



**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.¹ 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.

¹ 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 Provocation²:

- 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*³ 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.

² 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

³ *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.⁴ 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’.

⁴ 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’⁵, 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.”⁶ (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.

⁵ 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.

⁶ 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 or at 0450 552389.