

The Honourable Paul Lucas MP  
Attorney-General, Minister for Local Government  
and Special Minister of State  
PO Box 15009  
CITY EAST QLD 4002

Dear Attorney-General,

**Re: Amendments to section 304 of the Criminal Code**

On 9 November 2011 you announced the formation of a committee put together to advise you on possible changes to section 304 of the Criminal Code, regarding representations made to you by a number of stakeholders who held concerns about the use of “non-violent homosexual advances” to establish a defence of provocation in cases of murder. You asked for that committee to report to you by the end of January 2012.

It is convenient to describe some history behind the expression of these concerns. In October 2007 the Department of Justice and Attorney-General (DJAG) published a discussion paper entitled “Audit on defences to homicide: accident and provocation”. That report had been commissioned by the then Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, who had commissioned the audit of homicide trials to ascertain the nature and frequency of the reliance of the excuse of accident in section 23 of the Criminal Code, and on the partial defence to murder of provocation, provided for in section 304 of the Criminal Code. That audit had been precipitated by public comment on three recent cases, those of a defendant Jonathon Little, a defendant Ryan Moody, and a defendant Damien Sebo. Mr Sebo had been acquitted of murder but convicted of manslaughter, in relation to the death of a Taryn Hunt. Mr Sebo’s trial caused quite a degree of public discussion of the circumstances in which he had killed Taryn Hunt.

The October 2007 report to the then Attorney, described how an audit had been conducted of trials for the offences of murder and manslaughter which had been finalised between July 2002 and March 2007. In all, 101 defendants had been tried by a jury on a charge of murder, and the audit team analysed 80 of those 101 trials. During that same period 32 defendants were tried by a jury on charges of manslaughter, and the audit team analysed 20 of those 32 trials.

Of the 80 murder trials reviewed, provocation was raised as a defence 25 times. Eight of the defendants in those 25 trials were found not guilty of murder, and four of those were found guilty of manslaughter by the jury. In only two of those 25 cases in which provocation was raised, it was the only defence left to the jury. One of those

involved the man Sebo, convicted of manslaughter. Those figures do not suggest an extensive over use of the defence of provocation.

On 2 April 2008 the then Attorney-General asked the Queensland Law Reform Commission (QLRC) to review the defence of accident and the partial defence of provocation. That Commission presented its' report dated September 2008, and it was tabled in the Parliament on 1 October 2008. The QLRC report recommended some changes to the drafting to the defence of accident, and some significant changes to the defence of provocation. One was to reverse the onus of proof, and to recommend that it should be on the defence to establish the defence of provocation, on the balance of probabilities, rather than on the prosecution to negative it beyond reasonable doubt (as was then the present law). More significantly for present purposes, the QLRC recommended (in paragraph 21.79 at page 479 of its report number 64, dated September 2008) that section 304 of the Criminal Code be amended to include a provision to the effect that, other than in circumstances of an extreme and exceptional character, the defence of provocation could not be based on words alone or conduct that consisted substantially of words.

That recommendation reflected the statement of the Queensland Court of Appeal in *R v Buttigieg* [1993] 69ACrimR21 at 37, that:

“the use of words alone, no matter how insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in ‘circumstances of the most extreme and exceptional character’ ... A confession of adultery, even a sudden confession to a person unprepared for it, is never sufficient without more to sustain this defence ... it is however the combination of circumstances which is to be evaluated.”

That recommendation, to exclude the possibility of a defence of provocation to murder based on words alone or conduct consisting substantially of words, was a somewhat controversial one, because, as the report by the QLRC itself observed at paragraph 21.66, there were Queensland cases where provocation had been successfully pleaded, based on words alone. The QLRC report refers in that regard expressly to *R v Sebo*, *R v Auberson* [1996] QCA321, and *R v Schubring* [2005] 1 QdR515. The QLRC report notes that those cases contained, in the judgements given in the Court of Appeal, no reference to what was considered “extreme and exceptional circumstances” in which the words were spoken, such as to warrant the availability as provocation. The QLRC observed that it was unable to tell whether the authority of *Buttigieg* had simply been overlooked, or whether, when confronted with other authority requiring trial judges to leave the defence to the jury if there was the least doubt that defence was raised on the evidence (as in the High Court judgment *Van Den Hoek v Queen* [1986] 161CLR158), trial judges had decided to leave the defence to the jury rather than risk an appeal on the basis that the decision not to allow the defence was an error.

