

# **Criminal Law Amendment Bill 2016**

**Report No. 47, 55<sup>th</sup> Parliament  
Legal Affairs and Community Safety Committee**

**February, 2017**



## Legal Affairs and Community Safety Committee

<b>Chair</b>	Mr Duncan Pegg MP, Member for Stretton (from 14 February 2017) Mr Mark Furner MP, Member for Ferny Grove (to 14 February 2017)
<b>Deputy Chair</b>	Mr Michael Crandon MP, Member for Coomera
<b>Members</b>	Ms Nikki Boyd, Member for Pine Rivers Mr Don Brown MP, Member for Capalaba Mr Jon Krause MP, Member for Beaudesert Mrs Jann Stuckey MP, Member for Currumbin
<b>Committee Staff</b>	Ms Emily Booth, Acting Research Director Ms Kelli Longworth, Principal Research Officer Mr Gregory Thomson, Principal Research Officer Ms Janette Van Den Berg, Acting Committee Support Officer
<b>Technical Scrutiny Secretariat</b>	Ms Renée Easten, Research Director Mr Michael Gorringer, Principal Research Officer Ms Marissa Kerr, Principal Research Officer Ms Kellie Moule, Principal Research Officer Ms Lorraine Bowden, Senior Committee Support Officer
<b>Contact details</b>	Legal Affairs and Community Safety Committee Parliament House George Street Brisbane Qld 4000
<b>Telephone</b>	+61 7 3553 6641
<b>Fax</b>	+61 7 3553 6699
<b>Email</b>	<a href="mailto:lacsc@parliament.qld.gov.au">lacsc@parliament.qld.gov.au</a>
<b>Web</b>	<a href="http://www.parliament.qld.gov.au/lacsc">www.parliament.qld.gov.au/lacsc</a>

### Acknowledgements

The committee acknowledges the assistance provided by the Department of Justice and Attorney-General during its examination of the Bill, and the Queensland Parliamentary Library in preparing this report.



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## Abbreviations

2011 Expert Committee Report	A report by Mr Jerrard, a retired Queensland Court of Appeal judge, prepared in 2011 to ascertain whether s 304 should be amended and how the homosexual advance defence has been used in Queensland.
ATSILS	Aboriginal and Torres Strait Island Legal Service
Attorney-General	The Hon Yvette D’Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills
BAQ	Bar Association of Queensland
Bill	Criminal Law Amendment Bill 2016
CCC	Crime and Corruption Commission
committee	Legal Affairs and Community Safety Committee
CPCA	<i>Criminal Proceeds Confiscations Act 2002</i>
department	Department of Justice and Attorney-General
DPP	Director of Public Prosecutions (Qld)
FLP	Fundamental legislative principle
HAD	Homosexual advance defence
LAQ	Legal Aid Queensland
LGBTI Legal Service Inc	Lesbian Gay Bisexual Trans Intersex Legal Service Inc
PACT	Protect All Children Today Inc
QLS	Queensland Law Society
SDOCO	Serious drug offender confiscation order





## Chair's Foreword

This report details the examination by the Legal Affairs and Community Safety Committee (committee) of the Criminal Law Amendment Bill 2016.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament in accordance with section 4 of the *Legislative Standards Act 1991*.

The committee recommends that the Bill be passed.

On behalf of the committee, I thank those who lodged written submissions on this Bill and participated in the committee's briefing and hearing. I also thank the Department of Justice and Attorney-General, Parliamentary Library and Research Service, and Committee Office staff for the support they have provided the committee during this inquiry.

I would also like to thank the former Chair of the committee, Mr Mark Furner MP, Member for Ferny Grove, for his contribution to the committee's examination of the Bill.

I commend this report to the House.

A handwritten signature in blue ink that reads "D. Pegg". The signature is written in a cursive style with a large, stylized 'D' and 'P'.

Duncan Pegg MP

**Chair**



## Recommendations

### Recommendation 1

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The committee recommends that the Criminal Law Amendment Bill 2016 be passed.



## 1 Introduction

### 1.1 Role of the committee

The Legal Affairs and Community Safety Committee (the committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.<sup>1</sup>

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Police Service
- Corrective Services
- Fire and Emergency Services
- Training and Skills.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- for subordinate legislation – its lawfulness.

### 1.2 Inquiry process

On 30 November 2016, the Hon Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills (Attorney-General) introduced the Criminal Law Amendment Bill 2016 (Bill) into the Legislative Assembly. In accordance with Standing Order 131 of the Standing Rules and Orders of the Legislative Assembly, the Bill was referred to the committee for detailed consideration. By motion of the Legislative Assembly, the committee was required to report to the Legislative Assembly by 21 February 2017.

On 9 December 2016, the committee wrote to the Department of Justice and Attorney-General (the department) seeking advice on the Bill, and invited written submissions.

The committee received and published an initial written briefing from the department. Nine submissions were received from stakeholders (see **Appendix A**) and the department responded to issues raised in submissions on 3 February 2017.

The committee received an oral briefing on the Bill from the department and heard from witnesses invited to give evidence and respond to questions on the Bill at a public hearing on 25 January 2017 at Parliament House in Brisbane.

See **Appendix B** for details of the witnesses at the public hearing undertaken as part of the inquiry process.

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<sup>1</sup> *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

### 1.3 Policy objectives of the Criminal Law Amendment Bill

#### 1.3.1 Objectives of the Bill

The main objectives of the Bill are to:

- ensure that a person who commits murder cannot rely on an unwanted sexual advance as a basis for the partial defence of provocation which, if successfully raised, reduces murder to manslaughter; and
- make a number of miscellaneous criminal law-related amendments arising from the lapsed Justice and Other Legislation Amendment Bill 2014 and from stakeholder consultation, to improve the operation and delivery of Queensland's criminal and related laws.<sup>2</sup>

In achieving its objectives, the Bill amends the following legislation:

- *Bail Act 1980*
- *Criminal Code*
- *Criminal Proceeds Confiscations Act 2002 (CPCA)*
- *Director of Public Prosecutions Act 1984*
- *Drugs Misuse Act 1986*
- *Evidence Act 1977*
- *Jury Act 1995*
- *Justices Act 1996*
- *Penalties and Sentences Act 1992*
- *Recording of Evidence Act 1962, and*
- *Telecommunications Interception Act 2009*

#### 1.3.2 Consultation on the Bill

The explanatory notes advise that the following organisations were consulted on draft amendments to section 304 of the Criminal Code:

- Aboriginal and Torres Strait Island Legal Service (ATSILS),
- Bar Association of Queensland (BAQ)
- Director of Public Prosecutions (Qld) (DPP)
- Legal Aid Queensland (LAQ)
- Lesbian Gay Bisexual Trans Intersex Legal Service Inc (LGBTI Legal Service Inc)
- Queensland Law Society (QLS).<sup>3</sup>

The explanatory notes also advise that the amendment to section 304 takes account of the stakeholder feedback received.<sup>4</sup>

Additionally, a consultation draft of miscellaneous general criminal law-related reforms to the Bail Act (section 7), Criminal Code, CPCA, Drugs Misuse Act, Evidence Act, Jury Act, Justices Act, Penalties and

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<sup>2</sup> Explanatory Notes, p 1.

<sup>3</sup> Explanatory Notes, p 7.

<sup>4</sup> Explanatory Notes, p 7.

Sentences Act (Schedule 1), Recording of Evidence Act and Telecommunications Interception Act was provided to:

- The President of the Court of Appeal
- The Chief Justice of Queensland
- The Chief Judge of the District Court
- The Chief Magistrate
- LAQ
- DPP
- QLS
- BAQ
- the Crime and Corruption Commission, and
- ATSILS.

A stand-alone consultation draft of the proposed amendments to the CPCA was also sent to the Australian Bankers' Association and the Customer Owned Banking Association. Feedback raised by stakeholders assisted in informing the development of the amendments.

Consultation on the amendment to the Bail Act (section 14) to clarify the process on forfeiture of cash bail occurred with the Chief Magistrate.<sup>5</sup>

### **1.3.3 Outcome of committee considerations**

Standing Order 132(1)(a) requires that the committee after examining the Bill determine whether to recommend that the Bill be passed.

<b>Recommendation 1</b>
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The committee recommends that the Criminal Law Amendment Bill 2016 be passed.
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<sup>5</sup> Explanatory Notes, pp 7-8.

## 2 Examination of the Criminal Law Amendment Bill 2016

The committee's examination of the Bill is discussed in this section.

### 2.1 Section 304 of the Criminal Code - amendments to provocation defence

#### 2.1.1 Overview

Section 304 (Killing on provocation) of the Criminal Code provides the partial defence of provocation which, if successfully raised, reduces the criminal responsibility of the accused from murder to manslaughter.<sup>6</sup> The offence of murder carries mandatory life imprisonment, whereas the offence of manslaughter carries a maximum penalty of life imprisonment. Provocation exists as a partial defence to murder and may reduce a charge of murder to manslaughter.

In Queensland, the common law defence of provocation is codified in section 304 of the Criminal Code. The relevant subsections of section 304 provide:

*(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.*

*(2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.*

...

*(7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.*

The 'gay panic' defence is:

*... essentially a defence strategy in murder cases, based on common law, whereby evidence of an unwelcome sexual advance made by the purportedly gay victim towards the accused is led in support of establishing the defence of provocation.<sup>7</sup>*

The case law precedent, which forms part of the common law, allows people accused of murder to claim they were provoked to kill by an unwanted homosexual advance, thereby reducing criminal responsibility of the crime to manslaughter.<sup>8</sup>

#### 2.1.2 Background

The current version of section 304 reflects amendments made in 2011 which included that:

<sup>6</sup> *Criminal Code Act 1899* (Qld), s 304.

<sup>7</sup> K Blore, 'The Homosexual Advance Defence and the Campaign to Abolish it in Queensland: The Activist's Dilemma and the Politician's Paradox', *QUT Law & Justice Journal*, vol 12(2), 2012, pp 36-65, p 37. 'Gay panic defence' is the term given to the corresponding defence in the United States, which was originally based on the now discredited work of Edward J Kempf in the 1920s. Kempf hypothesised that a person with repressed or latent homosexual tendencies will have an excessive and uncontrollably violent response ('acute homosexual panic') when confronted with an unsolicited homosexual advance: New South Wales, Department of Justice, *Homosexual Advance Defence: Final Report of the Working Party*, 1998, p 4. See also Submission No. 7, p 3.

<sup>8</sup> T Eastley, N Haxton, T Ballard, Y D'Ath, 'Calls growing to abolish the gay panic defence', *ABC News*, 17 May 2016



- the onus now rests with the defence to establish provocation whereas previously the prosecution was required to disprove the defence if raised, and
- the defence of provocation can no longer be based on words alone unless they are of an 'extreme and exceptional character'.<sup>9</sup>

The Criminal Code does not contain a specific defence for homicides that are provoked by unwanted homosexual advances. Rather, the defence has been developed by judges in case law.

The Explanatory Notes provide the following additional background to the 2011 changes to section 304 of the Criminal Code:

*In April 2011, section 304 was amended to address its perceived bias and flaws following recommendations of the Queensland Law Reform Commission (QLRC) contained in its 2008 report. A review of the excuse of accident and the defence of provocation. While not specifically dealing with the issue of an unwanted sexual advance, the 2011 amendment to exclude 'words alone' applies to a sexual proposition, unaccompanied by physical contact. Further, the 2011 amendments reversed the onus of proof to a defendant. However, the partial defence of provocation continued to be criticised on the basis that it could be relied upon by a man who has killed in response to an unwanted homosexual advance from the deceased.*

*In November 2011, under the former Labor Government, an expert committee (the Committee) was tasked with reviewing section 304 regarding its application to an unwanted homosexual advance. The Committee was chaired by the Honourable John Jerrard, former judge of the Queensland Court of Appeal (the Chair). The Committee was equally divided about an amendment to section 304 on this matter; however ultimately the Chair recommended an amendment to exclude an unwanted sexual advance from the ambit of the partial defence, other than in circumstances of an exceptional character. The report records the Chair's part reasoning of "the goal of having a Criminal Code which does not condone or encourage violence against the Lesbian, Gay, Bisexual, Trans, Intersex (LGBTI) community" as being persuasive in supporting the amendment.<sup>10</sup>*

As noted above, in 2012, Mr Jerrard, a retired Queensland Court of Appeal judge, examined the sentencing remarks of a number of Queensland cases heard between April 2005 and October 2011 to ascertain how the HAD has been used in Queensland. Mr Jerrard submitted a report to the Queensland Attorney-General relating to the use of HAD which identified two Queensland cases where the defence had been raised (the "2011 Expert Committee Report").<sup>11</sup> It is relevant to note that both of these cases, being *R v Meerdink and Pearce*<sup>12</sup> and *R v Peterson and Smith*<sup>13</sup>, were decided prior to the 2011 amendments. A summary of these cases is attached as Appendix C.

In relation to the 2010 Queensland case of *R v Meerdink and Pearce*, Mr Jerrard concluded that the two defendants were found not guilty of murder, but guilty of manslaughter, because they lacked the

<sup>9</sup> *Criminal Code and Other Legislation Amendment Act 2011* (Qld) s 5; K Blore, 'The Homosexual Advance Defence and the Campaign to Abolish it in Queensland: The Activist's Dilemma and the Politician's Paradox', *QUT Law & Justice Journal*, vol 12(2), 2012, pp 36-65, p 43.

<sup>10</sup> Explanatory Notes, p 1.

<sup>11</sup> 2011 Export Committee Report, p 4.

<sup>12</sup> *R v Richard John Meerdink and Jason Andrew Pearce* [2010] QSC 158. See Appendix C for a summary of this case. Note also that as a result of this case, Queensland Catholic Priest, Fr Paul Kelly, began an e-petition on Change.org titled "Stop allowing 'gay panic' as an excuse for murder in Australia" in December 2011. The petition called on the Government to cut through the political rhetoric and actually and effectively eliminate the homosexual advance defence – see Kent Blore's article, p 56.

