

GREEN AND LINDSAY: TWO STEPS FORWARD – FIVE STEPS BACK HOMOSEXUAL ADVANCE DEFENCE – QUO VADIS?

KERSTIN BRAUN* AND ANTHONY GRAY**

In the past criminal laws in Australia and elsewhere penalised gay sexual acts. Over the past decades, however, many jurisdictions decriminalised said acts and, at the same time, anti-discrimination laws inter alia prohibiting discrimination based on sexual orientation were introduced. This apparent normalisation of gay identities in Australian society is at odds with the continued operation of the Homosexual Advance Defence ('HAD') in some jurisdictions allowing the partial exoneration of homophobic violence. HAD, where successful, allows a perpetrator to rely on provocation where he applies lethal force to another after a (non-violent) homosexual advance. As a consequence, a murder charge is downgraded to manslaughter. After analysing the status quo of HAD in Australian jurisdictions, the article concludes that a clear stand against a charge reduction in case of an alleged male on male sexual advance is necessary to limit the prejudicial application of this criminal defence. Where the High Court, Australia's most senior court, fails to do so as was most recently the case in Lindsay, Parliament must act to prevent discrimination in the context of provocation.

CONTENTS

I	Introduction.....	92
II	The Law and Homosexuality	93
	A Normalisation of Gay Identities in Australia.....	93
	B Homosexual Advance Defence in Australia	96
III	High Court and Parliamentary Responses to HAD in Australia	106
	A The Stance of the High Court: <i>Green</i> and <i>Lindsay</i>	106
	B The Role of Parliament	114
VI	Conclusion.....	117

* LLM, PhD (Qld.). Lecturer, School of Law and Justice, University of Southern Queensland.

** BBus, LLB (Hons), GDipLegPrac, LLM (Qld. UT), PhD (UNSW). Professor, School of Law and Justice, University of Southern Queensland.

I INTRODUCTION

Most (Western) societies today have anti-discrimination laws, which seek to prohibit discriminatory treatment on the basis of ‘attributes’. Of those attributes typically listed, sexual orientation is one which, at least in the past, discrimination has been most egregious. The law (legislation and case law) has an important role in the area of discrimination and homosexuality. It can reflect the attitudes that a society, or some sections of it, attach (and continue to attach) to a particular person, or particular behaviours. It can reflect features of a person that at one time did attract certain attitudes, but no longer do so. And it can reflect an attempt by lawmakers (legislators or judges) to tackle the negative attitudes that some hold with particular features, seeking to change said attitudes. Lawmakers can play a crucial leadership role in tackling attitudes that are no longer felt by that society, as a general rule. While there are difficult philosophical questions regarding whether the law simply reflects the society it serves, or whether the law can shape the society it serves, and if both, what relativity is optimal, the law often lags behind the society it serves.

This article contends that, while homophobic attitudes remain in some sections of society, gay identities in Australia have become normalised.¹ On this basis it argues that the Homosexual Advance Defence (‘HAD’), partially exonerating defendants who kill after a homosexual advance, is outdated, prejudicial and biased and thus has no place in modern society. Where Australia’s most senior court fails to take a clear stand against the operation of said defence as has become apparent in 2015 in its most recent decision on the matter (*Lindsay*), Parliament must act to limit bias and prejudice in the context of provocation.

After a brief introduction, part II of the article charts some of the important legal and social developments regarding the law and homosexuality and considers the current state of play in Australia and the compatibility of HAD with contemporary society values. Part III analyses the stance of the High Court and recent Parliamentary action in this context before concluding that while the law has come a long way in reaching a general accommodation and

¹ Point also made by South Australia, *Parliamentary Debates*, Legislative Council, Hon Tammy Franks MLC, 1 May 2013, 3804 < <https://hansardpublic.parliament.sa.gov.au>>. Similarly assumed in *R v Lindsay* [2014] SASFC 56: The judgment of the Hon. Justice Peek in *Lindsay* (with which the Hon. Chief Justice Kourakis agreed) appears clearly to contemplate that homosexuality is now largely accepted as part of contemporary Australian society, and certainly it is no longer unlawful for consenting adults to engage in homosexual sexual activity.

acceptance of homosexuality, the law relating to HAD continues to reflect homophobic attitudes and is in dire need of law reform.

II THE LAW AND HOMOSEXUALITY

A Normalisation of Gay Identities in Australia

The law has reflected the negativity attached to homosexual behaviour for centuries. Presumably taking its lead from passages of *Leviticus*,² the *Buggery Act 1533* (UK) prescribed the death penalty for ‘sodomy’,³ and remained until 1861.⁴ Blackstone described the ‘crime against nature’ as an offence of greater gravity than rape, and not fit to be named.⁵ Homosexual acts remained criminal.