The then Attorney-General followed the recommendations of the QLRC, and on 4 April 2011 legislation amending the Criminal Code in section 304 commenced, and relevantly added a number of subsections to the existing section 304. The new section 304(2) provided that the plea of provocation allowed for by section 304(1) “does not apply to sudden provocation based on words alone, other than in

circumstances of the most extreme and exceptional character". A new provision of section 304(7) provided that on a charge of murder, it was for the defence to prove that the person charged was liable to be convicted of manslaughter only, on the basis of the defence of provocation.

There have been no trials conducted in Queensland in which the amended provisions have applied, because they only have application to matters in which the offences occurred after 4 April 2011. However, passing those new laws has not satisfied some critics of the previous law, who would like to see the defence of provocation excluded completely, where it is pleaded in a defence to a charge of murder following a response to a homosexual approach by another. On 6 September 2011 two petitions containing a total of 4,682 signatures were tabled in the Parliament, which asked for the Criminal Code to be amended to completely eliminate "non-violent homosexual advance" as the basis for a defence of provocation to murder. At about the same time, a group called the LGBTI Legal Service Inc. (the Lesbian, Gay, Bi-sexual, Trans-intersex Legal Service Inc.) published what was described as a submission for law reform, calling for the removal of the "non-violent homosexual advance defence" from the ambit of the defence of provocation.

The QLRC report did consider, but recommended against, the inclusion of a "non violent sexual advance" as a matter (like "words alone") not capable of giving rise to a defence of provocation. The main reason given was the difficulty in defining what was a "non violent sexual advance".

On 9 November 2011 the formation of this committee was announced, and invitations to participate were issued to a substantial number of entities and individuals. A working group met on 22 December 2011 and again 12 January 2012. Those attending at all times included the Chair, John Jerrard; Shelley Argent, the national spokesperson for, and Queensland President of, the Parents and Friends of Lesbians and Gays (PFLAG); Tony Moynihan, the Director of Public Prosecutions; Debbie Kilroy from the Queensland Law Society Criminal Law Committee; Andrew Hoare, a Barrister, representing the Bar Association of Queensland; Jenny Lang, the Assistant Director-General of the Department, Mark Dixon the Assistant Director, Serious Crime from Legal Aid QLD; and on both days the working group included either the Public Defender John Allen, or his nominee Mr David Shepherd, and a person appearing from the Queensland Council for Civil Liberties. Mr Ross Thompson from the Queensland Homicide Victim Support Group attended for the first meeting and the Director of Strategic Policy sat with the working group, but, like Assistant Director-General Jenny Lang, took no voting part in the proceedings.

The working group received considerable help from the efforts of Jenny Lang and the Director of Strategic Policy. At my request, and with little fuss, I was provided with the sentencing remarks in 110 manslaughter sentencing exercises conducted between April 2005 and October 2011. Where relevant, I was also provided with a copy of the Appeal Court judgment where an appeal was taken, either by the person sentenced or the Attorney-General. Those 110 sentences were a different, but overlapping, group from the persons whose cases had been analysed by DJAG in the October 2007 discussion paper on the defences of accident and provocation. After reading those sentencing remarks, I was satisfied that defendants in

Queensland did not frequently or successfully plead “gay panic”, or “non-violent homosexual advance”, as a defence to a charge of murder, based on provocation. I found only one unequivocal example, a matter of *R v Peterson and Smith*, who were sentenced on 14 October 2011 in Maryborough circuit court for the offence of manslaughter of Stephen Ward. There was an earlier matter, also in the Maryborough circuit court, namely *R v Meerdink and Pearce*, sentenced on 13 May 2010, for an offence of manslaughter committed on or about 4 July 2008, involving the killing of Wayne Ruks.

