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### ACL Submission regarding the Criminal Law Amendment Bill 2016

The Australian Christian Lobby's (ACL's) vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With more than 80,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

### The Criminal Law Amendment Bill 2016

The *Criminal Law Amendment Bill 2016*, introduced to the Queensland Parliament by the Honourable Yvette D'Ath on 30 November 2016, proposes to address concerns from the homosexual community that section 304 currently works to legitimise homophobia. The recent case of *R v Meerdink and Pearce [2010]* has met with strong community feeling, expressed in the form of a significant petition, calling for the amendment of this "homosexual advance defence" (HAD) law, that is understood to particularly disadvantage the homosexual community.

ACL fully supports equality before the law for all members of the Australian community regardless of race, gender, age, sexual orientation, religion or political opinion. Discriminatory laws are clearly incompatible with understandings of the necessary preconditions for a free society and therefore need to be challenged. However, the case of section 304 is complicated because the law is not *prima facie*, discriminatory. It makes no reference to sexual orientation, gender or any other distinguishing features of the defendants who may avail themselves of the partial defence of provocation contained in section 304 or the circumstances in which they may do so.

Dissatisfaction from the homosexual community concerning section 304 derives from how it has been developed in case law.<sup>1</sup>

*Even when cases are not formally and specifically pleading the 'gay panic' defence, the mere bringing in of suggestions that the victim made a non-violent homosexual advance, (whether true or not), poisons the waters and taps into deep-seated homophobia and bigotry and ought not be brought up at all in any way in the hearing of a jury. The victim is not on trial here.*<sup>2</sup>

Cases, such as *R v Meerdink and Pearce*, are interpreted as evidence of community attitudes that are less condemnatory of violence in response to unwanted homosexual advances than towards violence in response to unwanted heterosexual advances.

ACL is concerned that the proposed change arbitrarily excludes all “unwanted sexual advances” of a non-violent nature from the court’s consideration of circumstances that might be understood to contribute to “provocation”. Section 304 does not relate exclusively to the cases of homosexual advances. The effect of these changes on the entire Queensland community must therefore be considered carefully. The proposed changes may result in unforeseen and disproportionately adverse consequences for many accused of murder in Queensland. Legislation cannot anticipate the complex matrices of evidence presented in court rooms. A fundamental obligation of the court is to ensure a fair trial for the accused. Restrictions regarding the evidence that can be considered relevant to the trial or attempts to direct the findings of a court too narrowly or to fetter the discretion of judges in deciding on sentencing, are likely to result in injustice in circumstances that have not been adequately anticipated, and cannot be adequately anticipated, outside the courtroom.

**ACL submits that the *Criminal Law Amendment Bill 2016* should not be passed.**

### Section 304 as a “gay panic” or homosexual advance defence (HAD) law

Between 1899, when the Criminal Code was first enacted, and 2011, section 304 remained essentially unchanged (with the exception of a minor amendment made in 1997).<sup>3</sup> Section 304 is available as a partial defence of “sudden provocation” to murder and, if considered applicable, has the effect of reducing murder charges to manslaughter:

*(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.*

According to the explanatory notes of the Queensland Department of Justice and Attorney-General, “sudden provocation” for the purposes of section 304 is understood to encompass:

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<sup>1</sup> Kent Blore, *"The Homosexual Advance Defence and the Campaign to Abolish it in Queensland: The Activist's Dilemma and the Politician's Paradox"*. *Queensland University of Technology Law & Justice Journal*, vol. 12(2), 2012.