The 1957 Wolfenden Report⁶ recommended decriminalisation of homosexual acts between consenting adults, and this was acted upon in 1967 in the United Kingdom. In the 1930s in the United States, Freud famously wrote to a concerned mother that ‘homosexuality is assuredly no advantage but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness’.⁷ Freud wrote at a time where attempted conversion of homosexuals to heterosexuality was common.⁸ The first *Diagnostic and Statistical Manual of*

² ‘If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them’: *Leviticus* 20:11-13. The death penalty was also prescribed in *Leviticus* for adultery, incest, bestiality (for both the human and animal involved).

³ The word itself is contentious. Clearly, it has links with the Bible’s Sodom and Gomorrah and *Genesis* 19. While the orthodox view is that this parable rails against homosexuality, others see it as a story about same-sex rape and inhospitality: Jeffrey Siker, ‘The Bible’ in Jeffrey Siker (ed) *Homosexuality and Religion: An Encyclopaedia* (Greenwood Press, 2006) 66: ‘even most conservative Christians who oppose homosexual practices agree that the story of Sodom is not really about homosexuality, but addresses the wickedness of the people of the city because of their desire to commit sexual violence against two strangers who should be shown hospitality’; Jay Michaelson ‘Chaos, Law and God: The Religious Meaning of Homosexuality’ (2008) 15 *Michigan Journal of Gender and Law* 41, 60: ‘notwithstanding its familiar association with homosexuality, the sin of Sodom is not on its face, and was almost never understood by other Biblical texts or Biblical commentators, to be such’.

⁴ *Offences Against the Person Act* (UK).

⁵ 4 William Blackstone *Commentaries on the Laws of England* (1765-1769) 215.

⁶ *Report of the Departmental Committee on Homosexual Offences and Prostitution* (1957)(UK), chaired by Lord Wolfenden.

⁷ *A Letter from Freud* (1951) 107 *American Journal of Psychiatry* 786, 787. Freud also claimed it was an ‘inversion’ on the way to a healthy heterosexuality.

⁸ Patrick Corrigan and Alicia Matthews, ‘Stigma and Disclosure: Implications for Coming out of the Closet’ (2003) 12(3) *Journal of Mental Health* 235, 238 point out that medicalisation of an occurrence is based on the underlying assumption that it can be treated and thus improved or corrected; Law

Mental Disorders ('DSM') in 1952, published by the American Psychological Association, listed homosexuality as a 'psychopathology'.⁹ The work of Kinsey in the 1960s was pivotal in a greater understanding of the 'normality' of homosexuality;¹⁰ Stonewall was pivotal in the eventual repeal of anti-sodomy statutes in the United States;¹¹ and in 1973 homosexuality was finally removed as a mental illness from the DSM.¹²

In Australia, homosexual acts were criminalised in each state and territory.¹³ These Acts tended to describe homosexual activity as being 'against the order of nature',¹⁴ and/or acts of 'gross indecency', leaving no-one in any doubt about the moral opprobrium attached to homosexual activity. As members of the High Court noted in *Croome v Tasmania*, such provisions 'significant(ly) ... overshadowed' the personal lives of individuals affected.¹⁵

As others have noted, the law with respect to homosexuality has been transformed, at least in the West.¹⁶ Campaigns in the 20th Century challenged

claims the conceptualisation of homosexuality as a (treatable) illness was part of a modern tendency to transform 'evil into madness': Sylvia Law, 'Law, Homosexuality and the Social Meaning of Gender' (1988) *Wisconsin Law Review* 187, 203.

⁹ Albert Ellis *Reason and Emotion in Psychotherapy* (Lyle Stuart, 1962) 242: 'fixed homosexuals in our society are almost invariably neurotic or psychotic ... no so-called normal group of homosexuals is to be found anywhere'.

¹⁰ This was primarily through the development of his heterosexuality-homosexuality scale, recognising the falsity of a simple binary between homosexuality and heterosexuality. He found about 10% of those he studied were exclusively homosexual during the period studied, and about 12% equally heterosexual and homosexual: Kinsey et al *Sexual Behavior in the Human Male* W B Saunders (1948); *Sexual Behavior in the Human Female* Pocket Books (1953).

¹¹ This is a reference to the Stonewall Inn, a gay bar in New York City. Resistance to a police raid on the bar came to symbolise resistance to enforcement of anti-gay laws.

