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**From:** Convenors (NSWGLRL)  
**Sent:** Monday, 12 November 2018 3:52 PM  
**To:** Committee Social Issues  
**Subject:** Re: Inquiry into Gay and Transgender hate crimes - Witness invitation - 9 November 2018  
**Attachments:** 121004 Dr Justin Koonin Co Convenor NSW Gay and Lesbian Rights Lobby responses to QoNs Supplementary QoNs and Options paper.pdf; submission\_on\_edb\_glr Nov\_2013.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

**Categories:** Agenda

Dear Sonya,

Please see attached, information that NSWGLRL took on notice at Friday's hearing.

**1. The use of "gay panic defence"**

Refer to page 4 of the Final Report of the Attorney-General's Homosexual Advance Defence Working Party ([found here](#)).

**2. The UK article regarding the 96% "justice gap"**

The citation is Owusu-Bempah et al 'Hate Crime and the 'Justice Gap': The Case for Law Reform [2018] *Criminal Law Report* vol 12, pp 961 - 986.

**3. The information regarding DCI Young in the Scott Johnson inquest**

See [this article from the ABC](#) (with the Lateline interview) and from [the Australian](#)

Kind regards, Lauren



# Gay & Lesbian Rights Lobby

CHALLENGING HOMOPHOBIA AND THE NEED FOR REFORM:

*THE HOMOSEXUAL ADVANCE DEFENCE IN NSW*

SUPPLEMENTARY SUBMISSION TO THE NSW LEGISLATIVE COUNCIL SELECT  
COMMITTEE ON THE PARTIAL DEFENCE OF PROVOCATION

OCTOBER 2012

## **ABOUT THE GAY & LESBIAN RIGHTS LOBBY**

Established in 1988, the NSW Gay & Lesbian Rights Lobby (GLRL) is the peak 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).

## EXECUTIVE SUMMARY

The NSW Gay and Lesbian Rights Lobby (GLRL) welcomes the opportunity to make a supplementary submission to this inquiry into the partial defence of provocation.

As indicated in our original submission, and in subsequent comments made at the hearing, the principal concern of the GLRL lies in the use of the partial defence of provocation in cases of what is commonly called "homosexual advance defence" or "gay panic defence". The GLRL acknowledges that the defence of provocation applies in areas outside of the ambit of the 'homosexual advance defence'. However, this issue is the one on which we have expertise, and which most concerns the people we represent.

While the abolition of s23 in its entirety would resolve the issue of homosexual advance defence, the impact of such a change on victims of domestic violence, and possible amendments to the law of self-defence, are beyond the scope of the work of the GLRL. For this reason, we are not able to comment further on this possibility.

The recommendation in our original submission was that the NSW Parliament should amend s23 of the Crimes Act 1900 (NSW) to exclude non-violent sexual advances from a person of the same sex from forming the basis of a partial defence of provocation.

In light of the questions we received during the hearing, and the Options Paper released by the Committee, we suggest a slightly different approach to the issue of non-violent sexual advances as a grounds for provocation.

Of the four options presented in the Options Paper that pertain to the retention of s23 with amendments, we consider Option 1 ('Positive restriction' model) to be the best option to address our specific concerns, Option 2 ('Exclusionary conduct' model) and Option 4 ('Gross Provocation' model) as potential alternatives, and Option 3 (Wood model) as unacceptable.

**Recommendation: The NSW Government should amend s23 of the Crimes Act 1900 (NSW) to restrict the use of the defence of provocation to situations where violent criminal conduct has occurred.**

## OPTIONS PAPER

As noted above, the GLRL will not canvass the possibility of the repeal of s23 in its entirety, as this involves issues around domestic violence, largely in opposite-sex relationships, a topic on which we do not possess the relevant knowledge and expertise.

We therefore focus on the four options for amendments to s23 which are presented in the Options Paper.