<sup>2</sup> Rev Fr Paul Kelly, “Stop allowing ‘gay panic’ as an excuse for murder in Australia”, Change.org petition. Available at: <https://www.change.org/p/stop-allowing-gay-panic-as-an-excuse-for-murder-in-australia>

<sup>3</sup> *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, Department of Justice and Attorney-General, 2007. p.1. Available at: [https://secured.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0019/21628/review-of-homicide-defences-paper.pdf](https://secured.justice.qld.gov.au/__data/assets/pdf_file/0019/21628/review-of-homicide-defences-paper.pdf)

*conduct which causes a loss of self-control on the part of the defendant and which could be capable of causing an ordinary person to lose self-control and to act in the way which the defendant did. The defendant must actually have been deprived of self-control and have killed the other person while so deprived.*

*As there is no definition of provocation in relation to murder ... the common law is relied upon for interpretation of section 304. The High Court in Stingel (1990) 171 CLR 312 stated that a subjective and an objective test apply. The accused's personal characteristics are considered to determine the level of seriousness of the provocation. This can include all the complexities that make up that individual, such as age, sex, cultural and racial background and family history. But then the question is whether an 'ordinary man' sharing only the same age as the accused would have killed in response to that level of provocation.<sup>4</sup>*

The degree to which the same external degree of "provocation" will affect different individuals is therefore determined according to a number of complex and inter-related characteristics of the accused. Within general parameters of what is considered "ordinary", these will vary on a case-by-case basis.

On the other hand, the findings of such cases as *R v Meerdink and Pearce* [2010], strengthen perceptions within the homosexual community that a generalised understanding exists, and is supported in law, that homosexual advances might justifiably be regarded as particularly repugnant to heterosexual men (simply because of the homosexual nature of these advances) compared with similar unwanted heterosexual advances directed towards women.

Although the law does not mention sex or sexual orientation, it is argued that the cultural understandings at work in the courtroom acknowledge "gay panic" as a legitimate response, with the result that a man's violent responses to unwanted homosexual advances are considered justifiable "provocation" for murder. Commenting on the similar operation of a NSW law in deciding the case *Green v The Queen* (1997), former High Court Justice Michael Kirby noted that the "non-violent homosexual advance" defence in murder cases provides a judicial understanding of the ordinary man as a "violent homophobe" in which "non-violent homosexual advances" are revolting and worthy of deadly force as a just punishment.<sup>5</sup> According to Justin Koonin, Convenor of the NSW Gay and Lesbian Rights Lobby:

*Aside from limiting criminal responsibility, the defence entrenches homophobia in the law by claiming the 'ordinary person' would find a flirtatious advance from a person of the same sex so provocative as to induce them to lose self-control to the extent that they form an intent to kill."<sup>6</sup>*

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<sup>4</sup> *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, Department of Justice and Attorney-General, 2007, pp. 16–17.

<sup>5</sup> "Qld's 'homosexual advance' defence puts gay men's lives at risk", Crikey, 18 March, 2014. Available at: <https://www.crikey.com.au/2014/03/18/qlds-homosexual-advance-defence-puts-gay-mens-lives-at-risk/>

<sup>6</sup> Justin Koonin, New South Wales Gay and Lesbian Rights Lobby, Submission No. 22 to the New South Wales Parliament's Select Committee on the Partial Defence of Provocation, *Inquiry into Partial Defence of Provocation*, 10 August 2012, p. 2. Available at: <https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/41747/0022%20New%20South%20Wales%20Gay%20and%20Lesbian%20Rights%20Lobby.pdf>

The interpretation of this law purely in terms of how it affects homosexual men, is set out clearly by David Mack, who argues that, in order to understand fully why reform is warranted and urgent, it is necessary first to “embrace an analysis framed by queer theory”:

*The very nature of HAD relies on cementing distinctions between a ‘heterosexual normality’ and a ‘homosexual other’. The ‘defence’ relies on reactions to perceived threats or insults to a personal male honour which has somehow been weakened or challenged as a result of the non-violent homosexual advance.<sup>7</sup>*

The purpose of changing the law to exclude unwanted sexual advances, is to prevent courts acting on social prejudice against homosexuals by legitimising “gay panic”.

