

**Submission
No 21**

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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Submission to the Legislative Council Provocation Committee Inquiry into the Partial Defence of Provocation

This submission will focus on one aspect of the operation of the partial defence of provocation – the so-called homosexual advance (or ‘gay panic’) defence.

In particular, it will argue that the law of provocation should be reformed by either amending s.23 of the *Crimes Act 1900* to ensure that non-violent sexual advances cannot be considered as an act which induces provocation, or by repealing s.23 in its entirety to remove the partial defence of provocation altogether.

This is necessary to ensure that never again can a person who commits homicide have their offence downgraded, from murder to manslaughter, with a consequent reduction in maximum sentence, simply on the basis of a non-violent sexual advance.

As noted in the Committee’s briefing paper for this inquiry, the statutory basis of the partial defence of provocation lies in s.23 of the *Crimes Act*. In particular, sub-sections (1) and (2) provide that:

(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

(a) the 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 (including grossly insulting words or gestures) towards or affecting the accused, and

(b) that conduct of the deceased was such as 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 to inflict grievous bodily harm upon, the deceased,

It is difficult to comprehend how these sub-sections have ever operated to mitigate the responsibility of an offender who kills another person in response to a non-violent sexual advance. It is almost impossible to understand how it could still be the case in 2012.

The ultimate fault for this sorry state of affairs lies with the majority of High Court justices in *Green v The Queen* [1997] HCA 50. With all due respect to Chief Justice Brennan, Justice Toohey and Justice McHugh, they incorrectly applied the ordinary person element in sub-section (2)(b) to mitigate the responsibility of the offender. As has been made clear in repeated criticisms of this decision, the 'ordinary person' in contemporary Australia is not so homophobic that their response to a non-violent homosexual advance is to form the intent to kill that person or to wish to inflict grievous bodily harm upon them.

This point was of course made eloquently by Justice Kirby in his dissent:

"If every woman who was the subject of a "gentle", "non-aggressive" although persistent sexual advance... could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended... Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this Court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones sexual violence by people who take the law into their own hands."

The truly offensive nature of the homosexual advance defence is revealed by asking why it invariably applies only to non-violent sexual advances by a man to another man? As Kirby asks, rhetorically, if a

non-violent sexual advance from one man to another was sufficient to justify forming the intention to kill or seriously wound, why should this not also apply to a non-violent sexual advance by a man to a woman? Further, why shouldn't a woman who receives an unwanted non-violent sexual advance from another woman have access to the partial defence of provocation? Why doesn't it also apply to a man who receives an unwanted non-violent sexual advance from a woman? Or, in my case, as a gay man, why can't I access the partial defence of provocation if I receive an unwanted sexual advance from another man?

The answer is that in all of these cases society justifiably expects the recipient of the unwanted sexual advance to exercise self-control. A violent response to an unwanted non-violent sexual advance, to the extent that the recipient forms the intention to kill or seriously wound, is so beyond the pale, or so far out of the 'ordinary', that we do not extend any reduction in culpability to the offender in these circumstances.

In my opinion, there is nothing so different, so special or so extraordinary, in the situation where the non-violent sexual advance is made by a man to another man, as to justify offering the offender in such cases any extra legal protection. In contemporary Australia, a man who receives an unwanted sexual advance should exercise the same level of self-control as we expect of any other person.

To have a separate legal standard apply to these cases is homophobic because it implies there is something so abhorrent about a non-violent sexual advance by a man to another man that a violent reaction is almost to be expected, and at least somewhat excused. This does not reflect the reality of contemporary Australia, where, with the exception of marriage, gay men enjoy the same rights as other men, and are accepted as equals by the majority of society.

Even if a small minority of people remain firmly intolerant of homosexuality, that does not mean there should be a 'special' law to reduce the culpability of such a person where they are confronted

by an unwanted homosexual sexual advance. To retain such a provision is unjust and discriminatory, and is a mark against any legal system which aspires to fairness.

The above discussion outlines why the homosexual advance defence is wrong in principle. What should not be forgotten is that the homosexual advance defence is also wrong in practice, or in the outcomes which it generates. After all, the defence does not simply exist in the statute books, ignored and unused. Instead, it has been argued in a number of different criminal cases, sometimes successfully.

This means there are real offenders who are in prison (or who have already been released), who have had their conviction reduced from murder to manslaughter, and most likely their sentence reduced along with it, simply because they killed in response to a non-violent homosexual advance. The legal system has operated to reduce the liability of these offenders even when broader society does not accept that such a reduction is justified. As a result, these offenders have not been adequately punished, meaning that above all these victims have not received justice.

Similarly, the family members and friends of the victims killed in such circumstances have witnessed the trials of these offenders, expecting justice to be served, only to find that the killer is not considered a murderer under the law. Instead, these family members and friends find some level of blame is placed on the actions of the victim, that somehow by engaging in a non-violent sexual advance they have helped to cause and even partly deserved their own death.

The saddest part of preparing this submission was in reading the Committee's briefing paper and learning that, not only have at least 11 men been killed in these circumstances in NSW, but also that 11 families were so profoundly let down by the justice system between January 1990 and September 2004. It is highly likely that the defence has been used more times since then, dishonouring more victims and causing additional pain to more families already dealing with the loss of a loved one.

I wrote earlier that it is the fault of the High Court, in *Green v The Queen*, that the homosexual advance defence remains a part of the criminal law. Where the courts get it wrong, as they clearly have in this area, it is the responsibility of the parliament to remedy the error and thereby ensure the justice system operates in a fair and non-discriminatory manner.

There are two options for the NSW Parliament to abolish the homosexual advance defence.

The first would be to amend s.23 of the *Crimes Act 1900* by inserting a section which would exclude non-violent homosexual advances from forming the basis of provocation. This was the course of action recommended by the Homosexual Advance Defence Working Group in 1998, and appears to have been adopted in the ACT and NT.

The second option would be repeal s.23 in its entirety and abolish the partial defence of provocation altogether, as has been done by Tasmania, Victoria and Western Australia.

As I have concentrated solely on the homosexual advance defence and not on the impact of such a change on cases involving family violence and other instances where the partial defence of provocation may be applied, I am not in a position to recommend which of these options should be adopted in the broader context (for example, if s.23 is repealed entirely, it may be necessary to incorporate a new provision for 'defensive homicide', as the Victorian Parliament did in 2008).

Nevertheless, I believe it is clear the NSW Parliament should adopt one of these courses of action to ensure that no more killers are able to rely on the homosexual advance defence to reduce their conviction from murder to manslaughter. The homosexual advance defence is unjust, it is discriminatory and it should be made history.

Recommendation

The NSW Parliament should either:

- a) Amend s.23 of the *Crimes Act 1900* by inserting a section which would exclude non-violent homosexual advances from forming the basis of provocation; or
- b) Repeal s.23 of the *Crimes Act*, thereby removing the partial defence of provocation entirely.

Alastair Lawrie

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