<sup>13</sup> *R v. Peterson & Smith* (Unreported, QSC, Maryborough, Atkinson J, 14/10/2011).

necessary intent (which is a prerequisite element of the charge of murder), so the defense of provocation was not relied upon by the court in convicting or sentencing the offenders.<sup>14</sup>

However, Mr Jerrad noted that in the 2011 Queensland case of *R v Peterson and Smith*, evidence of a homosexual advance by the deceased towards the accused ‘unequivocally’ resulted in murder being reduced to manslaughter.<sup>15</sup>

At the public briefing, the department took the following question on notice:

*How many murders or manslaughters, since the study referred to by the 2011 Expert Committee, have claimed provocation as a defence? How many were considered as provocation and how many were murders?*

It subsequently advised the committee:

*The Department is unable to provide detailed data on the application of the partial defence of provocation in Queensland since the study referred to by the 2011 Expert Committee. To obtain the data that was referenced by the Expert Committee, an extensive manual audit of trials for the offences of murder and manslaughter was undertaken. A similar manual audit has not occurred since that time and to undertake a similar review would take considerable time and resources, and is not possible to achieve in the time available in the context of this Bill.*

*Anecdotally, the Department is unaware of any instances where an unwanted sexual advance has been the basis for claiming the partial defence of provocation under section 304 of the Criminal Code since the delivery of the 2011 Expert Committee report.<sup>16</sup>*

There are, however, two High Court cases which are relevant in this context. These are the 1997 High Court case of *Green v R*<sup>17</sup> and the 2015 High Court case of *Lindsay v R*<sup>18</sup> which were both murder cases where the defence of provocation based on a homosexual advance was relied upon.

In the most recent High Court case of *Lindsay v R*<sup>19</sup>, the High Court overturned the decision of the South Australian Supreme Court and found that a defence of provocation in the homosexual advance context ought to have been left to the jury. All members of the Court found that the South Australian Supreme Court:

*... could not have meant that a non-violent sexual advance might never amount to provocation, because such a finding would be inconsistent with Green.<sup>20</sup>*

In the case of *Green v R*, the High Court overturned the majority decision of the New South Wales Supreme Court. In doing so, the dissenting justice of the New South Wales Supreme Court, Smart J,

<sup>14</sup> 2011 Expert Committee Report, p 4.

<sup>15</sup> 2011 Expert Committee Report, p 4.

<sup>16</sup> Correspondence (response to questions on notice), Department of Justice and Attorney-General, 27 January 2017, pp 2-3.

<sup>17</sup> (1997) 191 CLR 334408. For a summary of this case, see Braun K and Gray A, “*Green and Lindsay: Two Steps Forward – Five Steps Back – Homosexual Advance Defence – Quo Vadis*”, The University of Western Australia Law Review, Vol 41 (1) pp 106-7.

<sup>18</sup> [2015] HCA 16. For a summary of this case, see Braun K and Gray A, “*Green and Lindsay: Two Steps Forward – Five Steps Back – Homosexual Advance Defence – Quo Vadis*”, The University of Western Australia Law Review, Vol 41 (1) pp 108-9.

<sup>19</sup> [2015] HCA 16.

<sup>20</sup> Braun K and Gray A, “*Green and Lindsay: Two Steps Forward – Five Steps Back – Homosexual Advance Defence – Quo Vadis*”, The University of Western Australia Law Review, Vol 41 (1) p 110. Note that the reference to “*Green*” is a reference to *Green v R* (1997) 191 CLR 334408.

was quoted as describing the unwanted sexual advance as “*revolting*” and a “*terrifying*” experience for the offender.<sup>21</sup> However, Kirby J dissented strongly in this case:

*For the law to accept that a non-violent sexual advance, without more, by a man to a man could induce in an ordinary person such a reduction in self-control as to occasion the formation of an intent to kill, or to inflict grievous bodily harm, would sit ill with contemporary legal, educative and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear. 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.*<sup>22</sup>

A review of a number of the judgements in HAD cases conducted by Braun and Gray highlights the “*charged and value-laden language*” that has been used by Australian judges in HAD cases.<sup>23</sup>

In addition to the examples of the language used, or referred to, by judges in the *Green* case set out above, similar types of language was used in the *Lindsay* case. For example, in *Lindsay v R*, Nettle J described the ‘*anguish and loathing*’ with which the offender reacted to the victim’s sexual advances.<sup>24</sup>

Braun and Gray consider action by Parliaments in this area is necessary for the following reasons:

*It seems necessary that Parliament leads the way on this as the High Court appears unwilling to take a clear stand in this context. ... it is clear that without law reform decisions such as Lindsay could re-occur in Australia anytime in the future. It could be argued that only few cases featuring HAD have recently arising in Australia, making this an overall negligible issue. Yet, the above analysis suggests that even a singular decision in this context can carry significant weight by sending a negative message on LGBT identities with far reaching consequences.*<sup>25</sup>

In addition to the 2011 Expert Committee Report which recommended the amendment along the lines of the Clause 10 of the Bill, the Australian Human Rights Commission in its 2015 report titled “*Resilient Individuals – Sexual Orientation Gender Identity & Intersex Rights National Consultation Report*” called specifically on Queensland to legislate to abolish HAD.<sup>26</sup>

### **2.1.3 Proposal under the Bill**

Clause 10 of the Bill amends section 304 (Killing on provocation) of the Criminal Code to exclude an unwanted sexual advance, other than in circumstances of an exceptional character, from the ambit of the partial defence.

New subsection (3A) provides that the partial defence of provocation cannot be based on an unwanted sexual advance to the person, ‘other than in circumstances of an exceptional character’. As to what circumstances fall within the exception is a matter for the trial judge with an assessment

<sup>21</sup> *Green v R* (1997) 191 CLR 334, 345-346, referred to in Braun K and Gray A, “*Green and Lindsay: Two Steps Forward – Five Steps Back – Homosexual Advance Defence – Quo Vadis*”, The University of Western Australia Law Review, Vol 41 (1) p 113.

<sup>22</sup> *Green v. R* (1997) 191 CLOR 334408-409.

<sup>23</sup> See Braun K and Gray A, “*Green and Lindsay: Two Steps Forward – Five Steps Back – Homosexual Advance Defence – Quo Vadis*”, The University of Western Australia Law Review, Vol 41 (1) pp 112-4.

<sup>24</sup> *Lindsay v R* [2015] HCA 16 at 81, referred to in Braun K and Gray A, “*Green and Lindsay: Two Steps Forward – Five Steps Back – Homosexual Advance Defence – Quo Vadis*”, The University of Western Australia Law Review, Vol 41 (1) p 112.

<sup>25</sup> Braun K and Gray A, “*Green and Lindsay: Two Steps Forward – Five Steps Back – Homosexual Advance Defence – Quo Vadis*”, The University of Western Australia Law Review, Vol 41 (1) p 116.

<sup>26</sup> Australian Human Rights Commission, *Resilient Individuals – Sexual Orientation Gender Identity & Intersex Rights National Consultation Report* (2015) 3 [suggestion 6].

conducted on a case-by-case basis. The purpose of this proposed proviso is to guard against unjust outcomes as it is impossible to predict the factually dynamic circumstances that may arise in homicide cases.<sup>27</sup>

Without limiting the circumstances of an exceptional character to which consideration may be had, new subsection (6A) makes it clear that regard may be had to any history of sexual conduct, or of violence, between the person and the person who is unlawfully killed that is relevant in all the circumstances.<sup>28</sup>

The phrase ‘unwanted sexual advance’ is defined in new subsection (9) for the purposes of section 304 as meaning a sexual advance that is unwanted by the person; and if the sexual advance involves touching – involves only minor touching. It is not intended to preclude the operation of the defence where the conduct in question is more extensive than an unwanted sexual advance. The term ‘sexual advance’ is not defined and carries its ordinary meaning. The non-exhaustive examples make it clear that the consideration as to whether the conduct listed is minor touching depends on all the relevant circumstances.<sup>29</sup>

#### **2.1.4 Situation in other Australian Jurisdictions**

The ‘gay panic’ defence or the defence of provocation has been abolished in every Australian state or territory, except for Queensland and South Australia. In most jurisdictions, the defence has been abolished in either one of two ways:

- by abolishing the defence of provocation entirely, or
- by enacting a specific exception to the ‘gay panic defence’ in circumstances where a non-violent sexual advance is the only provocative conduct alleged by the defendant.

In Western Australia, the defence of provocation remains but does not apply in murder cases.

A jurisdictional comparison of the ‘gay panic’ defence in Australia is set out in Appendix D.

#### **2.1.5 Issues raised in submissions**

The committee accepted nine submissions in relation to the Bill. Seven of these were supportive of the amendments to section 304 of the Bill, one opposed them and the remaining submission did not deal with them. The following key issues arose in relation to the amendments of section 304 during the committee’s examination of the Bill.

##### **2.1.5.1 Consistency with other Australian jurisdictions**

As noted above, currently only two jurisdictions in Australia currently have the defence of provocation for murder cases.

Mr Stephen Page noted in his submission:

*Then Human Rights Commissioner, (and now Federal Liberal MP) Tim Wilson in his national consultation report Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights called on the two States that allowed gay panic defence to remain, namely Queensland and South Australia, to abolish it. Abolition by Queensland would bring Queensland into line with most other states.<sup>30</sup>*

<sup>27</sup> Explanatory Notes, pp 10-11.

<sup>28</sup> Explanatory Notes, pp 10-11.

<sup>29</sup> Explanatory Notes, pp 10-11.

<sup>30</sup> Submission 1, p 2.

### 2.1.5.2 High violence rate against LGBTI community

A number of submitters referred to the need for reform in this area due to the disproportionately high violence rate against the LGBTI community. In this regard, Mr Stephen Page pointed out some disturbing statistics in his submission:

*In their ground breaking research Speaking out, stopping homophobic and transphobic abuse in Queensland (2010) Dr Alan Berman and Shirleene Robinson paint a disturbing picture of abuse towards LGBTI people in Queensland. The most common form of abuse was, not surprisingly, verbal abuse which affected 73% of 796 respondents in their life time. Five hundred and ten respondents or 47% experienced harassment including spitting and offensive gestures. Four hundred and fifty two respondents or 41% experienced threats of physical violence in a life time. Two hundred and fifty four respondents or 23% were subjected to physical attack or assault without a weapon (including being punched, kicked or beaten).<sup>31</sup>*

The Brisbane LGBTIQ Action Group consider:

*As one of only two Australian states with this partial defence of provocation (the other being South Australia), LGBTI Queenslanders can feel at risk if an assailant, fuelled by prejudice, goes “poofter bashing” to intentionally harm and intentionally kill LGBTI people. As long as deep-seated homophobia and discrimination against people persists in some segments of society, LGBTI Queenslanders can feel vulnerable knowing this defence could potentially be used perhaps even fictitiously, if ever they were to be the victim of a targeted gay-bashing resulting in their death.<sup>32</sup>*

During the public hearing, Mr Phil Browne from the LGBTIQ Action Group elaborated further on these points:

*Although section 304 of the Criminal Code does not refer to any specific sexual orientation or gender, the courts have allowed it to be established if the perpetrator felt that their victim, who happened to be the same gender as them, was making a sexual advance. LGBTI Queenslanders understand that some perpetrators, desperate to escape life imprisonment, may even lie, especially when there are no witnesses to claim that the deceased hit on them, in order to escape a murder conviction. It is also possible that this same claim of sexual advance may be falsely alleged following the killing of a heterosexual person of the same sex as the killer or killers. This strikes fear in LGBTI Queenslanders, who feel vulnerable while this remains available as a partial defence to murder. This fear is also specifically felt by the transgender community, noting that in recent years around the world there has been a marked increase in the killing of individuals who are specifically targeted solely because they are transgender.<sup>33</sup>*

### 2.1.5.3 Discriminatory nature of the interpretation of s304

A number of submitters referred specifically to the discriminatory manner in which section 304 has been interpreted. For example, the LGBTI Legal Service Inc remarked that:

*Retention of the current law achieves no positive practical policy outcome, and will only continue to discriminate against LGBTI people.<sup>34</sup>*

Mr Alastair Lawrie comments in his submission that:

<sup>31</sup> Submission 1, p 2.

<sup>32</sup> Submission 3, p 2.

<sup>33</sup> Transcript, 25 January 2017, public hearing, p 1.

<sup>34</sup> Submission 6, p 1.

*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.<sup>35</sup>*

In this regard, the Brisbane LGBTIQ Action Group, concluded in its submission:

*In addition to making the law fairer, by removing the so-called Gay Panic defence this sends an important message to the community that LGBTI people are valued members of society and that discrimination is not acceptable.<sup>36</sup>*

During the public hearing, the LGBTIQ Action Group elaborated further on this aspect:

*Legislation that contains either actual or perceived discrimination can be seen to give permission for some in society to give lesser value to a particular subgroup involved. In this case, a perpetrator can think, 'It's only a gay person who I killed, so it doesn't matter as much, because the law allows me the chance of a lesser sentence for killing a gay person.' As a community, we must speak up and say that we value all citizens equally and that discrimination is not acceptable. We must ensure that our law is not used to target vulnerable groups.<sup>37</sup>*

The Anti-Discrimination Commission Queensland commends the Bill on the basis that Clause 10 removes the potentially discriminatory nature of the interpretation of s304:

*Queensland's criminal laws should reflect the human rights principles of equality before the law and freedom from discrimination, as well as the purposes and intent of the Anti-Discrimination Act 1991.*

*The Bill would amend the killing on provocation defence so that it would not be available on the basis of an unwanted sexual advance, other than in circumstances of an exceptional character. An 'unwanted sexual advance' is defined as a sexual advance that is unwanted, and where the advance involves touching, the touching is minor only. The amendment includes examples of what may be minor touching, depending on all the relevant circumstances, namely, patting, pinching, grabbing, or brushing against the person.*

*The amendment would exclude unwanted sexual advance irrespective of sexuality. The partial defence would not be available on the basis of unwanted sexual advance, whether a homosexual or heterosexual advance.*

*This approach to the legislation is consistent with the human rights principles of equality before the law and freedom from discrimination.<sup>38</sup>*

However, the Australian Christian Lobby (ACL) disagree that section 304 is discriminatory:

*Discriminatory laws are clearly incompatible with understandings of the necessary preconditions for a free society and therefore need to be challenged. However, the case of section 304 is complicated because the law is not prima facie, discriminatory. It makes no reference to sexual orientation, gender or any other distinguishing features of the defendants who may avail themselves of the partial defence of provocation contained in section 304 or the circumstances in which they may do so.<sup>39</sup>*

<sup>35</sup> Submission4, p 2.