¹² The 1980 Diagnostic and Statistical Manual listed 'ego-dystonic homosexuality', permitting conversion therapy to take place. Finally in 1994 homosexuality disappeared entirely: Kenji Yoshino 'Covering' (2002) 111 *Yale Law Journal* 769, 799. Yoshino notes that at the 1972 American Psychological Association meeting, where the removal of homosexuality from the list of 'mental illness' was considered and adopted, 'the sole openly gay psychiatrist testifying at the ... convention in favour of deleting homosexuality from the DSM was 'Dr Anonymous', who addressed the audience under a mask and a cloak', 820.

¹³ For example *Criminal Code* (Tas) ss 122, 123.

¹⁴ In such phrasing, reflecting the way in which Blackstone expressed homosexual activity as an 'infamous crime against nature' the mention of which was a 'disgrace to human nature': Blackstone, n 4, 215; the Texan statute successfully challenged in *Lawrence v Texas* 539 US 558 (2003) referred to 'deviate sexual intercourse'.

¹⁵ (1997) 191 CLR 119, 138 (Gaudron McHugh and Gummow JJ); see also *Lawrence v Texas* 539 US 558, 575 (2003), where the majority referred to anti-sodomy statutes as 'demeaning the lives' of homosexual people (Kennedy Stevens Souter Ginsburg and Breyer JJ)(O'Connor J concurring).

¹⁶ Sir Terence Etherton 'Religion, the Rule of Law and Discrimination' (2014) 16 *Ecclesiastical Law Journal* 265. It must still be noted that homosexual acts remain criminal in about 40% of United

the legal censorship of gay sexual acts ultimately leading to decriminalisation in many jurisdictions.¹⁷ In Australian states and territories, the final removal of acts criminalising homosexual behaviour followed the federal government's *Human Rights (Sexual Conduct) Act 1994* (Cth).¹⁸ The European Court of Human Rights has found that those defending legislation operating to the disadvantage of an individual due to their sexual orientation bear a particular onus in justifying the law under the 'margin of appreciation' granted to enacting states.¹⁹

Anti-discrimination laws in the West now routinely prevent, as a general rule, discrimination on the grounds of sexuality.²⁰ The Australian Government legislated to remove general discrimination against homosexual people.²¹ Courts have recently rejected appeals by religious organisations²² or religious-minded individuals²³ wishing to discriminate on the basis of sexuality in the area of accommodation.

These developments suggest that gay identities in Australia have been normalised and begs the question why HAD continues to operate in some Australia jurisdictions.²⁴ In these cases the law (as applied) sometimes partly

Nations' member states. Michael Kirby noted recently that 43 of 53 Commonwealth nations continue to criminalise homosexual sex between consenting adults: Michael Kirby, 'The Commonwealth of Nations and its Values – Bound to Disappoint?' (presented at Commonwealth Law Conference, April 2015) 36.

¹⁷ Stephen Tomsen and Thomas Crofts, 'Social and Cultural Meanings of Legal Responses to Homicide Among Men: Masculine Honour, Sexual Advances and Accidents' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 423, 425.

¹⁸ *Croome v Tasmania* (1997) 191 CLR 119; for an overview of decriminalisation in Australia see Melissa Bull, Susan Pinto and Paul Wilson 'Homosexual Law Reform in Australia' (1991) 29 *Trends and Issues in Crime and Criminal Justice* 1.

¹⁹ *EB v France* [2008] EHRR 509, [90]-[91]; *Salguero da Silva Mouta v Portugal* (2001) 31 EHRR 47.

²⁰ *Equality Act 2010* (UK) s12; *Sex Discrimination Act 1984* s 5A; *Anti-Discrimination Act 1977* (NSW) Part 4C; *Equal Opportunity Act 2010* (Vic) s 6(p); *Anti-Discrimination Act 1991* (Qld) s 7(n); *Equal Opportunity Act 1984* (SA) s 29(3); *Equal Opportunity Act 1984* (WA) Part IIB; *Anti-Discrimination Act 1998* (Tas) s 16(c).

²¹ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws) Act 2008* (Cth); *Family Law Amendment (De Facto Financial Matters and Other Measures Act 2008* (Cth); *Evidence Amendment Act 2008* (Cth).

²² *Christian Youth Camps Limited and Ors v Cobaw Community Health Services Limited and Ors* [2014] VSCA 75; leave to appeal to the High Court was refused: [2014] HCA Trans 289 (Crennan Kiefel and Bell JJ).

²³ *Bull v Hall* [2013] UKSC 73.