### 2011 amendments to section 304 and proposed further changes

In recognition of these concerns, under the terms of the *Criminal Code and Other Legislation Amendment Act (2011)*, a number of qualifying subsections were added to section 304. Subsections (3)–(6) explicitly disqualify established relationships from being considered under the terms of section 304. (These are dealt with in a separate section of the Criminal Code). In addition “provocation” is limited by subsections (2), (7) and (8):

*(2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.*

*(7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.*

*(8) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.*

The effect of these changes has not yet been tested in case law. Nevertheless, it is argued that considerable scope for injustice to homosexuals still remains and must be addressed by further amendments such as those proposed in the Government’s *Criminal Law Amendment Bill 2016*, currently being considered.<sup>8</sup>

Under the new proposals, the addition of subsections (3A) and (9) would exclude non-violent “unwanted sexual advance” from acceptable definitions of partial defence of “sudden provocation” normally available to a defendant under section 304:

*(3A) Further, subsection (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*

*(6A) For proof of circumstances of an exceptional character mentioned in subsection (4), regard may be had to any history of violence, or of sexual conduct, between the person and the person who is unlawfully killed that is relevant in all the circumstances.*

*(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 involved touching the person – involves only minor touching.*

<sup>7</sup> Mack, op. cit., p. 178.

<sup>8</sup> Hansard, Parliamentary Debates, Queensland Parliament, 30 November 2016, pp. 4699–4700. Available at: <http://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/161130/Criminal.pdf>

*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.<sup>9</sup>*

Section 352(1)(a) of the *Queensland Criminal Code (1899)* deals with sexual assaults and describes:

*Any person who unlawfully and indecently assaults another person.<sup>10</sup>*

This means that, if the government's proposed changes are enacted in law, actions that are sufficiently serious to constitute sexual assault according to the definition of section 352(1)(a) and which, in other circumstances, might carry a sentence of up to 10 years imprisonment, could no longer be considered as "provocation" for the purposes of a partial defence of section 304. Non-violent sexual assaults, which are currently available in law as legitimate grounds for a partial defence for murder, and which may, according to the court's discretion, reduce the charge from murder to manslaughter, could no longer be brought into the court's consideration of capital trials. Anyone responding violently to a non-violent sexual assault, where tragic results ensue, will be culpable for murder and a mandatory life sentence.

The denial of a partial defence to those accused of murder is particularly harsh and requires very strong justification. According to the Queensland Government's Discussion Paper *Audit on Defences to Homicide*:

*Although a number of jurisdictions have enacted repeal or reform of the provocation defence, none of these jurisdictions apply mandatory life imprisonment for murder.<sup>11</sup>*

The case of the law in Queensland therefore differs importantly and does not bear superficial comparison with other Australian jurisdictions.

### The proposed changes have several negative effects for women

Importantly, the arguments that evaluate section 304 as a HAD law, fail to take account of how such an amendment could affect the conduct of trials that do not involve homosexual advances. The language of section 304 is not gendered and does not distinguish according to sexual orientation. It applies equally to men and women of homosexual and heterosexual orientation. Several points need to be made here:

1. *Women experience higher levels of sexual harassment from heterosexual men than heterosexual men experience from homosexual men*

Kavita Ramakrishnan, recognises that women are routinely subjected to greater levels of sexual harassment than men and that this is already insufficiently acknowledged by the law:

*The law recognizes certain advances on men as inappropriate enough to deserve legal recognition in the form of mitigation of murder charges while the same*

<sup>9</sup>*Criminal Law Amendment Bill 2016*, p. 12. Available at:

<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2016/5516T2186.pdf>

<sup>10</sup> Queensland Consolidated Acts. [http://www.austlii.edu.au/au/legis/qld/consol\\_act/cc189994/s352.html](http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/s352.html)

<sup>11</sup> *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, op.cit., p. 2.