<sup>36</sup> Submission 3, p 2.

<sup>37</sup> Transcript, public hearing, 25 January 2017, p 2.

<sup>38</sup> Submission 5, p 2.

<sup>39</sup> Submission 8, p 1.

The ACL acknowledged in its submission that dissatisfaction from the homosexual community concerning section 304 derives from how it has been developed in case law.<sup>40</sup>

#### 2.1.5.4 *Separate legal standard in cases involving a homosexual advance*

A recent academic article on the homosexual advance defence stated that “[h]omophobia, while diminished is not yet fully expunged from our law”.<sup>41</sup>

In his submission, Mr Alastair Lawrie highlighted the inappropriateness of a separate legal standard in cases involving a homosexual advance:

*That is because the idea that a lesser level of criminal punishment - manslaughter rather than murder - should apply where a man kills another man because of an unwanted sexual advance is, to put it simply, abhorrent. ...*

*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 objectionable 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.<sup>42</sup>*

#### 2.1.5.5 *Mandatory life sentence for murder in Queensland*

During the public briefing, the committee asked the department whether Queensland should not be compared to those jurisdictions when considering the defences available as it is the only jurisdiction that carries mandatory life imprisonment for murder. The department responded:

*Certain jurisdictions such as Western Australia, Victoria and Tasmania have all abolished the partial defence but, as you indicate, they do not have mandatory life imprisonment for murder. The Australian Capital Territory and the Northern Territory have enacted amendments, as I understand it, consistent with those that were recommended by the expert committee and which have been adopted by the bill. New South Wales has also moved to abolish it but then reinstate it in a more limited sense. Because Queensland does carry that mandatory sentence of life imprisonment, that has factored into the decision to amend the partial defence as opposed to completely abolish it because, again, there may well be circumstances where that defence should at least be left to the jury for them to consider so as to avoid unjust outcomes for accusers.<sup>43</sup>*

#### 2.1.5.6 *Lesser sentence applicable to homophobic offenders*

A number of submitters were concerned that under the current law homophobic offenders who had murdered someone could receive a lesser sentence of manslaughter if they can show they killed in response to a non-violent homosexual advance.

Mr Alastair Lawrie elaborated on these concerns in his submission:

*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*

<sup>40</sup> Submission 8, p 2.

<sup>41</sup> Braun K and Gray A, “Green and Lindsay: Two Steps Forward – Five Steps Back – Homosexual Advance Defence – Quo Vadis”, The University of Western Australia Law Review, Vol 41 (1) p 96.

<sup>42</sup> Submission 4, pp 1-2.

<sup>43</sup> Transcript, 25 January 2017, public briefing, p 6.

*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.*<sup>44</sup>

#### 2.1.5.7 Impact of excluding all unwanted sexual advances

A number of submissions identify that the proposals under Clause 10 of the Bill may have unintended consequences resulting from the arbitrary exclusion of all unwanted sexual advances. For example, the ACL points out:

*ACL is concerned that the proposed change arbitrarily excludes all “unwanted sexual advances” of a non-violent nature from the court’s consideration of circumstances that might be understood to contribute to “provocation”. Section 304 does not relate exclusively to the cases of homosexual advances. The effect of these changes on the entire Queensland community must therefore be considered carefully. The proposed changes may result in unforeseen and disproportionately adverse consequences for many accused of murder in Queensland.*<sup>45</sup>

Additionally, the QLS noted the following unintended consequence of the removal of the partial defence of provocation in circumstances where the perpetrator was a victim of sexual abuse:

*If this amendment is made, it may have unintended consequences in some circumstances. Take for example where a person is propositioned for sexual intercourse, including a touching, against their will and this person has a background of having been sexually abused as a child or previously raped. Under the amendment this person would not be permitted to demonstrate to a Court, or more importantly a jury, that they had lost their self-control and responded lethally to the provocative act. This could potentially lead a Court to that previous sexual assault by the victim might not be an “exceptional circumstance”, which does not appear to be the intention of the legislation.*<sup>46</sup>

During the public briefing, the department provided the following response to the argument that the proposed change arbitrarily excludes all “unwanted sexual advances” of a non-violent nature from the court’s consideration:

*In that regard, the amendment essentially is intended to reflect the policy intention that an unwanted sexual advance—which may be words, may be a gesture, may be a minor touching—alone is not enough, other than in circumstances of an exceptional character, to justify a person intentionally killing another. It is intended to reflect modern societal views about criminal responsibility and that an ordinary person would be expected to exercise self-control in those particular circumstances, recognising that for this defence to be enlivened the jury must already be satisfied beyond reasonable doubt that the person has in fact killed another with murderous intent.*<sup>47</sup>

#### 2.1.5.8 Impact on women

The ACL considers the proposed changes would have the unintended consequences of negatively affecting the rights of women:

<sup>44</sup> Submission 4, pp 2-3.

<sup>45</sup> Submission. 8, p 2.

<sup>46</sup> Submission 9, p 3.

<sup>47</sup> Transcript, 25 January 2017, public briefing, p 3.



*Importantly, the arguments that evaluate section 304 as a HAD law, fail to take account of how such an amendment could affect the conduct of trials that do not involve homosexual advances. The language of section 304 is not gendered and does not distinguish according to sexual orientation. It applies equally to men and women of homosexual and heterosexual orientation.<sup>48</sup>*

The ACL stated that “women experience higher levels of sexual harassment from heterosexual men than heterosexual men experience from homosexual men”.<sup>49</sup> Consequently, the ACL is concerned that the proposed changes to section 304 would result in the “legitimisation of unwanted sexual advances of a non-violent nature” which will have “significant implications for women”.<sup>50</sup> In this regard, the ACL explained further:

*It is not acceptable for women to be grabbed, groped or pinched. Yet the exclusion of these forms of behaviour from section 304 sends a distinctly contrary message. If these forms of behaviour, which are recognised as sexual assault, are only admitted to contribute to a section 304 partial defence under “extreme and unusual circumstances”, this clearly communicates a legal tolerance of all these things under “common and usual” circumstances.<sup>51</sup>*

The ACL considers that “discussions of section 304 as a HAD law ignore its application to women and assume women will never need this partial defence” largely because:

*... “provocation” has not played a significant part in the case law for murder trials involving women defendants in Queensland. ...*

*The role of Parliament in establishing laws is not to respond to a statistical analysis of how frequently these laws have been appealed to in practice. The role of Parliament is to establish principles of justice to guide courts in their decisions and sentencing. The fact that no woman in Queensland facing murder charges has appealed to “provocation” does not mean that women who might face these charges in the future should be deprived of “unwanted sexual advances” as a contributing factor to this partial defence.*

*A scenario in which the proposed changes might result in injustice for a female defendant is not hard to imagine. If, for example, a woman working late in the office is the subject of an unwanted sexual advance from a male colleague, who grabs her breast (which, under the proposed wording of section 304(9)(b), would count as “light touching” and therefore would not qualify as a partial defence for a charge of murder) and she, being filled for that moment with murderous rage and having the memory of childhood abuse recur to her mind in such a way as to confuse her reason, responds violently by punching her assailant, or stabbing him with scissors, or beating him over the head with a convenient heavy object, so that he dies, she would have no access to the partial defence of provocation. In these circumstances a judge would be obliged to award the mandatory life sentence for murder because the provocation offered by the deceased to the accused constituted only a non-violent unwanted sexual advance.<sup>52</sup>*

During the public briefing, the department was asked to explain how the Bill addresses concerns about the potential adverse impact on women:

*That submitter has correctly identified that, because we do use gender-neutral language, it will apply equally to women who may find themselves charged with murder, but the*

<sup>48</sup> Submission 8, p 5.

<sup>49</sup> Submission 8, p 5.

<sup>50</sup> Submission 8, p 5.

<sup>51</sup> Submission 8, p 5.

<sup>52</sup> Submission 8, pp 7-8.

*amendments and the existing provision make it clear that, having regard to whether or not there are circumstances of an exceptional character, the court is entitled to look at whether or not there is a history of violence between the accused and the deceased and whether or not there is a history of sexual contact between the two. If, for example, you have a situation where you have a female—simply because you have raised that gender—who acts on the sudden, because history has shown for that person minor touching often precipitates much more severe abuse and in those circumstances they acted on the sudden, before there was time for the passion to cool, that is evidence that the court will be able to take into account in deciding whether or not to leave the partial defence to the jury but also for the jury in deciding whether or not the accused has made out that defence to the necessary standard.<sup>53</sup>*

The department also commented on this issue in its written response to submissions:

*The amendment reflects the policy rationale that an unwanted sexual advance that involves words, a gesture and/or minor touching cannot be enough, other than in circumstances of exceptional character, to justify a person killing another with murderous intent based on that alone. The amendment reflects modern societal views about criminal responsibility and the expectation that an ordinary person is expected to exercise self-control in that situation.*

*The amendment is deliberately framed in gender neutral language. That is, the partial defence cannot be based on an unwanted heterosexual or homosexual advance, other than in circumstances of an exceptional character. This is consistent with equality principles that require all people be held to the same standard by the law.<sup>54</sup>*

#### 2.1.5.9 Sentencing discretion of the judge

The ACL expressed concern that the proposed amendments to section 304 would fetter the sentencing discretion of the judge:

*Judges are uniquely placed, having heard all the evidence and examined the witnesses (particularly the accused), to decide sentencing according to the relevant sentencing criteria. The high standards of justice and impartiality to which judges are held, both in their conduct of the trial and their instructions to the jury, by internationally-recognised principles of fair trial are understood to apply a fortiori in cases in which a capital sentence may be pronounced on the accused.<sup>19</sup> Section 304(9), if passed, would tie the judge's hands, requiring the judge to award a mandatory sentence of life imprisonment when justice, given particular circumstances, may require greater leniency.<sup>55</sup>*

Furthermore, the ACL concludes:

*Attempts to make general changes, which affect all genders and sexual orientations, in the way proposed by the current Bill, will have unforeseeable and potentially unjust consequences for many members of the Queensland community. The court system, however subject to human vagaries and unpredictability, is nevertheless the best mechanism available for deciding and delivering justice. It has the ability to consider the circumstances of a single case and weigh the contrasting evidence presented. Attempts by the Parliament to anticipate all the evidentiary matrices of future cases, to direct the consideration of juries and fetter the sentencing discretion of judges, is likely to result in*

<sup>53</sup> Transcript, 25 January 2017, public briefing, p 6Public briefing transcript, p 6

<sup>54</sup> Letter from the department to the committee received 3 February 2017, p 7.

<sup>55</sup> Submission 8, p 9.

*greater injustices than that which it seeks to address through the proposed amendments to the current law.<sup>56</sup>*

The department provided the following response to these concerns:

*The proposed amendment recognises that the legislature cannot define or predict the circumstances in which a killing may occur and therefore, to guard against injustices occurring, includes the proviso of: 'other than in circumstances of exceptional character'.*

*This approach and the language used under the Bill is consistent with the existing provision (for example existing section 304(2) provides that the provocation cannot be based on words alone, other than in circumstances of a most extreme and exceptional character - noting that the Bill deletes the words 'a most extreme and').*

*As to the circumstances that may fall within the scope of the proviso, that will be a matter for determination on a case-by- case basis having regard to all of the circumstances of the particular matter.<sup>57</sup>*

#### *2.1.5.10 Definitions of 'circumstances of an exceptional character', 'unwanted sexual advance' and 'minor touching'*

Concerns were also raised by the QLS about the lack of definitions in Clause 10 of the Bill of the phrases 'circumstances of an exceptional character' and 'minor touching':

*Furthermore, the lack of definition of "circumstances of an exceptional character" might actually lead to a Court allowing in a "unwanted sexual advance" defence to provocation by attempting to argue that a homosexual advance is an exceptional circumstance, which is entirely contrary to the intention of the legislation and would contravene the drafter's intention.*

*We are also concerned about subsection 9(b) stating that an unwanted sexual advance involves only minor touching. This might potentially allow someone to run an "unwanted sexual advance" argument in circumstances where there is more than minor touching but less than sexual assault. Furthermore, "minor touching" is not defined in the legislation and it is unclear whether repeated touching would be considered minor.<sup>58</sup>*

At the public hearing, the Mr Bill Potts from the QLS elaborated further on these concerns:

*Why I have a problem with exceptional circumstances is this: when you look at it, there is no mention of homosexuality and there is no mention of gender. This is a provision that is aimed at that very significant ill, but it is drafted in such a way that it catches many things. I will give an example of exceptional circumstances that is not covered. We take our victims as we find them. If your victim has an unusually thin skull, that is the problem. You take your victim as you find them. Many people who are the perpetrators of crimes also have exceptional matters that do not necessarily excuse but may give rise to a defence. I will give you an example, and the law is littered with them: people who have been themselves the victims over lengthy periods of time of sexual abuse at the hands of somebody who may in fact be, in this case, the victim or who have had a flashback because they themselves were assaulted repeatedly and lose their provocation in circumstances where perhaps you or I may not. Do we take into account the exceptional circumstances of the psyche of the person who is, in fact, being charged in those circumstances, who may themselves be a member of the LGBTI community? That is the difficulty with these things.*

<sup>56</sup> Submission 8, p 12.

<sup>57</sup> Letter from the department to the committee received 3 February 2016, pp 6-7.

<sup>58</sup> Submission 9, p 3.