The trial of *R v Meerdink and Pearce* had several complicating factors to it. They were both charged with murder, and Mr Pearce pleaded guilty to manslaughter at the start of the trial. That plea was not accepted by the Crown, and he and Mr Meerdink faced the jury on a charge of murder, on which both were found not guilty. The jury found Mr Meerdink guilty of manslaughter, but it appears no verdict was taken in respect of Mr Pearce, who had already pleaded guilty to manslaughter and maintained that plea.

The circumstances of the killing were that on 3 July 2008, at about 9pm, the two defendants had walked past the Post Office Hotel in Maryborough where they met Mr Ruks, who was then very drunk. Both defendants had also been drinking, but were not completely intoxicated, although Mr Meerdink told another passer by that he and Mr Pearce were “having a blinder” and were “pissed”. Mr Ruks might have grabbed for a cask of wine that Mr Meerdink was carrying, and the two defendants crossed the road. Mr Ruks followed them. He apparently hoped to obtain some marijuana from Mr Pearce. The three men entered the grounds of St Mary’s Church at about 9.15pm that night. The sentencing judge recorded that what occurred thereafter was disputed, and that while Mr Pearce said that Mr Ruks had “touched” him, a CCTV did not show that actually happening, and the judge thought it likely that Mr Ruks had said something foolish to Mr Pearce, to induce Mr Pearce to share marijuana that Mr Pearce had, which Mr Ruks wanted to share, and that Mr Pearce interpreted or misinterpreted what was said as a sexual proposition. Mr Pearce later told a covert police officer who was put in a cell with Mr Pearce after his arrest, that he (Mr Pearce) had been sexually abused as a child and had just “snapped”. Mr Pearce described what happened to the undercover officer as Mr Ruks “started all this pooffer shit”.

Returning to the narrative, the three men had a verbal confrontation, still inside the church grounds, and then Mr Ruks was ordered by Mr Pearce and Mr Meerdink to leave the churchyard and he did, but he returned some three minutes later, and Mr Pearce confronted him again. At about 9.23pm, after some confrontation, Mr Ruks began to run and was chased by the other two into the street, and assaulted. He was punched and kicked for some six minutes.

The learned trial judge found that the jury was not satisfied that either of Mr Pearce and Mr Meerdink intended to kill or cause grievous bodily harm to Mr Ruks, by the punches or kicks that were delivered during that time. However, the judge found that each of them had inflicted kicks or punches and aided the other to do so by presence and implicit encouragement. Towards the conclusion of his sentencing remarks the judge said that he recognised that “you should be sentenced on the basis that neither of you intended to kill or cause grievous bodily harm to the deceased”.

That explanation of the verdicts of manslaughter is consistent with the evidence that those men had consumed a good deal of alcohol, and that 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. But it was the statements about “this pooffer shit” which attracted media attention, however, the learned sentencing judge clearly sentenced on the basis that the verdict of manslaughter reflected a finding of a failure to prove intent, rather than a failure to disprove a provocative act.

