



Our ref: AG/11/04263; 540422/1

Your ref: Petitions

- 6 OCT 2011

Mr Neil Laurie
The Clerk of the Parliament
Parliament House
Cnr Alice and George Streets
BRISBANE QLD 4000

Office of the
Attorney-General
Minister for Local Government
and Special Minister of State

Dear Mr Laurie

RE: Petitions received by the Queensland Legislative Assembly 1759-11 and 1694-11

Thank you for your letter of 9 September 2011 about petitions 1759-11 and 1694-11 received by the Queensland Legislative Assembly on 6 September 2011.

The two petitions advocate for the repeal of non-violent homosexual advance from the ambit of evidence considered in establishing whether the partial defence of provocation is justified in murder cases.

The Queensland Government abhors any attack on any person that occurs as a result of that person's sexual preference.

Under the Queensland Criminal Code, a person who is otherwise guilty of murder may be convicted of manslaughter if the jury decides that the murder was committed while the accused was provoked. This partial defence of provocation is found in section 304 of the Criminal Code and applies where a person 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. If the defence is raised, the prosecution bears the onus to negative the defence beyond a reasonable doubt. While the Criminal Code does not specifically provide a partial defence for provocation on the basis of a non-violent homosexual advance, depending on the circumstances, it would be accommodated by section 304.

On 2 April 2008, the former Attorney-General, Mr Kerry Shine, asked the QLRC to review the excuse of accident and the partial defence of provocation. The terms of reference of that review asked the QLRC to consider whether the partial defence of provocation should be abolished or recast to reflect community expectations. Importantly, the terms of reference asked the QLRC to have regard to the fact that the offence of murder carries mandatory life imprisonment and the Government's intention not to change the law in this regard.

The QLRC specifically canvassed the issue of excluding non-violent sexual advances in the consultation discussion paper "*A review of the excuse of provocation*". The QLRC received submissions on this consultation discussion paper from a variety of stakeholders including a number of legal professionals and academics. Responses on this issue were wary of specifically excluding non-violent sexual advance from the partial defence of provocation.

The QLRC's final report "*A review of the excuse of accident and the defence of provocation*" was tabled in Parliament on 1 October 2008. In this report, the QLRC recommended that the defence of provocation be recast to address its bias and other flaws. In particular, the QLRC recommended that amendments be made to the effect that, other than in circumstances of an extreme and exceptional character, the defence cannot be based on words alone and to place the onus of proof on the defendant.

The QLRC, at pages 481-483 of its report, recommended against excluding non-violent sexual advances in Queensland for the following reasons:

- the difficulties in defining what conduct is captured by a 'non-violent sexual advance', including drawing the line between a sexual advance and a sexual assault;
- in the context of an ongoing abusive relationship, such an exclusion could negatively affect a battered woman's ability to raise the defence where she is provoked by a sexual advance from her abuser, knowing that such an advance is usually the precursor to further abuse; and
- conduct cannot be categorised as sufficient or insufficient to amount to provocation in the absence of a consideration of the circumstances in which it occurred.

This does not mean that a non-violent sexual advance necessarily amounts to provocation. It simply means that the QLRC's preference was that the trial judge should determine whether a non-violent sexual advance amounted to provocation based on the individual circumstances of the case.

The *Criminal Code and Other Legislation Amendment Act 2011* (the Act) commenced on 4 April 2011. The Act amended the partial defence of provocation in the Criminal Code to implement the QLRC's recommendations.

While the recent amendments do not specifically exclude non-violent sexual advance from the partial defence of provocation, the amendments in the Act around excluding mere words will apply to a non-violent sexual advance consisting of no physical contact or other conduct.

It is also important to note that the reversal of onus of proof, which places the onus upon a defendant seeking to rely on the partial defence of provocation to reduce the offence from murder to manslaughter, will enhance the capacity of the trial judge to prevent unmeritorious claims being raised.

The Queensland Government has acted on the recommendations made by the QLRC. The Government abhors any attack on any person that occurs as a result of that person's sexual preference. However, as acknowledged in the QLRC's recommendations, it is necessary to ensure that amendments to our laws do not have any unintended consequences. In light of this, no further legislative changes in relation to the partial defence of provocation are under consideration at this point in time.

The Bligh Government has a proud record of acknowledging the rights of gay and lesbian people. Notably, as a result of legislative amendments made by the Government last year, all Queenslanders including same-sex couples are now able to engage in altruistic surrogacy arrangements and to be legally recognised as the parents on the child's birth certificate. This legislation was opposed by the Liberal National Party.

Also, as a result of complementary legislative amendments made by both the Rudd Labor Government and the Bligh Labor Government, same sex couples now have access to the same streamlined legal processes as married couples if their relationships fail, including matters in relation to custody of children and division of property and superannuation.

I trust this information is of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Lucas', with a long horizontal flourish extending to the right.

PAUL LUCAS MP
Attorney-General,
Minister for Local Government
and Special Minister of State