

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Organisation: ACON
Name: Mr Dean Price
Date received: 24/08/2012

We will largely be focusing on part 1(a) of the Terms of Reference – “the retention of the partial defence of provocation including: abolishing the defence; and amending the elements of the defence in light of proposals in other jurisdictions. Our submission discusses the issues relating to Homosexual Advance Defence.

The formal reviews of the utilisation of HAD have called for the removal of non-violent sexual advances from the partial defence of provocation, if not the outright removal of provocation. ACON supports the removal of the partial defence of provocation from the Crimes Act 1900.

HAD is a gross overreach of the law that justifies homophobia, which has been shown to result in negative impacts on mental health, higher levels of suicide and suicide ideation, higher rates of substance use, higher rates of verbal and physical violence as well as economic disadvantage; and is not in line with the principles of equality before the law. This should not continue to be a defence made available to defendants.



BUILDING OUR COMMUNITY'S
HEALTH & WELLBEING

Submission to:

NSW Legislative Council Provocation Committee

Inquiry into the partial defence of provocation

August 2012

About ACON

ACON (formerly known as the AIDS Council of NSW) was formed in 1985 as part of the community response to the impact of the HIV/AIDS epidemic in Australia. Today, ACON is Australia's largest community-based gay, lesbian, bisexual and transgender (GLBT) health and HIV/AIDS organisation. ACON provides information, support and advocacy for the GLBT community and people living with or at risk of acquiring HIV, including sex workers and people who use drugs.

ACON is home to the Lesbian and Gay Anti-Violence Project (AVP), the Community Support Network (CSN), and the Sex Workers Outreach Project (SWOP). ACON has its head office in Sydney as well as regional offices in the Illawarra, Northern Rivers, the Hunter region and the Mid North Coast.

The AVP delivers an annual average of 500 occasions of services in relation to support and referrals for victims of violence. The AVP also works with partners in NSW such as the NSW Police Force, local councils, Local Health Districts, community groups, sector networks and educators to prevent violence and homophobic abuse.

About this submission

We will largely be focusing on part 1(a) of the Terms of Reference – “the retention of the partial defence of provocation including: abolishing the defence; and amending the elements of the defence in light of proposals in other jurisdictions. Our submission discusses the issues relating to Homosexual Advance Defence.

Homosexual advance defence

Throughout this submission we will refer to Homosexual Advance Defence (HAD) when talking about the phenomenon of the use of the partial defence of provocation when alleging a sexual advance by a member of the same sex. HAD has alternatively been referred to as ‘homosexual panic defence’ and ‘gay panic,’ and in some jurisdictions these defences are related but slightly different. HAD is not a defence that exists in legislation, but rather a phenomenon that has been used to explain a defence that does exist in legislation. In recent NSW cases, HAD has only been used by males to justify the homicide of another male whom the offender perceived to be gay or bisexual.

Violence against GLBT people

Gay, lesbian, bisexual and transgender (GLBT) people experience significant levels of discrimination,¹ and experience violence, harassment and abuse at much higher rates than the general population.² HAD must be seen in the context of the experience and threat of violence towards GLBT people.

¹ Australian Research Centre in Sex, Health & Society, *Private Lives: a report on the health and wellbeing of GLBTI Australians*, (2006); L Hillier, T Jones, M Monagle *et. al.*, *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health and Society, La Trobe University, (2010); NSW Gay and Lesbian Rights Lobby, *The Pink Ceiling is Too Low*, (2003);

² NSW Attorney General's Department, *You Shouldn't Have to Hide to be Safe*, (2001).

Recent use of Homosexual Advance Defence

The Judicial Commission of NSW reported in 2006 that there were 11 offenders who successfully relied on HAD between 1990 and 2004 and that this included, “at least two that were violent advances”³. The Attorney General’s Working Group identified, “at least 13 homicide cases in which an allegation of a homosexual advance was made,” during the period of 1993 to 1998. The NSW Parliamentary Library reports that since 2005 there were five cases where non-violent confrontation was used to establish a partial defence of provocation, but none of these cases involved homosexual advance defence.

Reviews of provocation and HAD

There have been a number of reviews in NSW looking at the problems associated with the defence of provocation and HAD.