Our decision to vary our recommendation was framed by our response to two key concerns about the 'Exclusionary conduct' model (Option 2) we recommended in our original submission, which were raised at the hearing. These concerns are as follows:

1. *If an 'exclusionary conduct' model is adopted, where should the list of exclusions stop?*

This was the effect of the question on notice asked by Mr David Shoebridge MLC (see transcript of evidence for Tuesday 28 August 2012, p.30).

As noted in the Options Paper, conduct which, it has been suggested, should be excluded from forming the sole basis for a defence of provocation, includes:

- non-violent sexual advances
- sexual jealousy upon the discovery of infidelity of the victim
- confessions of infidelity by the victim
- taunts by the victim about the sexual inadequacy of the accused
- threats by the victim to leave a relationship with the accused
- actual termination of a relationship

However this list is almost certainly not exhaustive (Mr Shoebridge suggests it could include honour killings, for example).

There may be procedural and pragmatic difficulties with this approach. Procedurally, a long list of exclusions could become unworkable. In practice, there is likely to be conduct that is not excluded from forming the sole basis for a defence of provocation, because it is not included in the list, but for which it would be unreasonable to allow a defence of provocation.

2. *How is a "non-violent sexual advance" defined?*

The delineation between what constitutes a "non-violent sexual advance" and what does not is not necessarily clear. As noted by Hon. Trevor Khan MLC (see transcript of evidence for Tuesday 28 August 2012, p.28), a grab on the arm, or the buttock, may constitute a common assault. It could, therefore, be argued that such an

advance is no longer non-violent.

Mr Khan comments further (see transcript of evidence for Tuesday 28 August 2012, p.29) that since the exclusionary model list a range of conduct which, *on its own*, could not form the basis of a defence of provocation, such an act may immediately bring into consideration the previously excluded conduct.

### **Option 1 ('Positive restriction' model)**

The GLRL recommends this model because we believe it addresses the two key concerns raised above. It is stronger than the exclusionary model, in the sense that any conduct excluded under any proposed exclusionary model would most likely be excluded under this model too.

By providing a set of positive restrictions to the applicability of the defence, the issue of omissions to the list of exclusions does not arise.

Similarly, the ambiguity in what actually characterises a “non-violent sexual advance” is addressed by clearly articulating in the positive sense those violent criminal acts which may make available the defence of provocation.

We note that the draft presented in Appendix A of the Options Paper does not actually define what a “violent criminal act” is, and suggest this could be made more explicit. For example, a violent criminal act could be taken to mean an indictable offence, or a strictly indictable offence, under the Crimes Act 1900 (NSW).

We also note, in subsection (2) of Appendix A, the removal of the requirement in s23(2)(a) of the Crimes Act 1900 (NSW) that in order to rely on a defence of provocation,

*the act or omission is the result of a loss of self-control on the part of the accused.*

This removal of the requirement of a loss of self-control was discussed by the UK Law Commission in relation to gross provocation<sup>1</sup>. While there are issues around domestic violence to consider which are outside the scope of our expertise, we encourage the Committee to consider the consequences of this omission.

### **Option 2 ('Exclusionary conduct' model)**

While we understand the concerns raised with this model at the hearing and elsewhere, we still consider this model as an improvement on the current law.

The issue of the creation of a non-exhaustive list of exclusions could be allayed by wording the bill in a manner that makes it clear that the list is not exclusive or exhaustive.

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<sup>1</sup> Law Commission 2006 report, n. 172, p. 81.

The GLRL would still be amenable to the adoption of this model, were it recommended by the Committee.

### **Option 3 (Wood model)**

The GLRL does not support this model, at least in the form presented in Appendix B of the Options Paper, because it still appears to make available the defence of provocation in situations involving a non-violent sexual advance.

By replacing the 'ordinary person' test with a test which requires the jury to consider all characteristics of the accused and the circumstances in which the provocation occurred, it is perhaps even more likely than under the current law that a court could find that a 'special sensitivity' on the part of the accused to a same-sex sexual advance led to the loss of self-control of the accused. Such was the situation in *R v Green (1997) CLR 334*<sup>2</sup>, the case which gave the so-called "homosexual advance defence" much of its legal prominence.