*This parliament cannot provide a prescriptive list, but it can, by way of examples that no doubt parliamentary draftsmen will be working on, provide things that may assist the courts and may assist the jury in deciding what is exceptional in all the circumstances.*<sup>59</sup>

In his submission, Mr Alastair Lawrie also raised a concern about the phrase ‘other than in circumstances of an exceptional character’ because it “... leaves the door slightly ajar to at least some cases where the homosexual advance defence may be sought to be used.”<sup>60</sup>

During the public hearing, however, the LGBTI Legal Service noted that it did not share the same concerns about the lack of definitions in the Bill:

*I would also like to recognise the concerns of the Law Society in relation to the lack of definition of some key terms, that being circumstances of exceptional character. I would submit that the judiciary is very capable of interpreting the intent of these amendments and applying them in the spirit of the bill that is, not to allow a gay panic defence to be raised again in Queensland following these amendments. The lack of definition should not be in and of itself enough reason to further delay this vital reform.*<sup>61</sup>

The department responded to the QLS’s concerns about the phrase ‘circumstances of an exceptional character’ raised in its submission as follows:

*It is not intended to define the phrase ‘circumstances of an exceptional character’. The concern is that to define such a phrase may have the unintended consequence of fixing the concept or limiting its scope, which may ultimately lead to unjust outcomes. This is particularly so, given the broad range of examples that may, depending upon the circumstances of the particular case, constitute circumstances of an exceptional character in the particular context. What amounts to circumstances of an exceptional character is to be determined on a case-by-case basis.*

*The Explanatory Notes also make it clear that a homosexual advance of itself is not to be considered a circumstance of an exceptional character. This policy position was also articulated in the Explanatory Speech accompanying the introduction of the Bill.*<sup>62</sup>

In its submission, the QLS stated that it “... is concerned that clause 10, as currently worded, will not give effect to the policy intention”.<sup>63</sup> The QLS continued:

*We are also concerned that the present drafting of the removal of the ‘unwanted sexual advance’ defence could potentially affect circumstances other than those comprising a ‘gay panic’ defence. For example, it would be concerning if this defence were not open to a defendant where the victim had sexually assaulted or raped the defendant, or where the victim had sexually abused the defendant as a child. In circumstances such as those, there is support for an argument of “unwanted sexual advance” being used to support a provocation defence for murder.*

*It appears the legislation goes some way to addressing this concern by including subsection (3A), or ‘circumstances of an exceptional character’ as an exception to this amendment. However, we are concerned that circumstances of an exceptional character not being specifically defined, albeit clarified in a fashion by proposed subsection (6A).*

<sup>59</sup> Transcript, 25 January 2017, public hearing, p 7.

<sup>60</sup> Submission 4, pp 2-3.

<sup>61</sup> Transcript, 25 January 2017, public hearing, ppp2-3.

<sup>62</sup> Letter from the department to the committee dated 3 February 2017, p 10.

<sup>63</sup> Submission 9, p 2

The department responded to the QLS's concerns about the phrase 'unwanted sexual advance' as follows:

*An unwanted sexual advance that involves more than minor touching means the partial defence is not precluded from being relied upon by the defendant in a murder trial. This is the effect of the definition of 'unwanted sexual advance' as defined in new subsection (9).*

*The proposed amendment stems from the findings of the 2011 Expert Committee, whose report has formed the template for the amendment under the Bill, including the concept of an unwanted sexual advance (its meaning and appropriate definition).*

*The proposed amendment recognises that many sexual advances will include some form of minor touching. The proposed amendment reflects society's expectations on the exercise of self-control.*

*It is impossible to predict the myriad of scenarios so as to craft a comprehensive definition of minor touching. The amendment provides some context as to what may be 'minor touching' by including examples:*

*The non-exhaustive examples make it clear that the consideration as to whether the conduct amounts to minor touching will depend on all of the relevant circumstances of the particular case.<sup>64</sup>*

In its response to a question taken on notice, the QLS explained what it considers might constitute an exceptional circumstance and minor touching. It suggested the provision be amended by adding the following additional sub-paragraphs to section 6A of s 304:

- (6A) *For proof of circumstances of an exceptional character mentioned in subsection (4), regard may be had to:*
- (a) *any history of violence, or of sexual conduct, between the person and the person who is unlawfully killed;*
  - (b) whether the accused has been subject to current or historic sexual abuse;**
  - (c) whether the offence involved the accused acting violently or in a discriminatory manner based on the person's sexual orientation and/or gender;**
  - (d) the environment where the offence was committed, for example if the crime was committed in an isolated location.<sup>65</sup>**

The QLS also suggested that examples of situations that might constitute an exceptional circumstance be included in the legislation:

*Such an example might include where the person has historically subjected the accused to child sexual abuse and then the unwanted sexual advance caused the accused to suffer flashbacks and lose their control.<sup>66</sup>*

In the context of the definition of 'unwanted sexual advance', the QLS provided the following suggestions in relation to what might constitute relevant circumstances. For example:

- whether the minor touching was repetitive,

<sup>64</sup> Letter from the department to the committee dated 3 February 2017, p 11.

<sup>65</sup> Letter from the QLS to the committee dated 3 February 2017, pp 1-2.

<sup>66</sup> Letter from the QLS to the committee dated 3 February 2017, p 2.

- whether a combination of acts constituting minor touching were committed against the accused, and
- the location of the person's body that was subject to the minor touching.<sup>67</sup>

However, Mr Alastair Lawrie raises a concern about the inclusion of the definition of 'unwanted sexual advance' in new sub-section 9. In his view:

*...the creation of the definition of unwanted sexual advance creates the risk, and arguably the incentive, for the perpetrator of these types of offences to exaggerate the 'touching' that was involved in the unwanted sexual advance that preceded the murder. Given the nature of these cases, there will necessarily be no ability for the victim to provide any evidence disputing this exaggeration.*<sup>68</sup>

#### 2.1.5.11 Future review of amendments

In his submission, Mr Alastair Lawrie suggested that:

*The operation of the proposed reforms to section 304 should be reviewed after five years, to assess how they have operated in practice, including how the definition of 'unwanted sexual advance' has been applied, and whether it has simply induced defendants to exaggerate their claims about the unwanted sexual advance by the deceased.*<sup>69</sup>

The proposal to revisit these amendments was also supported by the LGBTI Legal Service at the public hearing:

*Our recommendation is that the bill be revisited after a period of four or five years with special consideration made to any cases arising in that time to determine if it is operating as intended.*<sup>70</sup>

#### Committee comment

The committee acknowledges the concerns identified by some stakeholders regarding the lack of definition of 'circumstances of an exceptional character' and thanks the QLS for its contribution to the examination of this issue.

The committee agrees that the proposals in Clause 10 of the Bill should be reviewed in five years to establish whether they have operated as intended.

However the Non-Government members also believe it would be beneficial for the Attorney-General to further consult with the QLS and the Bar Association in relation to the terminology of 'circumstances of exceptional character' with a view to perhaps providing examples in the Bill.

## 2.2 Amendments to the *Bail Act 1980*

### 2.2.1 Overview

The Bill proposes a number of amendments to the *Bail Act 1980* to improve the operation of criminal laws in Queensland by:

- encouraging police to exercise their discretion with regard to bail where a person cannot be taken promptly before a court, and

<sup>67</sup> Letter from the QLS to the committee dated 3 February 2017, p 2.

<sup>68</sup> Submission. 4, pp 4-5.

<sup>69</sup> Submission 4, pp 4-5.

<sup>70</sup> Transcript, 25 January 2017, public hearing, p 3.

- clarifying the process on forfeiture of cash bail to ensure consistency in approach.<sup>71</sup>

### 2.2.2 Issues raised in submissions

No issues were raised in relation to these proposed amendments to the *Bail Act 1980* in the submissions received by the committee on the Bill.

## 2.3 Additional amendments to the Criminal Code

The Bill proposes the following additional amendments to the Criminal Code to improve the operation of criminal laws in Queensland.

### 2.3.1 Section 89 – Public officers interested in contracts

The Bill proposes to create an exception to section 89 (Public officers interested in contracts) of the Criminal Code for public officers who acquire or hold a private interest made on account of their employment, having first disclosed to, and obtained the authorisation of, the chief executive of the relevant department. The amendment will address ambiguity as to whether section 89, in its current form, prevents departments from authorising public service officers to provide services in their private capacity. Such authorisation is often necessary in rural and remote areas.

In her Introductory Speech, the Attorney-General explained these amendments:

*The Bill will clarify that public service officers can be appropriately authorised to provide services in their private capacity. This is often necessary in rural and remote areas. An amendment will be made to the Criminal Code to create an exception to the offence in section 89 (Public officers interested in contracts) for public officers who acquire or hold a private interest made on account of their employment, having first disclosed to, and obtained the authorisation of, the chief executive of the relevant department. The requirement for disclosure and authorisation of the chief executive will limit the application of the exception to appropriate circumstances.*<sup>72</sup>

The following additional information was provided by the department during the public briefing:

*Potential applications of the exception being made include public officers moving to the non-government sector through the National Disability Insurance Scheme transition. To maintain service delivery during this transition, relevant employees may work simultaneously as departmental employees and as private contractors with the state, being registered providers of support. Another example is public officers providing specific training to other employees as consultants in addition to their usual employment. A further example is where a department is contracting with a family company where a family member is also a departmental employee but has nothing to do with the award of the contract or the administration of the company. Such arrangements provide operational convenience for the department and are sometimes unavoidable in regional areas where only one business may exist to supply a certain service.*<sup>73</sup>

#### 2.3.1.1 Issues raised in submissions

No issues were raised in relation to these proposed amendments in the submissions received by the Committee on the Bill.

<sup>71</sup> Explanatory Notes, p 2.

<sup>72</sup> Introductory Speech, 30 November 2016, Hansard, p 4701.

<sup>73</sup> Transcript, 25 January 2017, public hearing, p 2.

### 2.3.2 Misconduct regarding corpses

The Bill also proposes to increase the penalty for the offence of misconduct with regard to corpses in section 236(b) of the Criminal Code from two years imprisonment to five years imprisonment.<sup>74</sup>

In her Introductory Speech, the Attorney-General explained these amendments:

*A person involved in the death of another can benefit by destroying or contaminating evidence by disposing of, or hiding, a body. I am sure we can all recognise that, for loved ones, the recovery of a body that has been interfered with, or that cannot be recovered at all, can add to the suffering in an already traumatic situation. The bill acknowledges this and further acknowledges that misconduct with a corpse is serious criminal conduct by increasing the maximum penalty from two to five years imprisonment where a person improperly or indecently interferes with, or offers any indignity to, a body or human remains.*

*In addition to increasing the penalty, the offence will be added to the list of offences in the serious violent offence regime. This will mean that in those cases where the court orders that imprisonment for this offence is to be served cumulatively with a sentence for a related offence, such as manslaughter, the combined period of imprisonment will be relevant for the purpose of the serious violent offence regime. The effect of this is that if the combined sentence is imprisonment for 10 years or more, the offender is automatically required to serve a minimum non-parole period of 80 per cent of the imprisonment imposed.<sup>75</sup>*

During the public briefing, the department made the following additional comments on the proposed amendment to section 236(b) of the Criminal Code in a response to a question from the committee:

*The penalty increase from two to five years and the redesignation of the offence from a misdemeanour to a crime are generally reflective of the community's repugnance at improperly dealing with human remains or a deceased person or dealing with them in a disrespectful way. Significant adverse consequences can flow from such dealing with a corpse or human remains. This can encompass the concealing or corrupting of evidence and can in fact mask the detection of a more serious crime, as this offence is not uncommonly coupled with a homicide offence.*

*Moreover, there is significant anecdotal evidence to suggest that the surviving family members of the deceased person suffer significant distress from never recovering a loved one or from the recovery of a body in a state such that it has been dealt with improperly. Additionally, an examination of the convictions for this offence for the period between May 2009 and April 2016 revealed that all convictions for this offence resulted in a head sentence of imprisonment, and 17 per cent of those cases involved the imposition of the maximum penalty available of two years. That suggests that perhaps the maximum penalty, which is, as a matter of legal principle, reserved for the most serious examples of the offence, may justifiably be increased. Finally, just as a matter of interest for the committee, for equivalent offences other Australian jurisdictions impose maximum penalties of between two and 10 years imprisonment. Victoria, notably, has imposed the maximum penalty of five years imprisonment for the equivalent offence.<sup>76</sup>*

<sup>74</sup> Explanatory Notes, p 2.

<sup>75</sup> Introductory Speech, 30 November 2016, Hansard, p 4701.

<sup>76</sup> Transcript, 25 January 2017, public hearing, p 3.



### 2.3.3 Issues raised in submissions

The QLS opposed this proposal in its submission and made the following comments:

*The Society does not agree with the assertion in the Explanatory Notes to the Bill that the, ‘amendment is justified to appropriately reflect the seriousness of the offence and the community’s abhorrence of such conduct.’ The Explanatory Notes do not provide cogent evidence or persuasive data to justify this increase in penalty. In our view, seeking to increase the maximum penalty by more than double is excessive, unjustifiable and does not respect the principle of proportionality. We urge the Committee to consider making a recommendation to retain the current maximum penalty.<sup>77</sup>*

### 2.4 Amendments to *Criminal Proceeds Confiscations Act 2002*

Clause 21 of the Bill amends the CPCA as follows:

- to ensure all contraventions of restraining orders and forfeiture orders made under the CPCA are prohibited and appropriately sanctioned,
- to allow voluntary provision of information by financial institutions to the Crime and Corruption Commission with respect to the Serious Drug Offender Confiscation Order Scheme,
- to clarify the original intention with respect to section 93ZZB (Making of serious drug offender confiscation order), and
- to amend the definition of ‘applicant’.

In her Introductory Speech, the Attorney-General also further explained these amendments:

*Confiscation of illegally obtained proceeds of crime is a key strategy for disrupting criminal activity. The bill contains amendments to ensure that all contraventions of restraining and forfeiture orders made under the Criminal Proceeds Confiscation Act 2002 are prohibited whether intentional or otherwise. Maximum penalties for contraventions of restraining or forfeiture orders will be increased from the existing 350 penalty units to 2,500 penalty units for a financial institution or 1,000 penalty units for all other persons or the value of the property the subject of the offence, whichever is the greater. The existing defence for a person who had no notice or reason to expect that the property was subject to a relevant order will remain for the protection of those people acting in good faith.<sup>78</sup>*

The department provided the following additional background to these provisions during the public briefing:

*I now turn to the amendments in the bill to the Criminal Proceeds Confiscation Act. In the decision of the State of Queensland v Brett Raymond Stevens, the Court of Appeal examined the Criminal Proceeds Confiscation Act section 52, which deals with contraventions of restraining orders. In that case the financial institution failed to freeze accounts as required by a Supreme Court restraining order, and over \$300,000 of restrained funds were transferred, meaning the state could not confiscate them. The Stevens decision highlighted that the Criminal Proceeds Confiscation Act required amendment to ensure that all contraventions of restraining and forfeiture orders made under the Act are prohibited, whether intentional or otherwise. The amendments in the bill achieve this and increase maximum penalties for contraventions of restraining or forfeiture orders from the existing 350 penalty units to 2,500 penalty units for a financial*

<sup>77</sup> Submission. 9, p 2.

