Submission No 22

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: New South Wales Gay and Lesbian Rights Lobby

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Gay & Lesbian Rights Lobby

CHALLENGING HOMOPHOBIA AND THE NEED FOR REFORM

THE HOMOSEXUAL ADVANCE DEFENCE IN NSW

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

9 AUGUST 2012

ABOUT THE GAY & LESBIAN RIGHTS LOBBY

Established in 1988, the Gay & Lesbian Rights Lobby (GLRL) is the peak representative organisation for lesbian and gay rights in New South Wales (NSW). Our mission is to achieve legal equality and social justice for lesbians and gay men.

The GLRL has a strong history in legislative reform. In NSW, we led the fight for recognition of same-sex de facto relationships, which led to the passage of the *Property (Relationships) Legislation Amendment Act 1999* and subsequent amendments. The GLRL was also successful in lobbying for the equalisation of the age of consent in NSW for gay men in 2003.

In NSW, the rights and recognition of children raised by lesbians and gay men have 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 law reform recommendations outlined in our 2003 report, *And Then… The Brides 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), non-discriminatory surrogacy legislation, and the introduction of Relationship Registers.

EXECUTIVE SUMMARY

> Former High Court Justice Michael Kirby AC CMG:
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> *In my view, the "ordinary person" in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm.*[1]

The NSW Gay and Lesbian Rights Lobby (GLRL) welcomes the review of provocation defences in NSW by the Legislative Council Select Committee on the Partial Defence of Provocation (the Committee) and the opportunity to make a submission to the review.

The GLRL acknowledges the complexities of provocation as a broad partial defence. While the review raises a number of important issues for consideration, the GLRL's submission is confined to what has been commonly termed the 'homosexual advance defence' and its use an excuse for homophobic violence.

The 'homosexual advance defence' is a common law formulation of s23 of the *Crimes Act 1900* (NSW) that, if established, reduces a charge of murder to manslaughter for a person who murders an individual of the same-sex who makes a non-violent unwanted sexual advance towards them. 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. As a result, the GLRL urges the Committee to recommend that the NSW Government amend s 23 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.

Recommendation: The NSW Government 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.

[1] *R v Green* (1997) 191 CLR 334 at 714.

INTRODUCTION

Provocation is a partial defence under s 23 of the *Crimes Act 1900* (NSW) that, if established, can be used to reduce the charge of murder to manslaughter. It is one of three partial defences to murder—provocation, excessive self defence and substantial impairment by abnormality of the mind. Partial defences have been described as not operating to 'negate intent or recklessness; rather they recognise and make a concession for human frailty'.[2]

Provocation is established where an act (or omission) is the result of a loss of self control on the part of the accused that was induced by any conduct of the deceased toward or affecting the accused and that conduct of the deceased was such that it could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or inflict grievous bodily harm upon the deceased. The conduct of the deceased need not have occurred immediately before the act or omission causing death.[3]

As outlined in the Briefing Paper prepared by the Secretariat for the Committee:

The 'ordinary person' test has three components. Each component has a different test to determine the 'ordinary person'. The components are:

- *the ordinary person's perception of the gravity of the provocation. In this context, 'the ordinary person is regarded as having any relevant personal 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; and*
- *the form of the ordinary person's response after losing self-control in comparison to the accused's response.' The NSW Law Reform Commission has described this component of the test as being 'less clear'.*[4]

The defendant does not have to prove provocation. If there is evidence that there may have been provocation, the Crown bears the onus of proving beyond reasonable doubt that a defendant was not provoked.

From this general framing, the "homosexual advance defence" as it is commonly known, arises a creature of common law jurisprudence, rather than a specific statutory defence. It gained its legal prominence in NSW following the case of *R v Green* (1997) 191 CLR 334. Specifically, it operates as a partial defence strategy in murder cases whereby evidence of an unwelcome non-violent sexual advance made by the victim towards the perpetrator (of the same-sex) is used to establish provocation. The basis on which this defence is successful is by rendering an unwanted same-sex advance as necessarily provocative to the ordinary person. Thus effectively rendering the 'ordinary person' homophobic in the criminal law.