²⁴ Australia is not the only country in which HAD can be raised. The concept also known in the Canada, UK and the US. The American Bar Association, however, issued a statement in 2013 advocating that legislatures ban the homosexual advance defence, American Bar Association-Criminal Justice Section, (2013) *Report from the American Bar Association House of Delegates*

excuses what can be deadly violence against a person making an unwelcome homosexual advance to an offender. This is through the use of the provocation defence. In this area, it is arguable that the law betrays some residual antipathy towards homosexuality and homosexual practice.²⁵ Homophobia, while diminished, is not yet fully expunged from our law. In a 2015 High Court decision,²⁶ Australia's most senior court was asked, and refused, to make a principled stand against the use of a provocation defence in such a context.

The below analyses the status quo of Australian criminal law in light of HAD and provocation prior to considering the stance of the High Court and subsequent Parliamentary responses regarding the availability of this partial defence.

B *Homosexual Advance Defence in Australia*

1 *Origin*

The introduction of HAD is especially linked to the work of psychiatrist Edward Kempf. In 1920, Kempf studied the effect of grouping soldiers together in same-sex environments for long periods. He claimed that some soldiers were latent homosexuals, and would find a homosexual advance by another soldier to be very confronting, because it would make the person face their identity. They might respond to this with self-harm. Kempf called this the 'homosexual panic defence'. However, it did not have much impact on the law, because it described a person self-harming, rather than harming the person who had approached them.

Annual

Meeting

13

<www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013__hod_annual_resolutionswithreports.authcheckdam.pdf>. Most Canadian appellate courts have rejected HAD in the context of provocation and upheld convictions for second degree murder, see Allyson Lunny, 'Provocation and "Homosexual" Advance: Masculinized Subjects As Threat, Masculinized Subjects Under Threat' (2003) 12(3) *Social and Legal Studies* 311, 316. In the UK, the statutory defence of loss of control replaced provocation in 2009. For developments in this area in England and Wales see in general Oliver Quick and Celia Wells, 'Partial Reform of Partial Defences: Developments in England and Wales' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 337.

²⁵ David Mack suggests 'widespread acceptance of LGBTIQ people has not yet been achieved': "But Words Can Never Hurt Me": Untangling and Reforming Queensland's Homosexual Advance Defence' (2013) 37 *Sydney Law Review* 167, 182.

²⁶ *Lindsay v The Queen* [2015] HCA 16.

Out of the ‘homosexual panic defence’ morphed the ‘homosexual advance defence’, with much more important implications for the criminal law. It purported to explain, and perhaps partly justify, a violent response by a person subjected to an unwanted sexual advance by a homosexual person. Crucially, this version sought to explain violence by the person against the advancer.

While legislation typically did not specifically recognise this as a defence in itself, it found a willing ‘carrier’ in the common law partial defence of provocation, with its English origins. The defence typically justified (fully or partially) what would otherwise be criminal behaviour, if the behaviour was a response to something which would cause a reasonable person to ‘lose their cool’. In other words, it contained an objective standard by which the behaviour of the defendant would be judged. In turn, this forced the law to determine whether, in some cases, deadly violence in response to an unwanted homosexual advance was within the spectrum of behaviour that the law would or should recognise as possibly being ‘reasonable’.

2 *Status Quo of HAD in Australian States and Territories*

(a) *Law on the Books*

As pointed out, HAD is not a formally existing separate defence in Australia but is anchored in the provocation defence. The consequence is that, where raised successfully, a murder charge is reduced to manslaughter. HAD in the context of provocation did not feature prominently in the Australian legal landscape until the mid-1990s, where a significant number of cases arose within a two year timeframe in New South Wales.²⁷ In these cases defendants successfully relied on either self-defence or provocation after committing fatal violence in light of a purported homosexual advance. They often received a lesser manslaughter conviction or even acquittal.²⁸ Blore explains that the defence ‘draws on a culture of homophobic masculinity in order to place the blame squarely upon the victim’ and that it is entrenched in the assumption

²⁷ All cases are unreported decisions and are referenced in Bronwyn Stratham, ‘The Homosexual Advance Defence: “Yeah I killed him, but he did worse to me”’ *Green v R* (1998) 20 *University of Queensland Law Journal* 301, 302. For further discussion of these cases see Steve Tomsen, ‘Hatred, Murder & Male Honour: Gay Homicides and the “Homosexual Panic Defence”’ (1994) *Criminology Australia* 2, 3.

²⁸ For detailed discussion see Stephen Tomsen, ‘“He Had to be a Poofster or Something”: Violence, Male Honour and Heterosexual Panic’ (1998) 3(2) *Journal of Interdisciplinary Gender Studies* 44.

that 'lethal violence arose naturally enough from the loss of control the killer experienced when this heterosexual male honour was at stake'.²⁹

Historically, in England provocation was first introduced as a concession to 'human frailty'³⁰ in an attempt to avoid the mandatory death penalty for murder in cases where persons acted due to their human weakness. Provocation developed during a time where men carried weapons and fought duels to defend their honour.³¹ Protecting one's honour is therefore at the very heart of this partial defence. Ultimately, provocation is based on the consideration that a person who acts hastily and due to human weakness has a different moral culpability than a person who deliberately kills another and thus deserves a different punishment. The doctrine of provocation as developed in England was subsequently adopted in Australian criminal law.