The other matter heard in Maryborough (the trial *R v Peterson and Smith*) was conducted, ironically enough, by the judge who currently presides over the QLRC, and who had therefore been a part author of the QLRC report acted on earlier last year by the State Government. In that trial, both Peterson and Smith were convicted, after a trial, Mr Peterson of manslaughter, and Mr Smith of accessory after the fact to manslaughter. Mr Peterson had pleaded guilty to manslaughter at the start of the trial, but that plea was not accepted, and both faced trial, with Mr Peterson accused of murder and Mr Smith of being an accessory to that murder. The facts described in the sentencing remarks of the learned judge disclosed that Mr Ward was hitchhiking on the Bruce Highway at Curra, and was picked up by Mr Peterson and Mr Smith. Mr Ward was an alcoholic and inebriated, and Mr Smith and Mr Peterson had been drinking heavily that day as well, although Mr Smith was driving the vehicle. Mr Smith, the driver, invited Mr Ward to Mr Smith’s house for a roast dinner that Mr Smith’s wife had prepared for him and Mr Peterson, who was staying with Mr Smith. Mr Peterson did not object to this, and three men arrived at Mr Smith’s house at Glenwood. They shared the dinner that Mr Smith’s wife had cooked, and then Mr Smith and Mr Peterson invited Mr Ward into the kitchen, where they shared some marijuana with him. By that stage Mr Peterson had drunk a great deal. The learned judge accepted that it was also likely that Mr Peterson had used methylamphetamine on that day as was his habit to use intravenous methylamphetamine as well as alcohol. He also has some of the cannabis. Mr Smith then decided to drop Mr Ward at a truck stop on the highway, so he could hitch a ride, perhaps with a truck, further North. Mr Peterson went with them. Mr Smith drove, Mr Peterson was in the passenger seat and Mr Ward sat in the back. There was some conversation about the fact that Mr Ward did not have his bag with him (he had apparently left it at a motel). It being a two door car, when they stopped, Mr Peterson had to get out of the car to let Mr Ward out. Mr Ward at that stage was irritated by the fact that he did not have his bag with him, and he felt that it was somehow the fault of the people he was with, rather than his own. According to Mr Peterson’s evidence, which the judge accepted on this point, Mr Ward made a sexual pass at Mr Peterson, trying to grab Mr Peterson on the crotch, and made a remark to him with a sexual connotation. Mr Peterson in evidence said that he “snapped” and began punching Mr Ward to the face and head. He punched him perhaps 20 or 30 times until Mr Ward fell. Mr Smith knew what was happening. Mr Peterson got back in the car and they drove off, leaving Mr Ward there. Mr Peterson’s evidence at the trial, given by himself and his mother, was that he had grown up in a household where his father was a violent alcoholic and violent to him, his brothers, and to his mother. He was beaten as a child and suffered setbacks as a child. He was powerless against the situation and he left home when only 12 or 13. He was only a slightly built lad and as a result of his vulnerability, was taken advantage of by older men, being invited home by one who offered him accommodation and food and who after propositioning him in his

home, bashed Mr Peterson and raped him. That situation was repeated on at least one other occasion.

Medical evidence called from a Doctor Arthur, a psychiatrist at the trial, was that as a result of having examined Mr Peterson (after his arrest) Dr Arthur had formed the view that Mr Peterson even then was suffering from post traumatic stress disorder, as well as alcohol addiction and drug addiction, being prone to using alcohol in an extremely excessive way as well as cannabis, heroin and intravenous amphetamine.

The learned sentencing judge remarked, when passing sentence for manslaughter, that Mr Peterson's post traumatic stress disorder impaired his capacity to control his actions, and to know what he was doing. The judge accepted that no doubt Mr Peterson's capacities were substantially impaired, but that that was in no small part in due to his voluntary intoxication, but also accepted the time that he bashed Mr Ward, Mr Peterson had a flashback to what had happened to him as a child. 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.

Having driven off leaving Mr Ward by the side of the road, Mr Peterson and Mr Smith realised that he would be found there and they returned, not to give any assistance to Mr Ward, but because they wanted to make sure that they would not be punished for Mr Peterson's assault on Mr Ward. When they returned they found Mr Ward still alive and making noises, and they put him in the tray of the vehicle and drove for perhaps 20 to 30 minutes over very rough bush tracks until they found a very isolated spot, where Mr Ward was unlikely to be found, and left him there. After that they took many steps to avoid detection, and Mr Ward's death was not discovered for many weeks, because of the very isolated spot which his body had been left. Efficient police work brought the police to Mr Smith's doorstep, and there he was found cleaning his car, attempting to get rid of any further evidence.