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*advances on women are not even considered severe enough to rise to the level of a claim that may be heard in front of a jury.<sup>12</sup>*

This discrepancy underscores the fact that changes to “provocation” laws to exclude “unwanted sexual advances” are essentially anomalous and inconsistent with laws intended to offer protections from sexual harassment and assault. The minimisation of the harm done to women by routinely-experienced harassment (even harassment that does not involve “minor touching”), is of significant concern to everyone concerned for social justice, particularly the women’s rights movement and has been the subject of a world-wide, decades-long campaign for reform.

2. *To the extent that section 304 operates as a HAD law, changing it will operate to condone “unwanted sexual advances”*

If, as has been argued, the effect of section 304 is to legitimise violence against homosexuals (and this argument is complicated by objections that will be discussed further below<sup>13</sup>), then changing the law to exclude “unwanted sexual advances” from the grounds of admissible provocation must be recognised as legitimising unwanted sexual advances. The extent of legitimisation conferred by the law in each case must be at least equal. Obviously, the legitimisation of unwanted sexual advances of a non-violent nature has significant implications for women. Looking only at those cases in which men are the source of the unwanted sexual advances (and this is to momentarily overlook instances of female homosexual advances or the growing body of cases in which women have been sexually predatory towards men) only some (and perhaps a small percentage) of these will be homosexual advances towards heterosexual men. It can be assumed that most will be heterosexual advances towards women.

Recognition of the routine harassment faced by women is not new. Efforts to address this endemic problem, which works to the disadvantage of women in all spheres of life, have more recently included public education campaigns around what does, and what does not, constitute “consent” to sex. Some of the central messages of this campaign include the fact that “consent” cannot be inferred from the absence of sexual resistance; consent is not conferred by a grudging acquiescence in response to pressure. The aim of these campaigns is to challenge ideas that unwelcome sexual advances to women are acceptable and to advocate for verbal, non-physical, respectful forms of communication before sexual contact is initiated. It is not acceptable for women to be grabbed, groped or pinched. Yet the exclusion of these forms of behaviour from section 304 sends a distinctly contrary message. If these forms of behaviour, which are recognised as sexual assault, are only admitted to contribute to a section 304 partial defence under “extreme and unusual circumstances”, this clearly communicates a legal tolerance of all these things under “common and usual” circumstances.

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<sup>12</sup> Kavita B. Ramakrishnan, “Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace”, *Berkeley Journal of Gender, Law and Justice*, Vol. 26(2), pp. 296-97. Available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1293&context=bglj>

<sup>13</sup> See Section 5.

3. *Discussions of section 304 as a HAD law ignore its application to women and assume women will never need this partial defence*

Discussions that focus exclusively on the influence of HAD laws in legitimising “gay panic”, only parenthetically acknowledge that these laws apply equally to women.<sup>14</sup> Part of the reason for this seeming oversight, is the general acknowledgement that this “provocation” has not played a significant part in the case law for murder trials involving women defendants in Queensland:

*Although the provocation defence in Queensland appears to be neutral in terms of sexual orientation, the defence operates in a discriminatory fashion. A non-violent sexual advance can be asserted by anyone irrespective of sexual orientation, and yet a non-violent heterosexual advance has never been raised in any case in Queensland in the context of provocation.<sup>15</sup>*

An investigation of all the possible reasons for this is outside the scope of the current submission. One obvious factor might be the usual differences between the physical strength of men and women. Women, responding violently to unwanted sexual advances, are perhaps less likely to kill. The submission of Glenda Gartrell (who worked for many years in the NSW prison system in a capacity that required close study of the offences of both male and female prisoners) to the NSW Select Committee on the Partial Defence Provocation in 2012, suggests that the motivations of men and women for killing and the circumstances in which this happens might differ significantly. Gartrell argues that:

*“the provocation legislation was developed to take into account these very different circumstances. The behaviour differences which led to the introduction of provocation legislation continues [sic] to this day and for this reason the defence of provocation should be retained.”<sup>16</sup>*

The role of Parliament in establishing laws is not to respond to a statistical analysis of how frequently these laws have been appealed to in practice. The role of Parliament is to establish principles of justice to guide courts in their decisions and sentencing. The fact that no woman in Queensland facing murder charges has appealed to “provocation” does not mean that women who might face these charges in the future should be deprived of “unwanted sexual advances” as a contributing factor to this partial defence.