In 1993, the then Attorney General of NSW asked the NSW Law Reform Commission to review partial defences to murder and in 1997 the Commission recommended changes to the defence of provocation⁴. The NSW Law Reform Commission was aware of the Attorney General’s working group on HAD and deferred most of its commentary to that group. However their report recognised the strong reasons behind abolishing HAD and recommended that “non-violent homosexual advances should not generally be regarded as conduct sufficient to amount to provocation”⁵.

In 1995, the Attorney General of New South Wales, the Hon Jeff Shaw QC, MLC, directed that a Working Party review the operation of the HAD in NSW. The Working Party’s Terms of Reference were: to conduct a review of HAD; to examine court transcripts in order to document those cases where HAD has been raised and to ascertain whether there is difficulty with the operation or application of the law; and to identify community education strategies in order to address the issue raised by the defence. The Working Party was clear that HAD needed to be abolished. However there was not a consensus view on the abolition of the broader defence of provocation⁶. Instead the members of the Working Party put forward arguments both for and against the abolition of the broader defence.

Following these two reports, in 1998, the Model Criminal Code Officers Committee recommended that the partial defence of provocation be abolished⁷.

Queensland and South Australia are the only other jurisdictions in Australia that maintain the ability to invoke HAD, although there are moves towards abolishing it in Queensland. All other states and territories have abolished HAD either specifically or provocation in its entirety.

³ Judicial Commission of NSW, *Partial Defences to Murder in NSW 1990-2004*, June 2006.

⁴ NSW Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, October 1997.

⁵ NSW Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide*, October 1997.

⁶ NSW Attorney General’s Department, *Final Report of the Homosexual Advance Defence Working Party, September 1998*.

⁷ Model Criminal Code Officers Committee, *Discussion Paper: Model Criminal Code (Chapter 5 Fatal Offences Against the Person)*, 1998.

A review was undertaken by the former Queensland Government who promised to legislate changes. This move was supported by the then opposition who promised to abolish the defence. Recently there has been a delay in implementing this promise.

This commitment made by the Queensland Government was in part due to a campaign to remove HAD in Queensland by Rev. Paul Kelly, a Catholic priest who described the following situation that happened on his church grounds:

Just over two years ago, a man was killed in my church's grounds, and one of his killers used this same "gay panic" defence. They were eventually acquitted of murder. I'm utterly appalled that a law that so revoltingly and openly discriminates against gay people is still tolerated in a modern society. Laws like the "gay panic" defence are a crucial part of legitimising and reinforcing a culture of hate which means that 73% of gay and lesbian Queenslanders are subjected to verbal abuse or physical violence for their sexuality.

The formal reviews of the utilisation of HAD have called for the removal of non-violent sexual advances from the partial defence of provocation, if not the outright removal of provocation. ACON supports the removal of the partial defence of provocation from the Crimes Act 1900.

HAD is a gross overreach of the law that justifies homophobia, which has been shown to result in negative impacts on mental health, higher levels of suicide and suicide ideation, higher rates of substance use, higher rates of verbal and physical violence as well as economic disadvantage¹; and is not in line with the principles of equality before the law. This should not continue to be a defence made available to defendants.

Terms of Reference 1(b) the adequacy of the defence of self-defence for victims of prolonged domestic and sexual violence

Same Sex Domestic Violence

ACON has an interest in ensuring that same sex family and domestic violence is treated in an appropriate way and the same as any other form of family and domestic violence. The idea behind the use of the defence of self-defence or other variations on provocation by those who have experienced long term pattern of family and domestic violence needs to continue to be available.

ACON is unaware of this type of defence being used in any case of same sex family and domestic violence and therefore defers any discussion and recommendation about this type of provocation to the broader family and domestic violence sector. Nothing in our submission when talking about HAD should be interpreted as to impact on a defence when there is a long term pattern of partner or family abuse.

Recommendations

- 1) That the partial defence of provocation is abolished, by way of the removal of the current section 23 of the Crimes Act (NSW) 1900.
- 2) That if the entire defence of provocation is not abolished, that Homosexual Advance Defence explicitly be abolished by way of amendment to the current section 23 of the Crimes Act (NSW) 1900.