The elements of provocation are largely similar in Australian jurisdictions in which the defence continues to operate and consist of objective as well as subjective elements. To be able to successfully rely on provocation: (a) the defendant must have been provoked by the victim through conduct recognised by law as provocative conduct; (b) the defendant must have acted while having lost self-control due to the provocative conduct before there is time for the passion to cool; and (c) an ordinary person who was provoked with the same gravity as the accused would have lost self-control and formed an intent to kill or to cause grievous bodily harm.

Questions concerning the homosexual advance defence mainly arise in the context of element (a) whether such an advance constitutes provocative conduct, and element (c), whether an ordinary person who was provoked with the same gravity as the defendant would have lost self-control and formed an intent to kill or to cause grievous bodily harm.

Conduct can only constitute provocative conduct where this is so recognised by law. It has been found that the conduct in question must be assessed in context, meaning that singular acts which may not constitute provocative conduct on their own could be seen as provocative conduct when

²⁹ Kent Blore, 'The Homosexual Advance Defence and the Campaign to Abolish It in Queensland: The Activist's Dilemma and the Politician's Paradox' (2012) 12(2) *QUT Law & Justice Journal* 36, 37.

³⁰ William Blackstone, Commentaries 191 as cited Christina Pei-Lin Chen, 'Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic", and the Non-Violent Unwanted Sexual Advance Defense' (2000) 10 *Cornell Journal of Law and Public Policy* 195, 204-206.

³¹ Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) 18(1) *Current Issues in Criminal Justice* 51, 52.

considered holistically in the context of other behaviour.³² What constitutes provocative conduct in relation to HAD varies between Australian jurisdictions.

Victoria, Tasmania and Western Australia have abolished provocation entirely and now consider relevant aspects during sentencing.³³ These jurisdictions have therefore barred the operation of HAD in the context of provocation.

The Australian Capital Territory, the Northern Territory and New South Wales have explicitly excluded non-violent sexual advances *on their own* as provocative conduct.³⁴ In New South Wales, the conduct of the deceased must also have amounted to a serious indictable offence.³⁵ In each of these jurisdictions, a mere verbal offer to engage in homosexual intercourse alone is insufficient for provocation. Whilst at first glance the exclusion of non-violent sexual advances from provocation seems to clarify the legal situation, it is difficult to predict what in practice will be considered a non-violent advance rather than a violent one or an advance that gives rise to provocation. This is particularly true as the legislation does not provide a definition of a non-violent homosexual advance. While mere verbal advances could certainly be classified as non-violent, the differentiation is less clear in cases where verbal offers are accompanied by touching. The question in New South Wales then turns on whether the touching was indecent and could therefore constitute sexual assault in which case the advance would no longer be non-violent.

In the Northern Territory and the Australian Capital Territory, the question is whether the touching constitutes additional behaviour that, together

³² Lorraine Finlay and Tyrone Kirchengast, *Criminal Law in Australia* (Lexis Nexis Butterworth, 2015) 346-347.

³³ Abolished in Victoria in 2005 as per *Crimes (Homicide) Act 2005* s 3; abolished in Tasmania as per the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003*; abolished in Western Australia in 2008 see *Criminal Law Amendment (Homicide) Act 2008* (WA) s 12. In regards to provocation and sentencing considerations see *Atherden v The State of Western Australia* [2010] WASCA 33, [30].

³⁴ *Crimes Act 1900* (ACT) s 13(3)(a) (an exception applies for 'grossly insulting words or gestures', s 13(2)(a)), in addition the advance may be taken into consideration together with other conduct of the deceased, s 13(3)(a); *Criminal Code* (NT) s 158(5)(a) (an exception applies for 'grossly insulting words or gestures') (s158(3)); *Crimes Act 1900* (NSW) s 23(3)(a), in addition the advance may be taken into consideration together with other conduct of the deceased, 2 158(5)(b).