The sentencing remarks make it unarguable that this was a case of a relatively non violent homosexual approach to Mr Peterson, who reacted with murderous rage. But the evidence and the jury's verdict support the argument that that was because of Mr Peterson's experiences as a child, and ongoing post traumatic stress disorder. If his "flashback" which affected him so powerfully while intoxicated, and affected by drugs, was genuine, then it is difficult for me see why the law should deny him a defence that simply relies on explaining a response which an ordinary person could also have made (that is, an ordinary person who had experienced Mr Peterson's level of upset at recollecting the traumatic events which had happened earlier in his life).

The circumstances of *R v Peterson and Smith* were discussed by the working group, as were those in *R v Meerdink and Pearce*. Shelley Argent, the national spokesperson for the PFLAG, was unsympathetic to Mr Peterson's position, contending that too many people used post traumatic stress disorder, alcohol, and the use of other drugs, as excuses; and that prior sexual abuse should not be seen as an excuse for homicidal assault, because, she contended one in four females and one in six males, on average, are molested before the age of 18 in this country. As

she expressed it in a written submission to the working group, “surely we can’t have that many potential murderers in this country”.

Mr Mark Thomas, speaking on behalf of the LGBTI Legal Service Inc., contended that the Criminal Code should be amended to provide some words to demonstrate to society that certain types of behaviour were not acceptable, and should reflect that under no circumstances should a non violent sexual advance ever justify killing another. He accepted that there could be difficulty in defining what constituted a “non violent sexual advance”, but that the Parliament should not shy away from changing it because it was difficult to describe the desired result. He also remarked how the ACT and the NT have grappled with the same difficulty, and at the second meeting of the working group, (on 12 January 2012), Shelley Argent produced a submission paper (referred to earlier in this report) prepared on behalf of the LGBTI Legal Service Inc., in which that legal service recommended that the Queensland Parliament amend section 304 of the *Criminal Code 1899* (Queensland) by the addition of a subsection 304(9). The wording of that subsection is clearly borrowed from the relevant legislation in the ACT and NT, in which those two Territories legislated (in 2004 and 2006 respectively) to modify their criminal statutes, to provide as follows regarding provocation:

”However, conduct of the deceased consisting of a non violent sexual advance (or advances) toward the accused –

- (a) is taken not to be sufficient, by itself, to be conduct which constitutes provocation but
- (b) may be taken in to account together with other conduct of the deceased in deciding whether there has been an act or omission establishing provocation”

The LGBTI Legal Service Inc. written submission of October 2011, produced by Shelley Argent, contends for a section 304(9) drafted in similar terms, although Mr Thomas did not expressly argue for that position in the working group. At the first meeting (23 December 2011), he said he was in favour of embedding in section 304 some changes, to go towards solving some of the problems of people with PTSD. He said that when responding to a suggestion that section 304(2) as it currently reads, could be amended to include the words “or non violent sexual advance” after the expression “on words alone” presently appearing in section 304(2). He appeared satisfied that that a person suffering from PTSD, who responded violently to a sexual advance, could fairly argue that that person was in an extreme or exceptional circumstance.

The working party had difficulty with the expression “non violent sexual advance”, which is an expression capable of describing both a merely verbal proposition made by one person to another, or some deliberate touching of another’s body. The research undertaken by the lawyers between the first and second meetings of the group, both from within and without the Department, did not discover any examples of cases in which the phrase has been considered by the Supreme Courts of either the ACT or the NT. Nor was any assistance as to its meaning found in examining the explanatory notes, or the legislation by which the matter was introduced into the law in those two Territories.