A scenario in which the proposed changes might result in injustice for a female defendant is not hard to imagine. If, for example, a woman working late in the office is the subject of an unwanted sexual advance from a male colleague, who grabs her breast (which, under the proposed wording of section 304(9)(b), would count as “light touching” and therefore would not qualify as a partial defence for a charge of murder) and she, being filled for that moment with murderous rage and having the memory of childhood abuse recur to her mind in such a way as to confuse her reason, responds violently by punching her assailant, or stabbing him with scissors, or beating him over the head with a convenient heavy object, so that he dies, she would have no access to the partial defence of provocation. In these

<sup>14</sup> For example, “It is clear that the amendment in s 304(2) was not designed to completely eliminate ... the possibility that a defendant might rely on a non-violent homosexual (or even heterosexual) advance to establish a defence of provocation.” (David Mack, op. cit., p. 176.)

<sup>15</sup> “Qld's 'homosexual advance' defence puts gay men's lives at risk”, Crikey, 18 March, 2014. Available at: <https://www.crikey.com.au/2014/03/18/qlds-homosexual-advance-defence-puts-gay-mens-lives-at-risk/>

<sup>16</sup> Glenda Gartrell, Submission No. 7, NSW Select Committee on the Partial Defence of Provocation, 2012. Available at: <https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/52066/0007%20Ms%20Glenda%20Gartrell.pdf>

circumstances a judge would be obliged to award the mandatory life sentence for murder because the provocation offered by the deceased to the accused constituted only a non-violent unwanted sexual advance.

The Attorney-General has previously referred to the fact that the 2011 amendments (which considerably limit the circumstances in which section 304 can be applied) have not yet been tested in case law as the reason for his reluctance to limit section 304 further. Mack dismisses this argument as “fundamentally misguided” saying instead that the responsibility of the government is to

*“ensure its laws are watertight and not to allow ‘test cases’ to reveal legal loose ends. If a defendant is successful in arguing HAD under these new amendments and having his charge reduced from murder to manslaughter it will be too late to achieve true justice for the homosexual victim and his family. The apparent lack of clear-cut HAD cases in Queensland law at present should not be allowed to be a consideration in the argument for the necessity of reform.”<sup>17</sup>*

This same argument can be used equally to make the contrary case – that the government should not change the law in anticipation that no woman charged with murder will ever need to appeal to this partial defence. If the government does adopt the proposed changes, and a female defendant is subsequently unsuccessful in arguing the “provocation” of “unwanted sexual advances” and having her charge reduced from murder to manslaughter, it will be too late to achieve true justice for the accused. If a fundamental obligation of the court is to provide a fair trial for the accused, the restriction of its discretion will arguably result in a greater injustice than that envisaged by Mack if the laws remain unchanged.

### The proposed amendments would fetter the sentencing discretion of the judge

The circumstances of all trials before Queensland’s courts cannot be anticipated by Parliament. This is the very reason that discretion in interpreting the law is entrusted to a trained, professional, impartial judiciary. The judge is best placed to decide sentencing, including stiff sentences where appropriate, and is able to take account of the overarching circumstances of each case on its merits. This principle has been explicitly acknowledged in previous Parliamentary debates regarding amendments to section 304. Attorney-General, the Honourable Paul Lucas, when asked to define how the words “extreme and exceptional” in subsection (2) might be interpreted replied:

*The words are not defined in the clause for very good reason – they are matters that are best left to the court to determine in particular circumstances ... In fact, as an Attorney-General, I think it would be a bit foolish for parliament to be prescriptive and give an example, because we do not have the factual matrix in front of us that you can only have in a court. Of course, ultimately what happens with partial defences – or, indeed, defences – is that the judge will decide whether they are matters that can properly be left to the jury.<sup>18</sup>*

Judges are uniquely placed, having heard all the evidence and examined the witnesses (particularly the accused), to decide sentencing according to the relevant sentencing criteria. The high standards of justice and impartiality to which judges are held, both in their conduct of the trial and their instructions to the jury, by internationally-recognised principles of fair trial are understood to apply a

<sup>17</sup> Mack, op.cit., p. 186.