Between 1 January 1990 and 21 September 2004 in accepted provocation cases, alleged homosexual advance was relied upon as the provocative conduct in 11 cases.[5] While the defence has not been successfully relied upon in NSW recently, its existence continues to foster homophobia both in the criminal law and the broader community.

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[2] *R v Chhay* (1994) 72 A Crim R 1 at 11 (Gleeson CJ).
[3] *Crimes Act 1900* (NSW) s 23(2).
[4] Secretariat of the Legislative Council Selection Committee on the Partial Defence of Provocation, Briefing Paper (July 2012), 4.
[5] Judicial Commission of NSW, *Partial Defences to Murder in New South Wales 1990-2004* (2006), 38.

The GLRL notes that there are a number of prior reviews and inquiries relevant to this matter. In particular, we draw the Committee's attention to the work of the 1998 NSW Attorney General's Department Working Party which recommended, among other things, that non-violent homosexual advances be excluded from forming the basis of a defence of provocation.[6]

CONTEXTUALISING THE HOMOSEXUAL ADVANCE DEFENCE

The 'homosexual advance defence' or the 'gay panic defence' has a complex legal history in Australia and other jurisdictions. While it is beyond the scope of this submission to detail its history, in NSW, the 'homosexual advance defence' received much of its legal significance in the appellate jurisprudence arising from *R v Green* (1997) 191 CLR 334.[7]

The GLRL notes that in response to challenges raised with respect to provocation and the 'homosexual advance defence', numerous states and territories have abolished provocation. Tasmania and Victoria have repealed provocation entirely as a defence. The ACT and Northern Territory have amended their criminal statutes to exclude the ambit of non-violent sexual advances as the sole basis of justifying provocation.[8]

R V GREEN (1997) 191 CLR 338

The case of *Green* concerned the violent murder of Donald Gillies, 36, by his friend Malcolm Green, 22. In accounting for this grievous act of violence, Green pleaded that Gillies made an unwanted sexual advance toward him which triggered his latent rage towards his father who had allegedly sexually assaulted his sisters.[9] Of particular significance, was the brutal character of the homicide– the deceased was punched 35 times and then stabbed in the face with a pair of scissors at least 10 times.[10]

In accepting Green's assertions of Gillies' behaviour, the High Court was required to clarify the objective character of the questions relating to self-control and gravity under s23(2)(b) of *Crimes Act 1900* (NSW). That is, the Court had to determine whether an 'ordinary person in the position of the accused' would have been induced to form an intent to kill or inflict grievous bodily harm by the provocative conduct of the deceased.[11]

By partially excusing Green's conduct, the majority (3-2) of the High Court accepted that Green had a 'special sensitivity' to a same-sex sexual advance which led to his loss of self-control. What is particularly concerning in the majority judgments is that such a unique 'sensitivity' is almost exclusively restricted to those circumstances where the advance is of a homosexual kind.[12]

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[6] NSW Attorney General's Department, Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party* (1998*),* [6.7].
[7] *R v Green* (1997) 191 CLR 334.
[8] Lenny Roth, *Provocation and Self-defence in Intimate Partner and Homophobic Homicides*, Briefing Paper No 33/96 (2007), 5-8.
[9] *R v Green* (1997) 191 CLR 334 at 338 (Brennan CJ).
[10] Ibid.
[11] *Crimes Act 1900* (NSW), s 23(2)(b).
[12] *R v Green* (1997) 191 CLR 334 (Brennan CJ at 342, Toohey J at 357, McHugh J at 369, Gummow J at 377, Kirby J at 395).

