

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: Anti-Discrimination Board of New South Wales

Name: Ms Elizabeth Wing

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The Hon Greg Smith MP
Attorney General
Level 36, Governor Macquarie Tower
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SYDNEY NSW 2000

Ms Rachel Callinan
Director
Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie Street
SYDNEY NSW 2000

BY POST AND EMAIL: provocationinquiry@parliament.nsw.gov.au

Dear Attorney-General and Ms Callinan,

Inquiry into the partial defence of provocation – ‘homosexual advance’ defence

I refer to the current Legislative Council inquiry being conducted by the Provocation Committee into the partial defence of provocation.

The Anti-Discrimination Board of NSW requests that the *NSW Crimes Act* be amended to specifically exclude any violent response to a non-violent homosexual advance.

Currently the law continues to allow the partial defences of “provocation” and “excessive self defence” to be used to reduce a conviction from murder to manslaughter in circumstances where the killing occurs in response to a non-violent sexual advance. These partial defences have been used in NSW in situations where the victim was (or was perceived to be) homosexual.

These partial defences to murder do not operate to negate intent or recklessness, but have been said to “*recognise and make a concession for human frailty*”¹.

¹ *R v Chhay* [1994] 72 A Crim R 1

The test of provocation includes a test that the conduct toward or affecting the defendant to be such that it could have also induced an 'ordinary person' to have lost control. However the test for excessive self defence is entirely subjective, with no requirement that the response of the offender should be reasonable or proportionate to the actual threat of the situation.

In *Green v R* (1997) Justice Kirby (dissenting) reasoned that the "ordinary person" in Australian society was "*not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or inflict grievous bodily harm*"². In spite of his view, the offender's fatal stabbing and bashing of a male friend who made non-violent sexual advances towards him was held to have been 'provoked' by those advances, reducing the offence from murder to manslaughter.

Now, some fifteen years later, this so-called "gay panic" defence should no longer be available to those who cannot control their anger or violence. Homophobia has no place in our society and excessive violence perpetrated as a result of such beliefs must no longer be excused or attributed to 'human frailty'.

Whilst the partial defences still have a role to play in cases of domestic violence, their availability in response to non-violent homosexual advances is inappropriate and outdated. The *Anti-Discrimination Act 1977* (NSW) was enacted to protect minority groups from discrimination, harassment and abuse; New South Wales should no longer allow excessive violence fuelled by homophobic beliefs to be condoned or excused under its laws.

Yours sincerely,

Elizabeth Wing
Acting President
Anti-Discrimination Board of New South Wales

Date: 30 July 2012

² *Green v R* [1997] HCA 50