### **Option 4 ('Gross provocation' model)**

The GLRL would support this model, and consider it an improvement to existing law. The exclusion of a non-violent sexual advance from forming the sole basis for a defence of provocation in subsection (4)(d), together with a requirement that the defendant acted in response to "gross provocation which caused the defendant to have a justifiable sense of being seriously wronged" and/or a "fear of serious violence towards the defendant or another" provides stronger protection than the exclusionary model (Option 2).

Nevertheless this model does not completely resolve the issue of a non-exhaustive list, nor of the definition of what exactly constitutes a non-violent sexual advance.

We see no reasons to prefer this model over Option 1 ('Positive restriction' model).

## **REVERSAL OF THE ONUS OF PROOF**

In cases where a death has resulted from a non-violent sexual advance, there are often no witnesses to events aside from the accused and the deceased. The only guide to what actually occurred is invariably the word of the accused. Such was the case in *R v Green (1997) 191 CLR 334* as well as in the well-publicised murder of Gerard Fleming<sup>3</sup>.

In such cases, it may seem unreasonable for the onus of proof to lie on the Crown to show beyond reasonable doubt that a defendant was *not* provoked.

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<sup>2</sup>*R v Green (1997) 191 CLR 334*

<sup>3</sup>*R v CR [2008] NSWSC 1208*

At the same time, we acknowledge that there may be other situations, for example those involving situations of prolonged exposure to domestic violence, where the opposite is true. It may be equally unreasonable to expect a victim of prolonged domestic violence to bear the burden of proving that they are not liable for murder, when they may not have ever told anyone about the violence.

Given the complexity and range of issues the broader defence of provocation encompasses, the GLRL does not make a recommendation on this issue.

## QUESTIONS ON NOTICE

The following questions were taken on notice at our hearing on Tuesday 28<sup>th</sup> August, 2012:

(transcript p.27)

*The Hon. SCOT MacDONALD: I interrupt you there. Some are of the view that that is not such a bad thing because it can be accommodated in the sentencing and therefore one might get a more appropriate sentence, if you like. I am not satisfied in my mind that that is such a good thing because you have the more serious charge—for the rest of your life you are a murderer, not the committer of manslaughter. How do you feel about that?*

This question concerns the likely consequences of the full repeal of the partial defence of provocation, together with amendments to self-defence and excessive self-defence legislation, in the context of situations of prolonged domestic violence. The submission from the Gay and Lesbian Rights Lobby (GLRL) did not touch on this issue as we believe it is largely outside our area of expertise. Our key concern is the issue of non-violent sexual advances being used as a partial defence against murder, and on these broader issues we defer to those with more experience.

(transcript p.29)

*The Hon. TREVOR KHAN: That is the essential problem. That is what has happened in the United Kingdom: by carving out specific areas in so many cases there is some further small amount of conduct that then brings in the previously excluded conduct. If you have the grabbing of a buttock associated with the sexual advance then the murder that follows is really no different in culpability from one where there was not a grab on the butt or the thigh. I simply ask whether that is the way to proceed with this problem.*

This question is addressed directly in the GLRL response to the Options Paper (p.3).

(transcript p.30)

*Mr DAVID SHOEBRIDGE: One of the matters that I personally am grappling with is that, if we start amending the law of provocation, most people in the community are offended by adultery being raised as a partial defence to murder—or jealousy, or just verbal exchanges being raised as a partial defence. But if we start a list of exclusions, and say this is conduct you cannot rely upon in terms of provocation, the question is: Where do we end? Personally, I think it would include honour killings and all sorts of other conduct. Would we be better off trying to grapple with conduct that we think would permit a plea of provocation to be raised? Do we say, as the Hon. David Clarke said, the conduct has to be criminal?*

*Ms JOBSON: And proportionate as a reasonable response.*

*Mr DAVID SHOEBRIDGE: I am not saying that is the beginning and end of it. But, as a starting point, looking at what conduct you allow to raise a plea of provocation, should we as a society be saying, "If you want to justify even in a partial way your killing of somebody, what provoked you has to be unlawful."?*

*Mr MULVEY: That is certainly sensible. But could we take that question on notice, because it is a matter that we have not addressed in our submissions, and it is one I would like to address in further submissions.*

*Mr DAVID SHOEBRIDGE: In fact, I would ask that you both take it on notice. There is another issue raised in the submission of the Inner City Legal Centre, which recommends:*

This question is addressed directly in the GLRL response to the Options Paper (p.3).