ADDRESSING HOMOPHOBIA IN THE CRIMINAL LAW

Generally, the use of a non-violent homosexual advance as the basis of a provocation defence ought to be seen as discriminatory because it effectively treats the violence perpetrated towards gay men differently to that of heterosexual men who make an unwanted sexual advance. This arises because a 'special sensitivity' to a homosexual advance is considered essentially provocative. However, there is apparently no similar sensitivity by a gay man or a heterosexual woman reacting to a male heterosexual advance in the same way. Kirby J noted in *Green*:

> *If every woman who was the subject of a 'gentle', 'non-aggressive' although persistent sexual advance, in a comparable situation to that described in the evidence could respond with brutal violence...on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended.*[13]

By conflating terms like 'advance' and 'aggression', the concurring majority judgments in *Green* reflect a conceptual inability to separate non-violent and violent in relation to homosexuality. In particular, for Green, his anxiety over unwanted homosexual advances is oddly articulated through a history of child sexual assault in relation to his siblings. Interestingly, for Kirby J, the majority judgments are troubling because they are unable to represent homosexual intimacy as non-violent and hence accept the 'objective' basis of its provactiveness.

As the Queensland LGBTI Legal Service notes, recent cases in Queensland have reiterated the need to eliminate homophobia as an excuse for murder. In 2008 the Queensland Law Reform Commission briefly considered the non-violent homosexual advance defence.[14] The Commission agreed with Kirby J's dissent in *Green* that such an advance may never be sufficient to deprive the reasonable person of their self-control not to commit murder.[15]

However, the Commission expressed some concern that excluding non-violent sexual advances from the ambit of provocation might have the unintended consequence of making it difficult for women who have been subjected to a history of intimate partner violence to rely on the partial defence where the sexual advance of their batterer constituted the 'last straw'.[16] While the GLRL is not in a position to comment with authority on the complexities of provocation used in these circumstances, we believe that careful drafting specifically in relation to non-violent sexual advances could avoid the unintended consequences for survivors of domestic and family violence.

The defence also operates symbolically to legitimate homophobic violence in the community. In the words of one legal commentator, Bronwyn Statham:

> *The defence is inherently homophobic: it condones – it re-inscribes as 'justifiable,' as 'ordinary' – a reaction of extreme and excessive violence premised upon feelings of hatred, fear, revulsion and disgust, similarly re-inscribed as 'justifiable' and 'ordinary.' It interprets ... a non-violent homosexual advance as inherently 'provocative' (in both senses of the word) whereas non-violent non-homosexual advances are never so interpreted.*[17]

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[13] *Green v R* (1997) 191 CLR 334 at 415 (Kirby J).

[14] Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008), 481-483.

[15] Ibid, 282; and *Green v The Queen* (1997) 191 CLR 334 at 415-416 (Kirby J).

[16] Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008), 483.

[17] Bronwyn Statham, 'The homosexual advance defence: "Yeah, I killed him, but he did worse to me" *Green v R*' (1999) 20(2) *University of Queensland Law Journal* 301.

In broader, non-legal terms, the defence effectively legitimates homophobic violence and discrimination. Homophobic violence remains an ongoing problem in our communities. The *Outing Injustice* (2011) report identified that 58 percent of respondents experienced vilification with 10 percent experiencing physical violence.[18] It is counterintuitive for the law to repudiate homophobic violence and discrimination on the basis of a person's sexual orientation while enabling the excuse of the 'homosexual advance defence' in criminal law. The implication that ordinary people are fearful of same-sex advances entrenches discrimination against sexual minorities in the law.

NSW remains one of the few Australian jurisdictions in which this common law formulation continues to justify homophobic homicides. As a result, the GLRL urges the Committee to consider amendment of the Crimes Act to remedy this as a matter of urgency.

RECOMMENDATION

Recommendation: The NSW Government 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.

CONTACT INFORMATION

We welcome the opportunity to participate in any public hearings on this issue.
For further information please contact GLRL Convenors, Lainie Arnold or Dr Justin Koonin at convenors@glrl.org.au or (02) 9571 5501.

[18] Inner City Legal Centre, *Outing Injustice: Understanding the legal needs of gay, lesbian, bisexual, transgender and intersex communities in NSW* (2011), 14.