<sup>18</sup> Hansard, Queensland Legislative Council, 24 March 2011, p. 863. Available at: [http://www.parliament.qld.gov.au/documents/hansard/2011/2011\\_03\\_24\\_WEEKLY.pdf](http://www.parliament.qld.gov.au/documents/hansard/2011/2011_03_24_WEEKLY.pdf)



*fortiori* in cases in which a capital sentence may be pronounced on the accused.<sup>19</sup> Section 304(9), if passed, would tie the judge's hands, requiring the judge to award a mandatory sentence of life imprisonment when justice, given particular circumstances, may require greater leniency.

Moreover, the extent to which the proposed amendments can be applied in the context of courtroom hearings in a manner that properly serves the interests of justice is highly questionable. A jury, hearing all the evidence concerning the circumstances of the death of the victim, cannot surgically delineate a body of evidence to be excised from their consideration. Judges would be required to direct juries to expunge all consideration of "unwanted sexual advances" from their discussions of possible provocation. The potential for such an instruction to seriously interfere with the jury's ability to reflect comprehensively on the case is considerable and may be highly detrimental to the application of justice.

Laws created in Parliament do more than communicate social approbation or disapprobation of certain behaviours. They operate to enable judicial discretion so that justice may be served, to the greatest extent possible, in each case – with different circumstances, facts and evidence – that may be brought before the court. The effect of subsections (3A) and (9) is to complicate the considerations of the jury and fetter the discretion of judges in sentencing. It prescribes a formula for legal findings which has no reference to the complex matrix of evidence, opinion and circumstance which might be brought before courts and which parliament cannot hope to anticipate. The proposed restrictions therefore have the potential to seriously compromise a defendant's access to a fair trial in Queensland.

This is not to say that all members of Queensland's community will be universally satisfied with the level of justice resulting from each trial, particularly from cases which have proven very difficult for courts to decide.

*Often there is a sharp divergence between the prosecution and defence versions of events. If the defence's version of the facts is accepted by the jury, the accused may be entitled to be acquitted, even though that outcome might seem unreasonable on the prosecution's case.<sup>20</sup>*

The decisions of courts are complicated by the unpredictable dynamics of juries:

*Just because a jury acquits in a particular case does not mean the law is wrong ... It has often been said that 'hard cases make bad law', meaning that caution should always be exercised in making changes to the law based on an apparently unacceptable outcome occurring in a particular case. An amendment to the law designed to remedy an injustice in one case, may result in serious injustice in other cases.<sup>21</sup>*

The homosexual community may well feel that justice has not been served to their satisfaction in these admittedly very complicated cases. Evidence is capable of different interpretations, detailed points of law are at work and in balance, natural sympathies will be excited or not, according to different people's understanding of the evidence and circumstances of the case. Imperfect as it may

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<sup>19</sup> "The Right to a Fair Trial: Part II – From trial to final judgement", *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, 2003, p. 262. Available at: <http://www.ohchr.org/Documents/Publications/training9chapter7en.pdf>

<sup>20</sup> *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, op.cit., p. 2.

<sup>21</sup> *Discussion Paper Audit on Defences to Homicide: Accident and Provocation*, op.cit., p. 2.

be, the judicial system, properly supported by wise laws, has been developed to offer the best protections to all parties to the diverse human conflicts played out within the courts.