³⁵ *Crimes Act 1900* (NSW) s 23(2)(b). New South Wales has limited provocation as a response to a serious indictable offence which means a defendant can only rely on provocation where the provocative conduct constitutes a serious indictable offence, see *Crimes Amendment (Provocation) Act 2014*.

with the non-violent homosexual advance, could give rise to provocation. In other words it needs to be considered at what point the threshold between a non-violent sexual advance and provocative conduct is crossed: is it the gentle or forceful touching of the hand/knee/thigh or groin of the defendant? Additionally, due to the fatal character of the offence, the only evidence available on the nature of the advance will normally come from the defendant, and may thus be tailored to fit the defence.³⁶ Ultimately, as the above illustrates, the factual situations can vary greatly which is why the decision of whether or not certain conduct gives rise to provocation is not an easy one even in jurisdictions that have explicitly excluded non-violent sexual advances from the scope of provocation.

The situation differs in South Australia where the defence is governed entirely by common law, and Queensland if words suggesting homosexual intercourse were considered of 'extreme exceptional character'. In these two jurisdiction even a non-violent homosexual advance could be considered provocative conduct.

In addition in the context of provocation in the Northern Territory,³⁷ Queensland,³⁸ the Australian Capital Territory,³⁹ New South Wales⁴⁰ and South Australia the question must be addressed of whether an ordinary person who was provoked with the same degree of gravity could have lost self-control and formed an intent to kill or to cause grievous bodily harm. That means where there is the possibility that the ordinary person could have been provoked by the particular conduct and acted upon it, the prosecution has failed to negative the defence beyond a reasonable doubt.⁴¹

When assessing the gravity of the provocation, all attributes of the individual accused including 'age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history' can be taken into

³⁶ This point was made in the Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (2008) 481 [21.90].

³⁷ *Criminal Code* (NT) s 158(2)(b).

³⁸ *Criminal Code* (Qld) s 304.

³⁹ *Crimes Act 1900* (ACT) s 13(2) (b).

⁴⁰ *Crimes Act 1900* (NSW) s 23(2)(d). For some of the background on the New South Wales law in this area, see Thomas Crofts and Arlie Loughnan 'Provocation: The Good, the Bad and the Ugly' (2013) 37 *Criminal Law Journal* 23 and Thomas Crofts and Arlie Loughnan *Provocation, NSW Style: Reform of the Defence of Provocation in NSW*, Legal Studies Research Paper Sydney Law School No.14/19 (2014).

⁴¹ In Queensland, the onus of proof is now on the defence *Criminal Code 1899* (Qld) s 304(7).

consideration.⁴² Personal attributes can include the defendant's sensitivity towards issues of sexual abuse based on paedophilia, even where the defendant was not the victim.⁴³ Subsequently, when analysing whether the ordinary person provoked with that degree of gravity could have formed an intent to kill or to cause grievous bodily harm, the characteristics of the accused generally cannot be taken into account, except for age.⁴⁴ It is only significant whether the ordinary person could have formed an intent to kill in these circumstances; execution of the intent, for example, involving disproportionality, is irrelevant.⁴⁵ In the context of HAD, a jury must determine how gravely the defendant was threatened by the unwanted homosexual advance, based on their individual attributes. The jury must then consider whether an ordinary person similarly provoked would have formed an intent to kill or do grievous bodily harm. This is where prejudicial attitudes towards gay men could taint the decision making process and influence trial outcomes.

The below will consider recent cases concerned with HAD to outline how the law is currently applied in practice in Australia.

(b) *Law in Action*

As pointed out above, while also possible in the Australian Capital Territory, the Northern Territory and New South Wales depending on the circumstances of the provocation, cases which raise questions of HAD are most likely to occur in South Australia, where provocation has not been reformed and is entirely common law based, and in Queensland, where non-violent sexual advances are not explicitly excluded from provocative conduct. In 2009 and 2011 two cases from Queensland were decided in which HAD played a role.

In *R v Meerdink and Pearce*⁴⁶ the victim Ruks approached the defendants in a churchyard in Maryborough in hopes of obtaining drugs from them. One

⁴² *Masciantonio v R* (1995) 183 CLR 58, 67.

⁴³ *Green v The Queen* (1997) 191 CLR 334; Young explains that a number of cases in which a defendant seeks to rely on a homosexual advance defence are linked to unwanted homosexual experiences in the defendant's past. Young suggests that such evidence may be introduced as a tactic to raise the chances of succeeding see Alision Young, "Into the Blue": The Image Written on Law' (2001) 13(1) *Yale Journal of Law & the Humanities* 304, 307-308. *Green* is an exception here as it is not based on direct unwanted homosexual encounters but on the defendant's belief that his sisters were sexually abused by their father.

⁴⁴ *Stingel v R* (1990) 171 CLR 312.

⁴⁵ Andreas Schloenhardt, *Queensland Criminal Law* (Oxford, 4th ed, 2015) 533, 536.