<sup>78</sup> Hansard, Introductory Speech, 30 November 2016, p 4701.

*institution, or 1,000 penalty units for all other persons, or the value of the property subject to the offence, whichever is the greater.<sup>79</sup>*

#### **2.4.1 Issues raised in submissions**

The QLS does not support Clause 21 of the Bill which amends section 249 of the CPCA:

*The Society does not support the amendment which would allow financial institutions to voluntarily provide information to the Crime and Corruption Commission. In our view, this process should proceed by way of lawful notice. A notice should only be issued on the basis of probable cause. This will allow the lawfulness of the disclosure to be challenged in court and potentially decrease the likelihood of an inappropriate disclosure of private information by a bank official.<sup>80</sup>*

At the public hearing, Mr Bill Potts from the QLS elaborated further on the QLS's concerns:

*The Crime and Corruption Commission has a power to coerce by way of notice documents relating to financial affairs from financial institutions, as it ought. People ought to be able to have their affairs looked at if they are involved in or are reasonably suspected of being involved in organised criminal activity. You see it being used for drug dealings, large-scale frauds and the like. The concern I have is this, and it is just a practical observation: do we really want our banks effectively formulating all of your affairs and handing them over to the Crime and Corruption Commission or to the police force without a proper process involved? The issuing of the notice takes five minutes. It is not complicated, but it has to be based on and they have to set out that they have reasonable cause rather than whim, rather than some spurious basis or some interest. It merely requires, like search warrants, that the person making the requirement states that there is a reasonable basis for requiring the documents to be produced. It is not complicated and it does not delay, but it prevents, quite frankly, phone calls to mates at the banks to hand over all your banking affairs for no reason.<sup>81</sup>*

In response to the concerns raised in the QLS submission, the department commented:

*The amendment extends an existing process to accommodate changes made to the Criminal Proceeds Confiscations Act (CPCA). Section 249 of the CPCA enables financial institutions to voluntarily and lawfully provide information to investigators if they have a reasonable belief that they have information that may be relevant to an investigation of a criminal offence, serious criminal activity or would otherwise assist in the enforcement of the CPCA.*

*Section 249(3) provides that information may be given to an officer of the Crime and Corruption Commission (CCC) if the information relates to the investigation of 'serious crime related activity' or another matter for which an order may be made under chapter 2.*

*A 2013 amendment introduced a new chapter 2A under the CPCA. It provides for the serious drug offender confiscation order (SDOCO) scheme, which is administrated by the CCC.*

*Section 249(3) does not contemplate chapter 2A.*

<sup>79</sup> Transcript, 25 January 2017, public hearing, p 2.

<sup>80</sup> Submission 9, p 3.

<sup>81</sup> Transcript, 25 January 2017, public hearing, p 8.

*For the State to obtain a SDOCO against a respondent, that person must be convicted of a 'qualifying offence'. A 'qualifying offence' is a single conviction for the offence of drug trafficking or a third conviction for a 'serious drug offence' within a seven year period.*

*Although both drug trafficking and serious drug offences fall within the definition of 'serious crime related activity' this definition is primarily used with reference to chapter 2 of the CPCA.*

*This amendment clarifies that information may be given to a commission officer for any matter for which an order may be made under chapter 2A also.<sup>82</sup>*

## **2.5 Amendments to Director of Public Prosecutions Act 1984**

Clause 25 of the Bill proposes amendments to the *Director of Public Prosecutions Act 1984* and seeks to insert a new section 23A to create a power of delegation to the director's functions and powers. New section 23A states:

*The director may delegate the director's functions and powers under this Act or another Act to an appropriately qualified person.*

### **2.5.1 Issues raised in submissions**

The QLS does not support this proposed amendment making the following comments in its submission:

*The Society does not support the insertion of new section 23A. First, the Explanatory Notes do not provide any rationale for the proposed amendment. The Society notes that the Director of Public Prosecutions Act 1984 already provides that certain functions of the director may be carried out by a lawyer from either within the director's own office or one who is in private practice (section 10(4)).<sup>83</sup>*

*Of most concern is the fact that, there are no parameters which describe the extent to which some or all functions and powers might be delegated. In the Society's view, proposed section 23A is too wide, and the reliance on the definition of the term 'appropriately qualified' in the Acts Interpretation Act 1954 is inappropriate. In practice, the director may even delegate is power to prosecute to a person who is not bound by the Director of Public Prosecutions Act 1984. If the intent of the amendment is to outline the role and responsibility of the deputy prosecutor or provide a delegation power to a senior crown prosecutor, we suggest that this be made clear. Alternatively, we suggest that an inclusive definition of 'appropriately qualified person' be included in the Bill.*

*The appointment of the director by the Governor in Council is an established process and it may not serve the public interest for a director to delegate some or all functions/powers to a person who has not been appointed and without additional guidance and/or supervision. The Society submits that the delegation of powers and functions should be restrained to those described in sections 10, 11, 12, 13, 16, 24B, 24C, 27 and 33(3) of the Act, and that any powers or functions which may be delegated under 'another Act' should be specifically identified and included in the drafting.<sup>84</sup>*

In response to the concerns raised in the QLS submission, the department commented:

<sup>82</sup> Letter from the department to the committee received 3 February 2017, pp 11-12.

<sup>83</sup> Submission 9, 3

<sup>84</sup> Submission 9, pp 3-4.

Clause 25 amends the Director of Public Prosecutions Act 1984 (DPP Act) to enable the Director of Public Prosecutions (DPP) to delegate the Director's functions and powers to an appropriately qualified person.

Presently the power of delegation under the DPP Act is limited to bestowing the power of prosecution on officers employed in the Office of the OPP and to the Deputy Director of Public Prosecutions when the Director of Public Prosecutions is precluded from acting personally in a matter (sections 23 and 27(3) of the OPP Act respectively).

Inserting a general power of delegation into the OPP Act will provide the OPP with a wider range of options to ensure the on-going prosecution of criminal charges in Queensland. For example, the delegation power could be utilised to appoint a Crown Prosecutor from outside the ODPP where there might otherwise be a perception of bias.

The delegation power will also enable the OPP to delegate prosecution of State charges to the Commonwealth OPP. This might be appropriate where there are both Commonwealth and State charges against the same defendant for example drug charges under both the Crimes Act 1914 (Cth) and the Drugs Misuse Act 1986 (Qld).

The delegation must be to an 'appropriately qualified person'. The term 'appropriately qualified person' is defined in schedule 1 of the Acts Interpretation Act as follows-

*For a function or power – means having the qualifications, experience or standing appropriate to perform the function or exercise the power.*

*It is clear from this definition that the power of delegation is not unfettered i.e. it must be made to someone who has the experience or standing to perform the discreet function.*<sup>85</sup>

## **2.6 Amendments to Drugs Misuse Act 1986**

The Bill amends the *Drugs Misuse Act 1986* to update the evidentiary provision providing for a drug analyst's certificate, to reflect current scientific and operational practices of analysis and remove any uncertainty about the admissibility of certificates issued under the section.

### **2.6.1 Issues raised in submissions**

No issues were raised in relation to these proposed amendments in the submissions received by the committee on the Bill.

## **2.7 Amendments to Evidence Act 1977**

The Bill makes the following amendments to the *Evidence Act 1977*:

- To ensure that in proceedings other than committal hearings, unless a court otherwise orders, a party intending to rely on a properly disclosed DNA evidentiary certificate is only required to call the analyst who signed it if another party gives the requisite notice,
- to permit a court to order that the usable soundtrack of a videorecording (pre-recorded evidence) may be played at a proceeding in certain circumstances,
- to exclude the public from a courtroom while the pre-recorded evidence of an affected child witness or special witness is being played,
- to allow for the destruction of certain recordings held by courts in accordance with relevant practice directions, and
- to make technical amendments to provisions relating to the pre-recording of evidence to reflect contemporary court practices.

<sup>85</sup> Letter from the department to the committee received 3 February 2017, p 13.

In her Introductory Speech, the Attorney-General explained these amendments:

*The bill makes a number of amendments to the Evidence Act 1977, including extending the ability of the court to exclude the public from a courtroom while the pre-recorded evidence of an affected child witness, or special witness, is being played. This will provide further protection for these most vulnerable witnesses. Amendments will also allow, in certain circumstances, a court to use the soundtrack obtained from a video recording when the video cannot be played. This provides a practical alternative to having to recall the witness. The amendments also allow for appropriate destruction of recordings held by the courts in accordance with court issued practice directions and make a number of technical amendments to reflect contemporary court practices, such as the use of digital recording technology.*

*The Evidence Act will also be amended to limit the circumstances in which a DNA analyst is required to give evidence about an analyst's certificate. This amendment will not have any impact on the evidence given by analysts about the results of DNA profile comparisons. An amendment to the evidentiary provisions providing for a drug analyst's certificate in the Drugs Misuse Act 1986 will accommodate scientific and technological advances. The amendment acknowledges that an analysis or an examination may not be made by an analyst on every occasion but could be supported by automated processes or laboratory technicians.<sup>86</sup>*

### **2.7.1 Issues raised in submissions**

The proposed changes to the *Evidence Act 1977* were considered by Protect All Children Today Inc. (PACT). Overall PACT noted its support of the playing of videorecording evidence in proceedings in certain circumstances, especially where there is an identified level of vulnerability. PACT also was supportive of:

*Any technical amendments to provisions relating to the pre-recording of evidence to reflect contemporary court practices and ensure the accuracy of important court transcripts is supported by PACT.<sup>87</sup>*

In its submission, PACT set out the various clauses of the Bill that it supports and the reasons for its support. PACT also noted that:

*Clear communications, direction and education of the judiciary will be important to ensure all parties involved are aware of these updated legislative requirements.<sup>88</sup>*

PACT also supported to removal of the word 'tape' in Clauses 32 and 33 of the Bill.<sup>89</sup>

In relation to Clause 35 of the Bill, PACT made the following comment:

*We support the amendments to the instructions to the Jury in relation to the exclusion of non-essential persons when a child's evidence is being played.*

PACT also supported the proposed amendments to Clause 36:

*We appreciate the need for the amendments in relation to the use of soundtracks for particular videorecording and the clarification of the definition of 'relevant witness'. We are particularly supportive of any mechanisms that can prevent a vulnerable child witness from being recalled to give evidence again, as this places unnecessary stress on the child*

<sup>86</sup> Hansard, Introductory Speech, 30 November 2016, pp 4701-2.

<sup>87</sup> Submission 2, p 1.

<sup>88</sup> Submission 2, p 2.

<sup>89</sup> Submission 2, p 2.

*and their family. It also contravenes the intentions of the Evidence Act to reduce the time a child witness is involved in the court process by pre-recording their evidence as early as possible.*<sup>90</sup>

Clauses 37-41, 43 and 44 relating to the management, storage and destruction of video recordings were also supported by PACT.<sup>91</sup>

## **2.8 Amendments to *Jury Act 1995***

The Bill amends the *Jury Act 1995* to modernise a court's ability to use technology in jury selection processes. In her Introductory Speech, the Attorney-General stated:

*The modernisation of the courts' use of technology in the jury selection process will be accommodated by amendments to the Jury Act 1995, for example, by allowing certain notices and summons to be given electronically.*<sup>92</sup>

### **2.8.1 Issues raised in submissions**

PACT expressed support for the proposed changes to the *Jury Act 1995*:

*Any innovations that improve jury selection, communication and operational processes are supported by our organisation. We acknowledge the critical role that the Jury plays within the Queensland criminal court system.*<sup>93</sup>

## **2.9 Amendments to *Justices Act 1886***

The Bill makes the following amendments to the *Justices Act 1886*:

- to insert an authority to allow a Magistrate to order the joinder of trials,
- to allow for admissions of fact in summary trials for simple offences or breaches of duty,
- to allow for registry committals for legally represented defendants who are remanded in custody, and
- to enable a defendant to enter a plea in bulk in a Magistrates Court (also involves amendment to the Criminal Code).

In her Introductory Speech, the Attorney-General explained:

*The Bill also includes amendments to improve the operation of criminal law related practices and procedures. Amendments to the Justices Act 1886 and the Criminal Code adopt three existing practices from the Supreme and District courts for application in the Magistrates Court. The first is joinder of trials. This amendment will allow trials for a number of different people for offences arising from substantially the same set of facts to be heard at the same time. The second of these amendments extends the procedure providing for admissions of fact to summary trials for simple offences and breaches of duty. This amendment will allow certain facts to be agreed by the parties in a trial without needing to call witnesses to have those facts placed before the court.*

*The third practice provided for by the bill is bulk arraignments. This amendment will allow legally represented defendants to enter a single plea to a number of charges at the same time in the Magistrates Court. Each of these amendments will improve consistency in practice for criminal proceedings and support efficient trial procedures. A further procedural amendment will be made to the Justices Act to extend the availability of*

<sup>90</sup> Submission 2, p 2.

<sup>91</sup> Submission 2, p 2.

<sup>92</sup> Introductory Speech, 30 November 2016, Hansard, p 4702.

<sup>93</sup> Submission 2, p 2.

*registry committals, which occur on the papers and do not require an appearance in court, to those defendants remanded in custody.<sup>94</sup>*

### **2.9.1 Issues raised in submissions**

The proposed changes to the *Justices Act 1886* were also considered by PACT. PACT was supportive of these changes:

*Changes that enable a Defendant to enter a plea in bulk in a Magistrates Court is supported by PACT as it could result in affected child witnesses not having to give evidence or enduring the complex and daunting court process.<sup>95</sup>*

## **2.10 Amendments to *Penalties and Sentences Act 1992***

The Bill amends the *Penalties and Sentences Act 1992* to:

- add the offence in section 236(b) (Misconduct with regard to corpses) of the Criminal Code to the serious violent offences schedule,
- allow the Police Commissioner to issue a pre-sentence custody certificate in certain circumstances, and
- provide a mechanism to return offenders sentenced to a recognisance order who fail to properly enter into the recognisance back to the court, and allow for their re-sentencing in the Court's discretion.