(transcript p.31)

*The Hon. HELEN WESTWOOD: I was surprised too. I thought you might have observed that as well, or had read the literature, because I had not. So I was a bit puzzled about that response. Because it was in Victoria, I was not familiar with it. But my colleague has answered that question. I do not know whether you have read the submission of the NSW Beat Project, but one of its suggestions is mandating jury warnings for hate-related crimes and sentencing enhancements. Have you considered that, or have you any thoughts on it?*

*Ms JOBSON: What format would the warnings take? I am sorry, I have not read their submission.*



*The Hon. HELEN WESTWOOD: They do not give great detail, but I was wondering whether you have a view on that. One of the things that the Committee has been hearing is that juries are making findings that the broader community seems to be at a loss to understand; that their decisions do not reflect the values and attitudes of the general public; that 12 ordinary people have decided that the person is either guilty or not guilty of the charge.*

*Ms JOBSON: If I could take that question on notice, so that I can read those submissions and provide a response.*

The following was Recommendation 2 in the final report New South Wales Attorney General's Working Party on the Review of the Homosexual Advance Defence (1998):

*The Attorney General writing to the Judicial Commission suggesting that a direction to the effect that criminal courts are not "courts of morals" be included in the Benchbooks for consideration for use in all criminal trials in which the sexuality of the alleged victim does not conform with majority stereotypes.<sup>4</sup>*

Further, the Working Party suggested the following option (Optional Recommendation 2):

*As a more rigorous alternative to recommendation 2 above, legislation mandating the giving of such a direction in appropriate criminal trials in New South Wales.<sup>5</sup>*

We understand that Recommendation 1 of the working party has been implemented already. We would, in principle, support legislation mandating such a warning (Optional Recommendation 2), but would prefer to see further details before commenting at length.

(transcript p.32)

*Mr DAVID SHOEBRIDGE: Could you take on notice the issue of the double discounts and how, if at all, the law could respond to that?*

*Ms JOBSON: Yes.*

*Mr DAVID SHOEBRIDGE: Beyond just more courts. Perhaps you could take into account some of the valid rationales that the system has for wanting an early guilty plea, including allowing victims and family victims to avoid going through the trauma of a trial.*

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<sup>4</sup> Working Party (1998) *Homosexual Advance Defence: Final Report of the Working Party*, Recommendation 2

<sup>5</sup> *Ibid*, Optional Recommendation 2

The issue of double discounts is beyond the area of expertise of the GLRL, and we defer to those with more experience on this question.

(supplementary question from the Committee)

*1. Both of your submissions support an amendment to the legislation to exclude non-violent sexual advances as forming the basis of a provocation defence. The NSW Law Society in its submission opposes exclusion of specific categories of conduct from founding a provocation defence “because it would prevent proper consideration of the merits of individual cases.” Do you have any comments in respect of that assertion?*

There is ample evidence – in our submission and the many others before the Committee– that the law as it stands has led to unreasonable outcomes in court cases relating to the use of provocation, particularly in cases involving a non-violent sexual advance. To argue that the law should not change because it would prevent consideration of the merits of individual cases will simply perpetuate these unreasonable results and, in effect, legitimate a cycle of violence.

Individual judges and juries, left to assess the merits of a provocation defence on a case-by-case basis, have frequently delivered verdicts inconsistent with community expectations – for example, in *R v Green*. Legislative guidelines are necessary to ensure that this does not happen again.