The proposed amendment assumes absolute certainty that “gay panic” motivates the violence towards homosexual men in all cases

The current bill has been advanced in fulfilment of the Queensland government’s pre-election commitment to advance reforms that reflect “modern and progressive” society that Queensland is in 2016.<sup>22</sup>

*It is possible to see that the continued existence of HAD in law serves to legitimise homophobia in society. In this sense, one can see how law is capable of shaping society and social norms. Conversely one might argue that society is equally capable of shaping and influencing the law .... from this perspective, the increased tolerance towards homosexuals in society needs to be reflected in law.*<sup>23</sup>

Agreement with these amendments demands, as an absolute minimum, complete acceptance of the argument that violent responses to non-violent homosexual advances must be motivated by revulsion and that this revulsion is derived purely (or even just principally) from cultural constructs that define homosexuality as ‘other’ or ‘deviant’ and therefore as the legitimate object of violence. This is what the proponents of amendment claim:

*The homosexual advance defence legitimises violence against gay men in Queensland, sending a message to the wider community that violence perpetrated against homosexuals is somehow less deserving of protection than violence committed against other members of the community.*<sup>24</sup>

The goal here is to have “a Criminal Code which does not condone or encourage violence against the LGBTI community.”<sup>25</sup> Changes to section 304 (9) are also proposed partly to address the concern that juries may be “homophobic or unsympathetic”. The over-riding concern for the proponents of reform is to proscribe the potential operation of homophobia through these laws.

*Allowing a homosexual advance to be asserted as part of the defence of provocation has been strongly criticised for excusing male violence in situations where an ordinary person should be expected to exercise self-control ... Establishing a partial defence in the criminal law that offers differential protection to the right to life on the basis of sexual orientation is a violation of articles 2(1), 6, and 26 of the ICCPR.*<sup>26</sup>

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<sup>22</sup> Hansard, Queensland Parliamentary Debates, 30 November 2016, pp. 4699–4702. Available at: <http://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/161130/Criminal.pdf>

<sup>23</sup> Mack, op. cit. p. 177.

<sup>24</sup> “Qld’s ‘homosexual advance’ defence puts gay men’s lives at risk”, Crikey, 18 March, 2014. Available at: <https://www.crikey.com.au/2014/03/18/qlds-homosexual-advance-defence-puts-gay-mens-lives-at-risk/>

<sup>25</sup> Jerrard, *Special Committee Report on Non-Violent Sexual Advances*, (Special Committee Report to the Queensland Attorney-General, Parliament of Queensland), 2012, p. 8.

<sup>26</sup> “Qld’s ‘homosexual advance’ defence puts gay men’s lives at risk”, Crikey, 18 March, 2014. Available at: <https://www.crikey.com.au/2014/03/18/qlds-homosexual-advance-defence-puts-gay-mens-lives-at-risk/>

ACL is in complete agreement with the principle that it was not right that "someone can kill a gay person and then have a lesser punishment because the person they killed is gay".<sup>27</sup> This is why the law is silent on gender and on sexual orientation. Unwanted sexual advances are never appropriate regardless of a person's gender or sexual orientation.

There are a number of possible reasons for individuals to respond violently in such situations. This violence might result from panic at the perceived threat of rape or from the triggering of childhood memories of sexual abuse. It cannot be assumed that the homosexual and heterosexual man are in all other respects equal, or that power rests with the heterosexual by virtue of cultural privilege alone. For example, if the heterosexual man is much younger, drunk, vulnerable, emotionally unsettled, a survivor of childhood sexual abuse, if he is in a position of obligation to the homosexual or if the homosexual is in a position of trust which is breached by the act of pressing unwanted sexual advances, these are all factors that might mitigate the assumed cultural dominance of the heterosexual and place him at a disadvantage to his homosexual admirer. Are heterosexual men to be denied a partial defence for violent responses that would be completely understandable if they were female? What about cases where homosexual men or women respond to unwanted sexual advances from same-sex "admirers" with violence? In such cases, the violence could in no way be attributed to homophobia. Nevertheless, the homosexual defendant in such a case would be denied the benefit of the partial defence currently available under section 304.

