, gay, bisexual, trans\* and intersex (LGBTI) people have played a decisive role in the dehumanisation of members of our community throughout history, so the substantive revision of such laws is critical.

Proposed amendments to the *Criminal Code 1899 (QLD)*, in our view, would result in significant improvements to the criminal law as it stands, and send a strong symbolic and material message to perpetrators, as well as those in the community who would contemplate committing such acts, that they are not acceptable, are not condoned by the law, and will be punished accordingly. In our view, this would remedy a historic artefact of homophobia and bi-phobia in the law, and thereby further the goals of substantive legal equality for all people in QLD, and particularly victims of extreme violence following a non-violent sexual advance by someone of the same-sex.

Finally, in our view, the proposed amendments to the *Criminal Code 1899 (QLD)* embodied in the *Criminal Law Amendment Bill (2016)*, should be expressly introduced and enacted, in order to prevent the use of the partial defence of provocation in other cases that may come before the courts involving a non-violent sexual advance.

## CONTACT

For further information, please contact [REDACTED].

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<sup>3</sup> *Criminal Law Amendment Bill 2016 Explanatory Notes*