⁴⁶ [2010] QSC 158 (13 May 2010).

of the defendants, Pearce, alleged that the victim had subsequently touched his groin area while making verbal homosexual advances which triggered him to lose his cool as he had experienced abuse as a child. While the video footage of the scene did not show the victim physically touching the defendant anywhere, it did show that the victim tried to run away from the defendants while being chased and tackled to the ground by Pearce.⁴⁷ The defendant Meerdink came up and kicked the victim in the stomach. The defendants subsequently violently attacked the victim in intervals over a period of time, sometimes leaving and returning to the scene. After their attack, the defendants left the victim in the churchyard. He was discovered the next morning; he died from burst blood vessels in the stomach area occurring several hours after the attack.

During the homicide trial Pearce's barrister outlined that the homosexual advance represented a particularly grave provocation for his client due to the alleged sexual violence he experienced as a child and that neither of the defendants intended to cause the victim's death or grievous bodily harm.⁴⁸ Ultimately, both defendants were convicted of manslaughter and received a nine year and a 10 year prison sentence respectively.

Similarly, in 2011 the defendants Petersen and Smith were accused of killing Ward near Maryborough.⁴⁹ After picking the hitchhiking victim up, the three of them drank, took drugs and had dinner together at the defendant Smith's house. While in the process of dropping Ward back to a truck stop, the victim allegedly touched the defendant Petersen inappropriately. Petersen claimed to have been sexually abused as a teenager. He submitted that he lost self-control and, as a consequence, severely beat the victim between 20-30 times, dropped him at the side of the road and drove off with the defendant Smith. The defendants returned, moved the bleeding and unconscious victim from the street into the back of their ute, drove him to a forest where they left him to die in a ditch. A hiker discovered Ward's body in the forest a month later.

At trial, the same defence strategy based on HAD as in *Meerdink and Pearce* was employed, with particular emphasis on the fact that the defendant

⁴⁷ Discussed in David Donaldson, 'Masculinity and the Homosexual Advance Defence' (2011) *Overland* 82, 83.

⁴⁸ Discussed in Blore, n 29, 45: At trial it was submitted that the victim was heterosexual making it questionable why HAD should be successfully raised in this case. This, however, did not change the defendants' success in receiving a manslaughter conviction.

⁴⁹ Case discussed in Blore, n 29, 52-53.

had experienced abuse as a teenager and that the victim was much older than the defendant, thus conflating paedophilia and homosexuality. After just three hours' deliberation the jury convicted Petersen of manslaughter and Smith of accessory to manslaughter. The principal perpetrator received a ten year prison sentence while the accessory was sentenced to two years.

In South Australia, the decision of *Lindsay* has given rise to questions concerning the application of HAD in South Australian law which has been addressed by the High Court in 2015. This case will be discussed in detail below in part III of this article.

3 *Is the Availability of HAD Still in Line with Contemporary Community Values?*

Recent case law shows that relying on HAD is not only a theoretical possibility in some Australian jurisdictions, but has been successfully raised by defendants in Queensland and South Australia in the past decade.⁵⁰ It is submitted that the mere possibility of raising the provocation defence based on a homosexual advance regardless of the outcome in the particular case at hand already legitimises homophobic violence.⁵¹

This gives rise to the question of whether the (partial) exoneration of homophobic violence is still in line with current community values. This question has been debated in Australia since the 1990s where it was first raised by the Attorney-General's inquiry into the operation of HAD in New South Wales.⁵² Tomsen explains in the context of gay killings in Australia that in the 1990s 'the social inferiority of homosexuals has resulted in lax policing, unjust legal findings and even a disturbing degree of Australian community sympathy for the brutality of offenders'.⁵³

⁵⁰ Toole explains that while the defence was indeed raised at trial the manslaughter conviction was based on the fact that the intent for murder could not be established, see Kelly Toole, 'Submission into Inquiry into The Criminal Law Consolidation (Amendment) Bill 2013 (30 June 2014) <<http://blogs.adelaide.edu.au/public-law-rc/files/2014/07/Adelaide-Law-School-sub-to-LRC.pdf>> [3.1].

⁵¹ Statham, n 27, 309: 'the defence is inherently homophobic: it condones – it re-inscribes as justifiable, as ordinary – a reaction of extreme and excessive violence premised upon feelings of hatred, fear, revulsion and disgust, similarly re-inscribed as justifiable and ordinary'.

⁵² Discussed in Statham, n 27, 302.

⁵³ Tomsen, n 28, 46.