It is disingenuous for Justin Koonin to argue that amendments such as those envisaged for to section 304 amount only to the exclusion of "flirtatious advances" from the definition of "provocation".<sup>28</sup> It is also a mis-representation to argue, as Mack does, that the "so-called threat of 'penetration'" is only disgusting by virtue of cultural constructs that privilege heterosexuality.<sup>29</sup> The threat of penetration is commonly understood to be a powerful motivating factor for anyone who does not wish to be penetrated. The perceived threat alone, without the operation of any homophobia, might commonly be understood to represent "provocation" for murderous, violent responses from homosexuals, heterosexuals, men and women in many circumstances.

The presumption that a non-violent unwanted sexual advance (which may include 'minor' sexual assault) will be experienced as non-threatening by the object of these advances is obviously not robust to the lived experience of a great many individuals in the community. Subsections (3A) and (9) present a number of further difficulties:

- The distinction between a sexual advance that involves touching and a violent assault that would be allowable as "provocation" is one obvious difficulty. At what point does one become the other?<sup>30</sup>
- From the point of view of the receiver of the advances, there may be significant uncertainty as to whether the unwelcome sexual attentions will escalate into a violent sexual assault. The time elapsing between the touching and more violent attentions may amount to only moments. In such circumstances, instincts of self-preservation might understandably motivate an individual (of any sex or sexual orientation) to respond to the unwanted touching with violence in the hope of escaping further molestation. The purpose of section 304 is to

<sup>27</sup> Felicity Caldwell, "Gay panic laws: Queensland government urged to introduce reforms in 2016", *Brisbane Times*, 25 November 2016. Available at: <http://www.brisbanetimes.com.au/queensland/gay-panic-laws-queensland-government-urged-to-introduce-reforms-in-2016-20161125-gsxw4m.html>

<sup>28</sup> Koonen, op. cit., p. 2.

<sup>29</sup> Mack, op. cit., p. 178.

<sup>30</sup> This question was posed by the QLRC, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No. 64 (2008), p. 481. Available at: [http://www qlrc.qld.gov.au/\\_data/assets/pdf\\_file/0020/372008/R\\_64\\_Web.PDF](http://www qlrc.qld.gov.au/_data/assets/pdf_file/0020/372008/R_64_Web.PDF)

allow for judicial discretion about whether this violence was warranted in the circumstances. Such discretion would no longer be available if subsection (9) is enacted.

- It makes no allowance for the fact that non-violent unwanted sexual advances may persist after the recipient of these advances has clearly communicated that they are unwelcome (as in the case of *Green v The Queen*). Even in the event that the unwelcome attentions do not escalate into violence, their persistence may inspire panic.

The purpose of section 304 is to allow for situations such as this, in which the accused has reacted in the heat of the moment without the benefit of pausing to consider whether the non-violent sexual advance has yet become a serious threat. The distinction between a non-violent and a violent sexual advance may be a matter of moments but the perceived threat – and the accused’s reaction to it – is immediate. Section 304 does not justify or excuse unlawfully killing, but only offers a partial defence for it, to be used at a judge’s discretion.

## Conclusion

The Queensland Government cannot remove the possibility of ‘gay panic’ motivations working in the courts without explicitly addressing laws to this particular issue. Attempts to make general changes, which affect all genders and sexual orientations, in the way proposed by the current Bill, will have unforeseeable and potentially unjust consequences for many members of the Queensland community. The court system, however subject to human vagaries and unpredictability, is nevertheless the best mechanism available for deciding and delivering justice. It has the ability to consider the circumstances of a single case and weigh the contrasting evidence presented. Attempts by the Parliament to anticipate all the evidentiary matrices of future cases, to direct the consideration of juries and fetter the sentencing discretion of judges, is likely to result in greater injustices than that which it seeks to address through the proposed amendments to the current law.

**ACL submits that the *Criminal Law Amendment Bill 2016* should not be passed.**