**Gay & Lesbian  
Rights Lobby**

‘ENDING AN EXCUSE FOR MURDER’: REVISITING THE PARTIAL DEFENCE OF  
PROVOCATION IN NEW SOUTH WALES

SUBMISSION TO THE NEW SOUTH WALES ATTORNEY GENERAL’S DEPARTMENT ON  
THE CRIMES AMENDMENT (PROVOCATION) BILL 2013.

**NOVEMBER 2013**

## 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).

## INTRODUCTION

The New South Wales Gay and Lesbian Rights Lobby (GLRL) welcomes the opportunity to provide comment on the exposure draft of the Crimes Amendment (Provocation) Bill 2013. We commend the NSW Government for releasing this exposure draft for consultation. We are strongly supportive of proposals to restrict the partial defence of provocation, particularly in cases involving a non-violent sexual advance.

In this brief submission, we intend to focus on specific subsections of the exposure draft, providing detailed commentary in our area(s) of expertise and interest, noting the findings and recommendations of previous inquiries into this matter, including the recent report of the NSW Legislative Council Select Committee into the Partial Defence of Provocation.<sup>1</sup> We limit our comments to the common law formulation of the 'homosexual advance defence'. Our recommendations include:

- Prioritising the passage of this legislation, to avoid future instances where the defence of provocation can be invoked;
- Amending the wording contained in subsection 3(a); and;
- Removing the 'loss of control' element, through amendments to subsection 2.

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<sup>1</sup> NSW Parliament Legislative Council Select Committee on the Partial Defence of Provocation (2013). *The partial defence of provocation*. Sydney: NSW Legislative Council Select Committee on the Partial Defence of Provocation.

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

Provocation is a partial defence under s23 of the *Crimes Act 1900* (NSW) (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. The ordinary person test contains three core components, as outlined in a briefing paper prepared for the NSW Legislative Council Select Committee Inquiry into the Partial Defence of Provocation<sup>2</sup>:

- The ordinary person's perception of the gravity of the provocation. In this context, 'the ordinary person is regarded as having any relevant characteristics of the accused.'
- The ordinary person's power to exercise self-control in response to that provocation. In this context, the 'ordinary person' is a person of the same age and maturity as the accused. Considerations of sexual preference, racial background, physical disability and the like, while relevant to the assessment of the gravity of the conduct said to constitute provocation (i.e. the first component), are not to be imputed to the ordinary person;
- The form of the ordinary person's response after losing self-control in comparison to the accused's response.

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 Act. 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 Green*<sup>3</sup> in NSW, 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 provocative to the 'ordinary person', a construction that nonetheless belies a deep-seated homophobia.

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<sup>2</sup> NSW Legislative Council Select Committee into the Partial Defence of Provocation Secretariat (2012). *Briefing Paper: Defences and Partial Defences to Homicide*. Sydney: NSW Parliament, p.4

<sup>3</sup> *R v Green* (1997) 191 CLR 334 at 714

Successive inquiries in NSW have called for the restriction of the partial defence of provocation, particularly in cases involving a non-violent sexual advance.<sup>4</sup> The Legislative Council Select Committee Inquiry into the Partial Defence of Provocation in their report recommended, amongst other things, that s23 of the Act should be amended to preclude the use of the defence of provocation in cases involving a non-violent sexual advance. If adopted, 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.

## 2. COMMENTS ON SPECIFIC SUBSECTIONS

In subsection 3(a), we propose the deletion of the word ‘only’ where it appears. Section 3(a) currently reads:

(3) Conduct of the deceased does not constitute extreme provocation if:

(a) the conduct was **only** a non-violent sexual advance to the accused (*emphasis added*)

Not only is the word unnecessary but it may also give rise to situations where the partial defence of provocation is invoked in nuanced ways in cases involving both a non-violent sexual advance as well as some form of bodily contact, albeit not necessarily occasioning assault under the law, in the recent past.