In her Introductory Speech, the Attorney-General explained these amendments:

*The Penalties and Sentences Act 1992 will be amended to provide a mechanism to return offenders sentenced to a recognisance order who fail to properly enter into the recognisance back to the court and to allow for their resentencing at the court's discretion. The bill will also allow the Director of Public Prosecutions to delegate his or her functions and powers to an appropriately qualified person and make other minor and technical amendments.<sup>96</sup>*

### **2.10.1 Issues raised in submissions**

The proposed changes to the *Penalties and Sentences Act 1992* were also considered by PACT. PACT indicated that it did not have the expertise to provide meaningful comment but was supportive of:

*... any amendments that better protect vulnerable children and young people from unnecessary risk and prevent further offending behaviours.<sup>97</sup>*

## **2.11 Amendments to *Recording of Evidence Act 1962***

The Bill also amends the *Recording of Evidence Act 1962* to permit the destruction of recordings of Magistrates Court proceedings that are authorised by the archivist.

### **2.11.1 Issues raised in submissions**

In relation to the proposed amendments to the *Recording of Evidence Act 1962*:

<sup>94</sup> Introductory Speech, 30 November 2016, Hansard, p 4701.

<sup>95</sup> Submission 2, p 2.

<sup>96</sup> Introductory Speech, 30 November 2016, Hansard, p 4702.

<sup>97</sup> Submission 2, p 2.

*PACT is supportive of amendments in relation to the destruction of Magistrates Court recordings providing they are in accordance with the other relevant legislation about the disposal and archiving of sensitive records.*<sup>98</sup>

## **2.12 Amendments to *Telecommunications Interception Act 2009***

The Bill also amends the *Telecommunications Interception Act 2009* to insert a new subsection to the provision concerning the keeping of documents by an eligible authority connected with the issue of warrants.

### **2.12.1 Issues raised in submissions**

In relation to the proposed amendments to the *Telecommunications Interception Act 2009*, PACT notes in its submission that it agrees:

*... with amendments that better manage the storage of relevant documents associated with individual court cases.*<sup>99</sup>

## **3 Compliance with the *Legislative Standards Act 1992***

### **3.1 Fundamental legislative principles**

Section 4 of the *Legislative Standards Act 1992* states that ‘fundamental legislative principles’ (FLPs) are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

#### **3.1.1 Rights and liberties of individuals - Section 4(2)(a) *Legislative Standards Act 1992***

Clauses 9, 10, 14, 15, 16, 18, 19, 20 and 21 have the potential to raise the issue of whether the Bill has sufficient regard to the rights and liberties of individuals.

##### **3.1.1.1 Clause 9**

Clause 9 replaces section 236 of the Criminal Code (Misconduct with regard to corpses). Section 236(b) prohibits improperly or indecently interfering with, or offering any indignity to, any dead human body or human remains, whether buried or not. Previously this offence was classified as a misdemeanour attracting a maximum 2 years imprisonment; now pursuant to clause 9 the offence is reclassified as a crime attracting a maximum penalty of 5 years imprisonment.

The proposed amendment potentially impacts on the rights and liberties of individuals by imposing a higher maximum penalty for the offence and thereby exposing an offender to greater punishment than was authorised by the former law. The Explanatory Notes advise that:

*... the amendment is justified to appropriately reflect the seriousness of the offence and the community’s abhorrence of such conduct. The amendment operates prospectively and will only apply to offenders who commit the offence on, or after, the date upon which the amendments commence.*<sup>100</sup>

<sup>98</sup> Submission 2, p 3.

<sup>99</sup> Submission 2, p 3.

<sup>100</sup> Explanatory Notes, p 4.



### 3.1.1.2 Clause 10

Clause 10 amends section 304 of the Criminal Code (Killing on provocation) to restrict the scope of the partial defence of provocation from applying, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person.

This proposed amendment has the potential to significantly affect the rights and liberties of individuals as the defence can currently operate to reduce what would otherwise be a conviction for murder to manslaughter. By removing this defence persons may be convicted of murder and subject to life imprisonment.

The Explanatory Notes advise:

*The proposed amendment reflects changes in community expectations that such conduct should not be able to establish a partial defence of provocation to murder, i.e. where the defendant has killed with murderous intent. However, the proposed amendment also includes the operation of the proviso "other than in circumstances of an exceptional character" to guard against unjust outcomes as it is impossible to predict the factually dynamic circumstances that may arise in homicide cases.<sup>101</sup>*

### 3.1.1.3 Clause 21

Clause 21 amends s.249(3) of the *Criminal Proceeds Confiscation Act 2002* to allow financial institutions to voluntarily provide private and confidential personal financial information about a customer to the Crime and Corruption Commission, where it relates to a matter for which an order may be made under Chapter 2A (the serious drug offender confiscation order scheme).

This amendment breaches an individual's expectation of privacy with respect to their financial records. However, financial institutions are already able (and often required) to provide information related to 'serious crime related activity'.

The serious drug offender confiscation order scheme applies to a drug trafficking conviction or a third conviction for other prescribed drug offences such as supplying or producing a dangerous drug (qualifying offences). Although the qualifying offences fall within the definition of 'serious crime related activity', the Crime and Corruption Commission has sought this amendment because section 249 does not currently contemplate chapter 2A.

By allowing financial institutions to lawfully provide personal financial information to the Commission with respect to the serious drug offender confiscation order scheme it will help further the main object of the *Criminal Proceeds Confiscation Act 2002* which is to remove the financial gain and increase the financial loss associated with illegal activity by permitting the State to identify, seize, and forfeit to the State, property of persons that has been obtained using the proceeds of crime.

In the circumstances, it is arguably appropriate, as a matter of public policy, that the financial records of an individual that is the subject of a serious drug offender confiscation order, be made available to the Crime and Corruption Commission for the purposes of forensic accounting, asset identification and asset seizure/forfeiture.

### 3.1.1.4 Clauses 14, 15, 16, 18, 19, 20

Clauses 14, 15, 16, 18, 19 and 20 amend the *Criminal Proceeds Confiscation Act 2002* in respect of breaches of restraining orders and prohibited dealings with property that is the subject of a forfeiture order.

<sup>101</sup> Explanatory Notes, p 4.

The removal of the element of intention (except for attempted offences) in the above offence provisions makes the offences easier to prosecute and consequently secure a conviction. This will increase the number of successful prosecutions and will invariably result in more convictions than would have been possible under the current system where the prosecution had to prove that the accused had acted from ‘an intention to directly or indirectly defeat an order.’ This obviously will increase the number of offenders whose rights and liberties are effected by increasing the number of successful prosecutions.

The penalties applying under the above provisions have also substantially increased, typically from 350 penalty units to max. 2500 penalty units for a financial institution and a maximum of 1000 penalty units for an individual.

The Explanatory Notes advise:

*The amendments are justified to reinforce the authority of orders of the Supreme Court of Queensland issued under the CPCA and ensure that assets that are liable to confiscation or forfeiture to the State are not dissipated. If assets are dissipated in breach of Supreme Court orders, it impedes the CPCA from achieving its main objective of removing the financial gain and increasing the financial loss associated with illegal activity.*

*The expansion of the scope of the provisions voiding dealings with property increases the elements a potential innocent party must address in order to successfully legitimise the dealing. However, the expansion is justified as it is consistent with the CPCA’s objects, including that in section 4(2)(g) aimed at protecting property honestly acquired for sufficient consideration by persons innocent of illegal activity from forfeiture and other orders affecting property.<sup>102</sup>*

#### **Committee comment**

The committee has considered the above and concludes that, on balance, given the nature of the provisions involved, the Bill does have sufficient regard to the rights and liberties of individuals in the circumstances.

#### **3.1.2 Onus of proof – Section 4(3)(d) Legislative Standards Act 1992**

Clauses 8 and 9 of the Bill both have the potential to raise the issue of whether the Bill reverses the onus of proof in criminal proceedings without adequate justification.

##### Summary of provisions

Two provisions operate to reverse the onus of proving something onto the defendant in a criminal proceeding. Those are:

- Clause 8, inserting new section 89(1B) into the Criminal Code, and
- Clause 9, replacing section 236(1) of the Criminal Code.

##### Potential FLP issues

Legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence. *“For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential*

<sup>102</sup> Explanatory Notes, p 5.

*means and the defendant would be particularly well positioned to disprove guilt*".<sup>103</sup> Generally, the former Scrutiny of Legislation Committee opposed the reversal of the onus of proof.<sup>104</sup>

#### Comment

In respect of the clause 8 amendment, it relates to a public officer making a prior disclosure (to the chief executive of the relevant department) of a private interest in a matter coming up for contract and obtaining from the chief executive written authorisation to acquire or hold the interest. Under new subsection (1B) proof that that disclosure was made and authorisation obtained 'lies on the person' being proceeded against for an offence.

It could be argued that this is a matter solely within the knowledge of the defendant themselves, and therefore difficult to establish by alternative evidential means, although given the propensity for bureaucratic record-keeping it seems unlikely that the chief executive to whom the disclosure was made and who was required to provide written authorisation, would not have retained a copy or record that such authorisation was given. Thus, whilst it might be easier for the defendant to prove they received authorisation, it is arguable that it is possible to prove the disclosure and the consequent authorisation by evidential means other than reversing the onus and requiring the defendant to provide exculpatory evidence on his/her own behalf.

In respect of the clause 9 amendment to the s.236 of the Code, it makes misconduct with regard to corpses an offence for a person 'who, without lawful justification or excuse, the proof of which lies on the person' neglects to perform any duty imposed on the person by law or improperly or indecently interferes with human remains. Perhaps in this instance the defendant is arguably 'particularly well positioned to disprove guilt' given the likely absence of other witnesses to a breach of duty or indecency/interference offence.

#### **Committee comment**

The committee has considered the above and concludes that, on balance, given the nature of the provisions involved, the reversal of the onus of proof in the Bill is acceptable in the circumstances.

### **3.1.3 Restrospective operation - Section 4(3)(g) Legislative Standards Act 1992**

Clauses 14, 15, 16, 18, 19 and 20 of the Bill both have the potential to raise the issue of whether the Bill adversely affect rights and liberties, or impose obligations, retrospectively.

#### *3.1.3.1 Clauses 14, 15, 16, 18, 19, 20*

Clauses 14, 15, 16, 18, 19, 20 amend the *Criminal Proceeds Confiscation Act 2002* in respect of breaches of restraining orders and prohibited dealings with property that is subject of a forfeiture order.

Section 4(3)(g) of the *Legislative Standards Act 1992* provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

It may be argued that the amendments to these sections will provide for a partial retrospective effect in that the amendments will apply to all restraining orders and forfeiture orders issued under that Act whether those orders were issued before or after the commencement of the provisions.

<sup>103</sup> Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 36.

<sup>104</sup> Alert Digest 2002/4, p 27, para 10.

**Committee comment**

As advised by the Explanatory Notes, although the amended provisions will apply to all restraining orders and forfeiture orders issued under the CPCA whether those orders were issued before or after the commencement of the provisions, the amendments will only apply to breaches or prohibited dealings that occur *after* the commencement of the amendments. On this basis, the committee considers the proposals under the Bill in relation to Clauses 14, 15, 16, 18, 19, 20 to be acceptable, even if they may operate retrospectively.

**3.2 Explanatory notes**

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory Notes were tabled with the introduction of the Bill. The Explanatory Notes in respect of the Bill are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

## Appendix A – List of submissions

- 001 Stephen Page
- 002 Protect All Children Now Inc.
- 003 Brisbane LGBTIQ Action Group
- 004 Alastair Lawrie
- 005 Anti Discrimination Commission Queensland
- 006 LGBTI Legal Service Inc
- 007 Gay & Lesbian Rights Lobby
- 008 Australian Christian Lobby
- 009 Queensland Law Society

## Appendix B – Witnesses at public hearing

### **LGBTI Legal Service**

- Mr Thomas Clark, Director of Law Reform

### **Brisbane LGBTIQ Action Group**

- Mr Phil Browne, Convenor

### **Queensland Law Society**

- Mr Bill Potts, Immediate Past President
- Ms Binny De Saram, Senior Policy Solicitor

### **Mr Stephen Page**

- Solicitor, Accredited Specialist Family Law

### **Australian Christian Lobby**

- Mrs Wendy Francis, Queensland State Director
- Dr Elisabeth Taylor, Director of Research

## Appendix C – QLD Case summaries <sup>105</sup>

### 1. *R v Meerdink and Pearce*

*R v Meerdink and Pearce* related to the killing of Wayne Ruks by two men in a Maryborough churchyard in 2008. Meerdink, Pearce and Ruks had been smoking marijuana together in the churchyard, when a verbal confrontation developed. Ruks left but returned a short time later and the confrontation recommenced. Pearce and Meerdink then chased Ruks and tackled him to the ground, where they assaulted him on and off for approximately six minutes. Ruks died from internal bleeding into the abdomen caused by the assault.

Meerdink and Pearce pleaded not guilty to murder and the trial jury found them not guilty of that offence. The jury found Meerdink guilty of manslaughter and Pearce pleaded guilty to manslaughter. In his sentencing remarks, Applegarth J notes that ‘the jury was not satisfied that either of you intended to kill or cause grievous bodily harm to Mr Ruks’. Mr Jerrard in his report commented that:

*those men had consumed a good deal of alcohol, and ... Mr Pearce had also had some cannabis, and accordingly may have been incapable of forming a coherent intention to kill or do grievous bodily harm.*

Pearce led evidence that he ‘snapped’ when Ruks made sexual advances towards him, as he had been sexually abused on at least two occasions by a school janitor when he was six years old.

Applegarth J also stated:

*Whatever original offence Mr Ruks caused was removed in time and was not the immediate cause of the violence that was unleashed on him. He returned to the scene and there was probably verbal abuse on his part directed to both defendants. Mr Pearce, you may have over-reacted to this abuse because of matters personal to you. However, that cannot explain the persistence in assaulting Mr Ruks.*

The 2011 Expert Committee Report concluded that the two men were found not guilty of murder because they lacked the necessary intent, rather than due to provocation by the victim.