By the end of the deliberations it appeared that the “gay panic” defence was not frequently advanced in Queensland, and there have already been amendments made in 2011 which will make it more difficult to advance an unmeritorious defence based on a violent response to a homosexual overture. However, the possibility of such a response happening raises strong feelings for those who urge a change to the law. Those feelings are well described in the submission of the LGBTI Legal Service Inc. of October 2011, which has as its heading the statement made by Mr Pearce, in *R v Meerdink and Pearce* that “He started all this poofter shit, so I snapped”. The written submission contains in its body the statement that in a non violent homosexual advance case, the “narrative fed to the jury is that lethal violence arose naturally enough from the loss of control the killer experienced when his heterosexual male honour was at stake”. In fact, that description is not accurate about either of the trials *R v Meerdink and Pearce*, or *R v Peterson and Smith*, for the reasons described.

At the conclusion of deliberations, the members of the working group were equally divided for or against an amendment to change the wording of the current section 304; principally because, it seemed to me, of a lack of evidence of abuse of the potential defence, a view that “non violent sexual advance” was an amorphous concept capable of describing a wide range of conduct, and uncertainty as to the affect of the recent amendments. It was suggested that if the use of more than “words alone” were to be put forward as a reason for refusing a defence of provocation, then the impermissible or permissible conduct should be clearly defined. One suggestion was to use a composite phrase, such as “unwanted sexual advance or other minor touching” in a redrafted section 304(9), with the object being to ensure that conduct amounting to an assault was not a basis for refusing a plea of provocation.

Those suggesting no change included the lawyers appearing as, or representing, Legal Aid QLD, the Queensland Law Society, the Bar Association, the Aboriginal and Torres Strait Islander Legal Service and the Queensland Council for Civil Liberties. Those supporting some amendment to section 304 included the lawyers or persons speaking for the Anti-Discrimination Commission, the LGBTI Legal Service Inc., PFLAG, the Director of Public Prosecutions and myself.

I add that regarding the current drafting of section 304(2), the working group (other than the two DJAG Directors) appeared to accept that the words “a most extreme and” in section 304, wherever they appear, add difficulties, of definition and example, to the requirement that provocation by words alone only apply in circumstances of an exceptional character. The DJAG Directors were anxious that you appreciate that the current terminology, in section 304, denying a defence of provocation based on words alone “other than in circumstances of the most extreme and exceptional character” were explicitly recommended in paragraph 21.37 (page 479) of the QLRC report, in turn citing from the Court of Appeal judgment *R v Buttigieg*.

As to that, the QLRC report also makes the point that the rule in *R v Buttigieg* appears to have been more honoured in the breach than in the observance, referring to the Court of Appeal judgments in *Sebo*, *Auberson*, *Schubring*. The analysis of those three decisions of the Court of Appeal by the QLRC does not record any of the judges of the Court of Appeal remarking adversely about provocation having being

left to the jury in those matters, or any complaint by the prosecution. Two of those were Attorney-General's appeals (on sentence), so the Attorney had an opportunity to raise non compliance, had it been thought proper.

Keeping in mind the concern felt by the PFLAG and the LGBTI Legal Service Inc. about the possibility of homophobic or unsympathetic juries, and the goal of having a Criminal Code which does not condone or encourage violence against the LGBTI community, and in view of the equal division of opinion of the committee, I would, as Chair, support the amendment of section 304 of the Code by an addition of a subsection (9), which reads:

“(9) Subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance towards the defendant or other minor touching.”

I would also support an amendment omitting from subsections 304(2) and (3), the words 'of a most extreme and', and inserting instead the words 'of an'. In my opinion, such an amendment would not have the effect of lowering the 'bar'. A requirement to establish exceptional circumstances is not easily met but it can be understood by a jury and it can be achieved. To prove that the circumstances are 'most extreme' may be more or less difficult than establishing it is 'exceptional' and if not, it is a tautology. However, I agree that for consistency, all subsections should have the same test.

I particularly express my thanks for the work done by Assistant Director-General Jenny Lang, Director of Strategic Policy Louise Shephard, and Dr Cate Banks, the facilitator and Minute keeper. They uncomplainingly provided me with everything I asked of them, and arranged meetings of the working group members at short notice, and efficiently.

I remain,  
yours faithfully,

JA Jerrard BA,LLB, LLM, QC.