For example, in a case where an individual alleges they lost control solely on the basis of a non-violent sexual advance by someone of the same sex in the immediate past, preceded by physical contact in other instances, although not occasioning assault, the effect of this subsection may be to encourage the defence to exacerbate the nature of that earlier contact, thereby undermining the intended effects of these amendments proposed in other sections of the exposure draft. In our view, this would be a manifestly unsatisfactory outcome, insofar as it potentially creates ambiguity and, in doing so, undermines what the provisions of the exposure draft aim to achieve.

Accordingly, we recommend the deletion of the word ‘only’ from subsection 3(a), to render the exposure draft clearer, removing any potential ambiguity.

**Recommendation 1:** The NSW GLRL recommends amending the wording in subsection 3(a), to remove the word ‘only’.

<sup>4</sup> See: NSW Attorney General’s Department, Criminal Law Division (1998). *Homosexual Advance Defence: Final Report of the Working Party*. Sydney: NSW Government; NSW Parliament Legislative Council Select Committee on the Partial Defence of Provocation (2013). *The partial defence of provocation*. Sydney: NSW Legislative Council Select Committee on the Partial Defence of Provocation; NSW Law Reform Commission (1997) *Partial Defences to Murder — Provocation and Infanticide*, Report No 83. Sydney: NSW Law Reform Commission.

## 2. OMISSIONS OR EXCLUSIONS OF CONCERN

The NSW GLRL is concerned that the exposure draft does not contain provisions to address concerns regarding the element of the ‘loss of control’ that has become germane to the partial defence of provocation, codified in s23(2) of the Act and retained, to some extent, in the exposure draft. The Act sets out a subjective requirement, pertaining to an individual actually losing self-control, but there is a further requirement that the loss of self-control, and the subsequent formation of intent to kill or inflict grievous bodily harm, on the part of the accused, be induced by, or causally linked, to the provocative conduct of the victim.

A number of submitters to the recent NSW Legislative Council Select Committee on the Partial Defence of Provocation Inquiry argued that the term was both ambiguous, insofar as it could be read as ‘pertaining to a failure to exercise self-control or the inability to exercise self-control’<sup>5</sup>, and was not based on an adequate scientific or medical evidence-base. One legal expert, quoted at length in the Select Committee report, asserted:

“Many commentators, noting the psychological literature, have poured scorn on this concept of loss of control, concluding either that there is insufficient evidence for its existence, or else that the evidence in fact supports the notion that there is always choice, an election to act in a certain way.”<sup>6</sup> (p54)

The NSW GLRL notes in this respect that the removal of the ‘loss of control’ element was recommended in the recent report of the Legislative Council Select Committee into the Partial Defence of Provocation Inquiry report.

Consequently, the NSW GLRL calls for the removal of the ‘loss of control’ element, through amendments to subsection 2 of the exposure draft. We argue that this would both address community concerns as well as the recommendations of previous reports concerning the partial defence of provocation in NSW.

**Recommendation 2:** The NSW GLRL recommends removing the element of the ‘loss of control’ from the partial defence of provocation, through amending the exposure draft.

## CONCLUSION

The NSW GLRL welcomes the recommendation 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.

<sup>5</sup> See, for instance: NSW Parliament Legislative Council Select Committee on the Partial Defence of Provocation (2013). *The partial defence of provocation*. Sydney: NSW Legislative Council Select Committee on the Partial Defence of Provocation, p. 54.

<sup>6</sup> Mr Graham Coss, cited in: NSW Parliament Legislative Council Select Committee on the Partial Defence of Provocation (2013). *The partial defence of provocation*. Sydney: NSW Legislative Council Select Committee on the Partial Defence of Provocation, p. 54.

The amendments we have proposed in our submission seek to strengthen the current legislative proposals, addressing existing concerns in the community and the recommendations of successive reports on the partial defence of provocation in NSW. These amendments, 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 NSW, 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 *Crimes Act 1900* (NSW) embodied in the exposure draft, should be expressly introduced and enacted, preferably before the end of the March 2014 scheduled sittings of the NSW Parliament, 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 Jed Horner, Policy and Project Officer, at [jed.horner@girl.org.au](mailto:jed.horner@girl.org.au) or at 0450 552389.