### 2. *R v Peterson and Smith*

*R v Peterson and Smith* relates to the killing of Stephen Ward by Smith and Peterson in Maryborough in 2008.

The two men had offered Ward, who was hitchhiking on the Bruce Highway, a lift and invited him home for dinner at Smith’s house. After dinner, Peterson and Smith drove Ward back to a truck stop on the highway. All three men were heavily intoxicated with alcohol and cannabis, and Peterson was also under the influence of methamphetamine. As he was exiting the vehicle, Ward attempted to grab Peterson’s crotch and made a remark to him with a sexual connotation. Peterson ‘snapped’ and punched Ward 20 or 30 times. The assault ended only when Ward collapsed. Peterson and Smith left Ward at the side of the road, returning later to move Ward (who was still alive) to a more isolated location.

Peterson and Smith were charged with Ward’s murder after his badly decomposed body was found months later.

<sup>105</sup> See 2011 Expert Committee Report, pp 4-6; *R v Richard John Meerdink and Jason Andrew Pearce* [2010] QSC 158 and *R v. Peterson & Smith* (Unreported, QSC, Maryborough, Atkinson J, 14/10/2011).

Peterson had grown up in a violent household, where his father, an alcoholic, was violent towards him, his brothers and his mother. Peterson left home when he was 12 or 13 years old, and was raped on at least two occasions by older men offering him accommodation. Peterson suffered from post-traumatic stress disorder and alcohol and poly-drug addiction.

In relation to Peterson, who carried out the attack, the jury returned a verdict of not guilty to murder, but guilty to manslaughter. Mr Jerrard commented in the 2011 Expert Committee Report that:

*The judge concluded from the jury's verdict of not guilty of murder, and guilty of manslaughter, that the jury were unable to exclude the beyond reasonable doubt that an ordinary person, who had suffered what Mr Peterson had suffered in his childhood abuse, could not have reacted in a way in which Mr Peterson had reacted.*

In the 2011 Expert Committee Report, Mr Jerrard concluded that this is the only case in which evidence of a homosexual advance by the deceased towards the accused 'unequivocally' resulted in murder being reduced to manslaughter.



## Appendix D – Jurisdictional Comparison of Provocation and “Gay Panic Defence” in Australia

Table 1– Comparison of the availability of the provocation and ‘gay panic’ defences in Australia

Jurisdiction QLD	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the ‘Gay Panic Defence’ in reducing murder to manslaughter
Queensland	<ul style="list-style-type: none"> <li>• Yes</li> <li>• Provocation is available as a defence and it is contained in section 304 <a href="#">Criminal Code (Qld)</a> (Schedule 1 of the <a href="#">Criminal Code Act 1899 (Qld)</a>.<sup>2</sup></li> <li>• Section 304 of the <i>Criminal Code</i> (Qld) embodies the common law rules.<sup>3</sup></li> <li>• The <a href="#">Criminal Code (Qld)</a> was amended in 2011 to limit provocation within a domestic relationship and place the burden of proving provocation on the defence.<sup>4</sup></li> <li>• Provocation exists as a partial defence to murder and may reduce murder to manslaughter.</li> <li>• The defence also denies liability for a limited range of offences other than murder.<sup>5</sup></li> </ul> <p style="text-align: center;"><b>304 Killing on provocation</b> <i>(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden</i></p>	<ul style="list-style-type: none"> <li>• Yes</li> <li>• The case law precedent allows people accused of murder to claim they were provoked to kill by an unwanted homosexual advance, thereby reducing criminal responsibility of the crime to manslaughter.<sup>6</sup></li> </ul> <p>Pending legislative reforms:</p> <ul style="list-style-type: none"> <li>• On 30 November 2016, the Honourable Yvette D’Ath introduced the <a href="#">Criminal Law Amendment Bill 2016 (Qld)</a>.</li> <li>• Clause 10 of the Bill includes proposed amendments to section 304, killing on provocation.</li> <li>• The Bill amends section 304 to exclude an unwanted sexual advance, other than in circumstances of an</li> </ul>

<sup>2</sup> [Criminal Code \(Qld\)](#), s 304.

<sup>3</sup> *Van Den Hoek v The Queen* (1986) 161 CLR 158; *R v Herlihy* [1956] St R Qd 18 (CCA); *R v Johnson* [1964] Qd R 1 (CCA); *R v Callope* [1965] Qd R 456 (CCA); *Kaporonovski v The Queen* (1973) 133 CLR 209.

<sup>4</sup> [Criminal Code and Other Legislation Amendment Act 2011 \(Qld\)](#).

<sup>5</sup> [Criminal Code \(Qld\)](#), ss 268, 269.

<sup>6</sup> T Eastley, N Haxton, T Ballard, Y D’Ath, ‘Calls growing to abolish the gay panic defence’, *ABC News*, 17 May 2016.

Jurisdiction QLD	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
	<p><i>provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.</i></p> <p><i>(2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.</i></p> <p><i>(3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if—</i></p> <p style="padding-left: 40px;"><i>(a) a domestic relationship exists between 2 persons; and</i></p> <p style="padding-left: 40px;"><i>(b) one person unlawfully kills the other person (the <b>deceased</b>); and</i></p> <p style="padding-left: 40px;"><i>(c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—</i></p> <p style="padding-left: 80px;"><i>(i) to end the relationship; or</i></p> <p style="padding-left: 80px;"><i>(ii) to change the nature of the relationship; or</i></p> <p style="padding-left: 80px;"><i>(iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.</i></p> <p><i>(4) For subsection (3)(a), despite the Domestic and Family Violence Protection Act 2012, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.</i></p> <p><i>(5) Subsection (3)(c)(i) applies even if the relationship has ended</i></p> <p><i>before the sudden provocation and killing happens.</i></p> <p><i>(6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.</i></p>	<p>exceptional character, from the ambit of the partial defence.<sup>7</sup></p> <ul style="list-style-type: none"> <li>• The proposed amendment to s304 aims to restrict the scope of the partial defence of provocation from applying, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person has the potential to significantly affect the rights and liberties of individuals.<sup>8</sup></li> <li>• The defence operates to reduce what would otherwise be murder to manslaughter and the penalty for murder is mandatory life imprisonment.</li> <li>• The proposed amendment reflects changes in community expectations that such conduct should not be able to establish a partial defence of provocation to murder (i.e. where the defendant was killed with murderous intent).<sup>9</sup></li> <li>• The proposed amendment also includes operation of the proviso "<i>other than in circumstances of an exceptional character</i>" to guard against unjust outcomes as it is impossible to predict the factually dynamic circumstances that may arise in homicide cases.<sup>10</sup></li> </ul>

<sup>7</sup> [Criminal Law Amendment Bill 2016](#), s 10.

<sup>8</sup> Explanatory Memorandum, [Criminal Law Amendment Bill 2016](#), p 4.

<sup>9</sup> Explanatory Memorandum, [Criminal Law Amendment Bill 2016](#), p 4.

<sup>10</sup> Explanatory Memorandum, [Criminal Law Amendment Bill 2016](#), p 4.

Jurisdiction QLD	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
	<p>(7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.</p> <p>(8) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.</p>	<p><b>Clause 10 Amendment of s304 (Killing on provocation):</b></p> <p>(1) Section 304(2), (3) and (6), 'a most extreme and'—omit, insert— an</p> <p>(2) Section 304—insert—</p> <p>(3A) Further, subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person.</p> <p>(6A) For proof of circumstances of an exceptional character mentioned in subsection (4), regard may be had to any history of violence, or of sexual conduct, between the person and the person who is unlawfully killed that is relevant in all the circumstances.</p> <p>(9) In this section— unwanted sexual advance, to a person, means a sexual advance that—</p> <p>(a) is unwanted by the person; and</p> <p>(b) if the sexual advance involves touching the person—involves only minor touching. Examples of what may be minor touching depending on all the relevant circumstances— patting, pinching, grabbing or brushing against the person, even if the touching is an offence against section 352(1)(a) or another provision of this Code or another Act</p> <p>(3) Section 304(3A) to (9)— renumber as section 304(4) to (11).</p>

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Jurisdiction NSW	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
New South Wales	<ul style="list-style-type: none"> <li>• Yes</li> <li>• The defence of provocation is contained in s23 <a href="#">Crimes Act 1900 No 40 (NSW)</a>.<sup>11</sup></li> <li>• The defence of provocation exists as a partial defence to murder in 'extreme' provocation.<sup>12</sup> It may reduce a murder conviction to manslaughter.</li> <li>• Provocation must involve the commission of a serious indictable offence by the deceased.<sup>13</sup></li> </ul> <p><b>23 Trial for murder—partial defence of extreme provocation</b></p> <p><i>(1) If, on the trial of a person for murder, it appears that the act causing death was in response to extreme provocation and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter.</i></p> <p><i>(2) An act is done in response to extreme provocation if and only if:</i></p> <ul style="list-style-type: none"> <li><i>(a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and</i></li> <li><i>(b) the conduct of the deceased was a serious indictable offence, and</i></li> <li><i>(c) the conduct of the deceased caused the accused to lose self-control, and</i></li> <li><i>(d) the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.</i></li> </ul> <p><i>(3) Conduct of the deceased does not constitute extreme provocation if:</i></p> <ul style="list-style-type: none"> <li><i>(a) the conduct was only a non-violent sexual advance to the accused, or</i></li> </ul>	<ul style="list-style-type: none"> <li>• No</li> <li>• The provisions contain an express exclusion relating to non-violent sexual advance<sup>14</sup> That is, a non-violent sexual advance cannot, by itself, constitute provocation.</li> <li>• Section 23(3)(b) also excludes conduct which is incited by the accused in order to provide an excuse to use violence against the deceased.</li> </ul>

<sup>11</sup> [Crimes Act 1900 No 40 \(NSW\)](#), s 23.

<sup>12</sup> [Crimes Amendment \(Provocation\) Act 2014 No 13 \(NSW\)](#); [Crimes Act 1900 No 40 \(NSW\)](#), s 23. Section 23(2) defines the circumstances that constitute extreme provocation. The list is exhaustive.

<sup>13</sup> [Crimes Act 1900 No 40 \(NSW\)](#), s 23(2)(b).

<sup>14</sup> [Crimes Act 1900 No 40 \(NSW\)](#), s 23(3).

Jurisdiction QLD	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
	<p><i>(b) the accused incited the conduct in order to provide an excuse to use violence against the deceased.</i></p> <p><i>(4) Conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.</i></p> <p><i>(5) For the purpose of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication of the accused (within the meaning of Part 11A) cannot be taken into account.</i></p> <p><i>(6) For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negated merely because the act causing death was done with intent to kill or inflict grievous bodily harm.</i></p> <p><i>(7) If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation.</i></p> <p><i>(8) This section does not exclude or limit any defence to a charge of murder.</i></p> <p><i>(9) The substitution of this section by the <a href="#">Crimes Amendment (Provocation) Act 2014</a> does not apply to the trial of a person for murder that was allegedly committed before the commencement of that Act.</i></p> <p><i>(10) In this section: act includes an omission to act.</i></p>	

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Jurisdiction VIC	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
<b>Victoria</b>	<ul style="list-style-type: none"> <li>• No</li> <li>• In 2004 the Victorian Law Reform Commission reviewed the defence of provocation and found that the information received in favour of abolishing the defence was 'compelling'.<sup>15</sup></li> <li>• Victoria subsequently abolished the defence of provocation entirely in 2005<sup>16</sup>.</li> <li>• The <a href="#">Crimes (Homicide) Act 2005 (Vic)</a> introduced the partial defence of 'defensive homicide' in place of provocation, however on 9 September 2014 this defence was also repealed.<sup>17</sup></li> <li>• The defence is not available to reduce murder to manslaughter.</li> </ul>	No

<sup>15</sup> Victoria. Victorian Law Reform Commission, [Defences to Homicide Final Report](#), 2004, p 55.

<sup>16</sup> [Crimes \(Homicide\) Act 2005 \(Vic\)](#), s 3B.

<sup>17</sup> [Crimes Amendment \(Abolition of Defensive Homicide\) Bill 2014](#).

Jurisdiction SA	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
South Australia	<ul style="list-style-type: none"> <li>• Yes</li> <li>• Provocation is governed by the common law in South Australia.<sup>18</sup></li> <li>• Provocation exists as a partial defence to murder and the defence may reduce a murder charge to manslaughter.</li> </ul>	<ul style="list-style-type: none"> <li>• Yes</li> <li>• The case law precedent allows people accused of murder to claim they were provoked to kill by an unwanted homosexual advance, thereby reducing criminal responsibility of the crime to manslaughter.<sup>19</sup></li> </ul> <p>Reform attempts in 2013:</p> <ul style="list-style-type: none"> <li>• On 1 May 2013, the Honourable Tammy Franks introduced the <a href="#">Criminal Law Consolidation (Provocation) Amendment Bill 2013 (SA)</a>.<sup>20</sup></li> <li>• The Bill proposed the insertion of a new s 11A in the <a href="#">Criminal Law Consolidation Act 1935 (SA)</a> (see below) which sought to limit the partial defence of provocation by removing the "the gay panic defence" from the laws of South Australia.<sup>21</sup></li> <li>• On 30 October 2013 the Legislative Council withdrew the Bill following a debate.</li> <li>• The Bill was then referred to the South Australian Parliament's Legislative Review Committee, which tabled its report on 2 December 2014. The Committee '<i>strongly [agreed] with the Honourable Member's desire to ensure that homophobic violence should not be tolerated,</i>' but recommended that the bill should not be passed. The Committee concluded that the bill will not result in effective reform because</li> </ul>

<sup>18</sup> *R v Hajistassi* (2010) 107 SASR 67; *R v Cox* [2006] SASC 188; *R v Lem* [2005] SASC 405 (CCA); *R v Singh* (2003) 86 SASR 473; *R v R* (1981) 28 SASR 321; *R v Webb* (1977) 16 SASR 309 (CCA).

<sup>19</sup> T Eastley, N Haxton, T Ballard, Y D'Ath, '[Calls growing to abolish the gay panic defence](#)', *ABC News*, 17 May 2016.

<sup>20</sup> T Franks, '[Second reading speech: Criminal Law Consolidation \(Provocation\) Amendment Bill 2013](#)', South Australia, Debates, 1 May 2013.

<sup>21</sup> [Criminal Law Consolidation \(Provocation\) Amendment Bill 2013](#).

Jurisdiction SA	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
		<p>subsequent to the South Australian Court of Criminal Appeal's recent judgment in <i>R v Lindsay</i><sup>22</sup>, 'it is now very unlikely that a non-violent homosexual advance, of itself, will ever constitute sufficient grounds to establish a provocation defence'.<sup>23</sup></p> <p>Reform attempts in 2015:</p> <ul style="list-style-type: none"> <li>• On 13 May 2015, the Honourable Tammy Franks introduced the South Australia – Criminal Law Consolidation (Provocation) Amendment Bill 2015 to amend the <i>Criminal Law Consolidation Act 1935</i> to the Legislative Council for a second time.<sup>24</sup></li> <li>• The Bill sought to insert s11A (identical to the one introduced in 2013) in the <a href="#">Criminal Law Consolidation Act 1935 (SA)</a> to limit the partial defence of provocation by removing the 'the gay panic defence' from the laws of South Australia.<sup>25</sup></li> <li>• The Bill failed on 2 December 2015 after the second reading was negatived.<sup>26</sup></li> </ul> <p><b><i>s 11A—Limitation on defence of provocation</i></b></p> <p><i>For the purposes of proceedings in which the defence of provocation may be raised, conduct of a sexual nature by a person does not constitute provocation merely because the person was the same sex as the defendant.</i></p>

<sup>22</sup> [2014] SASCFC 56; (2014) 119 SASR 320.

<sup>23</sup> Parliament of South Australia, [Report of the Legislative Review Committee into the Partial Defence of Provocation](#), 2014, p 40.

<sup>24</sup> T Franks, '[Second reading speech: Criminal Law Consolidation \(Provocation\) Amendment Bill 2015](#)', South Australia, *Debates*, 2 December 2015.

<sup>25</sup> [Criminal Law Consolidation \(Provocation\) Amendment Bill 2015](#).

<sup>26</sup> T Franks, '[Second reading speech: Criminal Law Consolidation \(Provocation\) Amendment Bill 2015](#)', South Australia, *Debates*, 2 December 2015.



Jurisdiction SA	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
		<p>Media:</p> <ul style="list-style-type: none"> <li>In 2016 former South Australian Law Society president David Caruso stated that the law of provocation is not just about homosexual advances, and has been misleadingly labelled the "gay panic defence". He said that while some reform is warranted, the law should still recognise that in some extraordinary circumstances, people can lose control in a manner that does not warrant a murder conviction, such as a victim of domestic violence who lashes out and kills after years of abuse.<sup>27</sup></li> <li>Current Premier, Jay Weatherill is also committed to ending the availability of this type of offence stating that the gay panic defence was an "outdated and offensive notion".<sup>28</sup></li> </ul>

<sup>27</sup> T Eastley, N Haxton, T Ballard, Y D'Ath, ['Calls growing to abolish the gay panic defence'](#), ABC News, 17 May 2016.

<sup>28</sup> T Eastley, N Haxton, T Ballard, Y D'Ath, ['Calls growing to abolish the gay panic defence'](#), ABC News, 17 May 2016; L Waldhuter, ['International day against homophobia: Comedian Tom Ballard joins call to axe 'gay panic' murder defence'](#), ABC News, 17 May 2016.

Jurisdiction WA	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
Western Australia	<ul style="list-style-type: none"> <li>• Provocation is available as a defence and it is contained in s246 of the <a href="#">Criminal Code (WA)</a>.</li> <li>• The defence also denies liability for a limited range of offences other than murder.<sup>29</sup></li> <li>• For example, provocation remains a complete defence to assault, provided that the assault was not intended or is unlikely to cause death or grievous bodily harm.<sup>30</sup></li> <li>• In 2008, provocation was abolished as a partial defence to murder following the Western Australian Law Reform Commission review of homicide laws.<sup>31</sup></li> <li>• The Commission stated that provoked killings were not uniform, in either their intent or degree of moral culpability and that <i>"the only lawful purpose for intentional killings is self-preservation or the protection of others"</i>.<sup>32</sup></li> <li>• The provocation defence to murder has been replaced by the offence of 'unlawful assault causing death'.<sup>33</sup></li> </ul> <p><b>s 246. Defence of provocation</b>  <i>A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely to cause death or grievous bodily harm.</i>  <i>Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.</i></p>	No

<sup>29</sup> [Criminal Code \(WA\)](#), ss 245, 246.

<sup>30</sup> [Criminal Code \(WA\)](#)s 246.

<sup>31</sup> [Criminal Law Amendment \(Homicide\) Act 2008 \(WA\)](#), s 12; Western Australia, Law Reform Commission of Western Australia, [Review of the law of homicide: Final report](#), 2007.

<sup>32</sup> New South Wales, Select Committee on the Partial Defence of Provocation, [The partial defence of provocation](#), 2013, p 26; Western Australia, Law Reform Commission of Western Australia, [Review of the law of homicide: Final report](#), 2007, p 219.

<sup>33</sup> [Criminal Code \(WA\)](#), s 281.

Jurisdiction TAS	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
Tasmania	<ul style="list-style-type: none"> <li>• No</li> <li>• Tasmania became the first state to abolish the defence of provocation entirely in 2003.<sup>34</sup> The defence is not available to reduce murder to manslaughter.</li> <li>• The Tasmania Director of Public Prosecutions Annual Report 2000-2001 noted that <i>“one of the hallmarks of [provocation] is a sudden loss of self-control. This is not entirely consistent with the expectations of a civilised society”</i>.<sup>35</sup> The report further noted <i>“with the abolition of mandatory life imprisonment for murder, and the ability to impose a sentence reflective of the circumstances, it seems to me to be questionable that provocation as a defence needs to be retained”</i>.<sup>36</sup></li> <li>• In her second reading speech, the Honourable Judy Jackson stated that: <ul style="list-style-type: none"> <li><i>“The main argument for abolishing the defence stems from the fact that people who rely on provocation intend to kill. An intention to kill is murder. Why should the fact that the killing occurred when the defendant was acting out of control make a difference? All the ingredients exist for the crime of murder. Another reason to abolish the defence is that provocation is and can be adequately considered as a factor during sentencing. Now that the death penalty and mandatory life imprisonment have been removed, provocation remains as an anachronism”</i>.<sup>37</sup></li> </ul> </li> </ul>	No

<sup>34</sup> [Criminal Code Amendment \(Abolition of Defence of Provocation\) Act 2003 \(Tas\)](#).

<sup>35</sup> New South Wales, Select Committee on the Partial Defence of Provocation, [The partial defence of provocation](#), 2013, p 23; Tasmania, Director of Public Prosecutions, [Annual Report 2000-2001](#), p 6.

<sup>36</sup> New South Wales, Select Committee on the Partial Defence of Provocation, [The partial defence of provocation](#), 2013, p 23; Tasmania, Director of Public Prosecutions, [Annual Report 2000-2001](#), p 6.

<sup>37</sup> J Jackson, [‘Second reading speech: Criminal Code Amendment \(Abolition of Defence of Provocation\) Bill 2003 \(no. 15\)’](#), Tasmania, *Debates*, 20 March 2003, p 30-108.

Jurisdiction ACT	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
<b>Australian Capital Territory</b>	<ul style="list-style-type: none"> <li>• Yes</li> <li>• The defence of provocation is contained in s13 of the <a href="#">Crimes Act 1900 (ACT)</a>.</li> <li>• Provocation exists as a partial defence to reduce murder to manslaughter.<sup>38</sup></li> </ul> <p style="text-align: center;"><b>s 13 Trial for murder—provocation</b></p> <p><i>(1) If, on a trial for murder—</i></p> <p style="padding-left: 40px;"><i>(a) it appears that the act or omission causing death occurred under provocation; and</i></p> <p style="padding-left: 40px;"><i>(b) apart from this subsection and the provocation, the jury would have found the accused guilty of murder;</i></p> <p style="padding-left: 40px;"><i>the jury shall acquit the accused of murder and find him or her guilty of manslaughter'</i></p> <p><i>(2) For subsection (1), an act or omission causing death shall be taken to have occurred under provocation if—</i></p> <p style="padding-left: 40px;"><i>(a) the act or omission was the result of the accused's loss of self-control induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and</i></p> <p style="padding-left: 40px;"><i>(b) the 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—</i></p> <p style="padding-left: 80px;"><i>(i) as to have formed an intent to kill the deceased; or</i></p> <p style="padding-left: 80px;"><i>(ii) as to be recklessly indifferent to the probability of causing the deceased's death; whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.</i></p> <p><i>(3) However, conduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused—</i></p>	<ul style="list-style-type: none"> <li>• No</li> <li>• The provisions contain an express exclusion relating to non-violent sexual advance which was introduced in 2004.<sup>39</sup></li> <li>• That is, a non-violent sexual advance cannot be relied upon by a defendant asserting provocation during a trial for murder, but only where the advance occurs in isolation from other objectionable acts.<sup>40</sup></li> </ul> <p>Section 13(3) applies to any non-violent sexual advance, regardless of the sexes of those involved. For example, it is not limited to only a non-violent homosexual advance.</p>

<sup>38</sup> [Crimes Act 1900 \(ACT\)](#), s 13.

<sup>39</sup> [Crimes Act 1900 \(ACT\)](#), s 13(3); [Sexuality Discrimination Legislation Amendment Act 2004 \(ACT\)](#), Schedule 2, Part 2.1.

<sup>40</sup> New South Wales, Select Committee on the Partial Defence of Provocation, [The partial defence of provocation](#), 2013, p 26.

Jurisdiction ACT	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
	<p><i>(a) is taken not to be sufficient, by itself, to be conduct to which subsection (2) (b) applies; but</i></p> <p><i>(b) may be taken into account together with other conduct of the deceased in deciding whether there has been an act or omission to which subsection (2) applies.</i></p> <p><i>(4) For the purpose of determining whether an act or omission causing death occurred under provocation, there is no rule of law that provocation is negated if—</i></p> <p><i>(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission; or</i></p> <p><i>(b) the act or omission causing death did not occur suddenly; or</i></p> <p><i>(c) the act or omission causing death occurred with any intent to take life or inflict grievous bodily harm.</i></p> <p><i>(5) If, on a trial for murder, there is evidence that the act or omission causing death occurred under provocation, the onus of proving beyond reasonable doubt that the act or omission did not occur under provocation lies on the prosecution.</i></p> <p><i>(6) This section does not exclude or limit any defence to a charge of murder.</i></p>	

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Jurisdiction NT	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
Northern Territory	<ul style="list-style-type: none"> <li>• Yes</li> <li>• The defence of provocation is contained in s158 of the Criminal Code (NT).<sup>41</sup></li> <li>• The defence of provocation exists as a partial defence to murder and can be used to reduce murder to manslaughter.<sup>42</sup></li> <li>• In the Northern Territory, provocation is no longer a defence to offences other than murder.<sup>43</sup> <p><i>s 158 Trial for murder – partial defence of provocation</i></p> <p><i>(1) A person (the defendant) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.</i></p> <p><i>(2) The defence of provocation applies if:</i></p> <ul style="list-style-type: none"> <li><i>(a) the conduct causing death was the result of the defendant's loss of self-control induced by conduct</i></li> <li><i>(b) the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.</i></li> </ul> <p><i>(3) Grossly insulting words or gestures towards or affecting the defendant can be conduct of a kind that induces the defendant's loss of self-control.</i></p> <p><i>(4) A defence of provocation may arise regardless of whether the conduct of the deceased occurred immediately before the conduct causing death or at an earlier time.</i></p> <p><i>(5) However, conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant:</i></p> </li> </ul>	<ul style="list-style-type: none"> <li>• No</li> <li>• The provisions contain an express exclusion relating to non-violent sexual advance.<sup>44</sup></li> <li>• That is, a non-violent sexual advance cannot, by itself, sustain a provocation defence in the Northern Territory.</li> <li>• The changes were brought about in 2006 by the Northern Territory Department of Justice.<sup>45</sup></li> </ul>

<sup>41</sup> [Criminal Code \(NT\)](#), s 158.

<sup>42</sup> [Criminal Code \(NT\)](#), s 158.

<sup>43</sup> [Criminal Reform Amendment Act \(No 2\) 2006 \(NT\)](#). This Act abolished the previous *Criminal Code (NT)*, s 34 and made the defence of provocation for murder the same as that at common law: See Explanatory Statement, [Criminal Reform Amendment Bill \(No 2\) 2006](#).

<sup>44</sup> *Criminal Code (NT)*, s 158(5); [Criminal Reform Amendment Act \(No. 2\) 2006 \(NT\)](#), ss 8 and 158(5).

<sup>45</sup> New South Wales, Select Committee on the Partial Defence of Provocation, [The partial defence of provocation](#), 2013, p 26.

Jurisdiction NT	Availability of provocation as a defence in criminal law and whether it can be used to reduce murder to manslaughter	Availability of the 'Gay Panic Defence' in reducing murder to manslaughter
	<p><i>(a) is not, by itself, a sufficient basis for a defence of provocation; but</i></p> <p><i>(b) may be taken into account together with other conduct of the deceased in deciding whether the defence has been established.</i></p> <p><i>(6) For deciding whether the conduct causing death occurred under provocation, there is no rule of law that provocation is negated if:</i></p> <p><i>(a) there was not a reasonable proportion between the conduct causing death and the conduct of the deceased that induced the conduct causing death; or</i></p> <p><i>(b) the conduct causing death did not occur suddenly; or</i></p> <p><i>(c) the conduct causing death occurred with an intent to take life or cause serious harm.</i></p> <p><i>(7) The defendant bears an evidential burden in relation to the defence of provocation.</i></p> <p><i>Note for subsection (7)</i></p> <p><i>Under section 43BR(2), the prosecution bears a legal burden of disproving a matter in relation to which the defendant has discharged an evidential burden of proof. The legal burden of proof on the prosecution must be discharged beyond reasonable doubt – see section 43BS(1).</i></p> <p><i>(8) A defendant who would, apart from this section, be liable to to be convicted of murder must be convicted of manslaughter.</i></p>	

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