Two decades later it is questionable whether the message that a homosexual advance can exonerate fatal violence is still in touch with contemporary community values. Permitting the use of provocation in light of HAD sends the message that expressing one's gay sexuality by making a non-violent advance at another is so repulsive and unacceptable that it can (partially) justify one's death, rendering gay lives worth less than the lives of others.⁵⁴

Allowing a jury to decide whether the ordinary person in a particular case would have reacted to a homosexual advance with lethal force rather than abandoning this question altogether is in itself based on outdated stereotypes relating to male honour and the defence of the male body.⁵⁵ As the Hon. Justice Peak outlined in *R v Lindsay*, a South Australian appeal dealing with a homosexual advance:⁵⁶

There is no doubt that in former times, when acts of homosexuality constituted serious crime and men were accustomed to resort to weapons and violence to defend their honour, a killing under the provocation present here would have been seen as giving rise to a verdict of manslaughter rather than murder. However, times have very much changed. The question has to be decided in the light of contemporary conditions and attitudes, for what might be provocative in one age might be regarded with comparative equanimity in another, and a greater measure of self-control is expected as society develops.⁵⁷

Leaving the question to the jury to decide means that if a jury considers homophobia to be reasonable the defence will be successful,⁵⁸ which is inconsistent with a non-discriminatory criminal law. This outcome surely is not justified in 21st century Australia in light of human right standards. That the

⁵⁴ Stephen Tomsen 'The Political Contradictions of Policing and Countering Anti-Gay Violence in New South Wales' (1993) 5 *Current Issues in Criminal Justice* 209, 214: 'gay bashers and murderers, however loathsome, may be understood as rational social actors who believe that their attacks are the acting out of dominant views of sexuality, that are in some form condoned by current police practices and judicial findings. Accordingly, the struggle against violence cannot be separated from, and ought not replace, an ongoing struggle against any legal repression of gays and lesbians'; Stephen Tomsen 'Homophobic Violence, Cultural Essentialism and Shifting Sexual Identities' (2006) 15(3) *Social and Legal Studies* 389, 396: 'criminal courts have leaned towards essentialist classifications of same-sex activity as a marker of pathology'.

⁵⁵ See Donaldson, n 47, 83; Jef Sewell, "I Just Bashed Somebody Up. Don't Worry About it Mum, He's Only a Poof": The Homosexual Advance Defence and Discursive Constructions of the Gay Victim' (2001) 5 *Southern Cross University Law Review* 47, 49: 'the ordinary person standard is constructed within the dominant white, middle-class, Christian, heterosexual, male culture which operates to surreptitiously perpetuate, not only an overwhelming gender bias against women, but also a homophobic intolerance of the homosexual other'.

⁵⁶ [2014] SASCFC 5.

⁵⁷ *R v Lindsay* [2014] SASCFC 5 [235].

⁵⁸ Blore, n 29, 39.

possibility to raise HAD is out of touch with current community values is further supported by the fact that over the past 10 years Tasmania, Victoria and Western Australia have abolished provocation and the Territories as well as New South Wales have explicitly excluded non-violent homosexual advances on their own as provocative conduct *inter alia* on the assumption that ‘killings provoked by a non-violent homosexual advance do not demonstrate reduced moral culpability’.⁵⁹ Similarly, the South Australian Equal Opportunity Commission noted that

[the] common law ‘gay panic’ defence is no longer reflective of community attitudes in our society today and has no place in our justice system. The ‘gay panic’ defence established in *Green v The Queen* is a relic of a bygone era where homophobic attitudes were tragically rife and accepted in our community.⁶⁰

In this context, the Hon. K L Vincent, MLC South Australia, in the second reading of a bill intended to abolish HAD in South Australian law formulated to the extreme that

[a]s a vegetarian I do not eat meat and I do not particularly agree with people who do eat meat. However, if I am at a dinner party and somebody offers me a meat lovers pizza, can I then harm that person, claiming ‘pepperoni panic’? I think not. As long as the approach is nonviolent, I have no right to violently assert my beliefs toward that person just because I do not appreciate the approach.⁶¹

The above suggests that provocation laws at least in some Australian jurisdictions lack behind society’s general attitudes towards gay identities by allowing defendants to raise HAD. On this basis the recent leadership of lawmakers in this area, namely the High Court and Parliament, is considered below.

⁵⁹ Law Reform Commission of Western Australia, *A Review of the Law of Homicide, Final Report*, Project No 97 (September 2007) <http://www.lrc.justice.wa.gov.au/P/project_97.aspx> 219.

⁶⁰ South Australian Equal Opportunity Commission, Submission No 40, 12, as cited in South Australian Law Reform Institute, *Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (Audit Paper 2015) <https://law.adelaide.edu.au/research/law-reform-institute/documents/audit_report_lgbtiq_sept_2015.pdf> 110-111.

⁶¹ South Australia, *Parliamentary Debates*, Legislative Council, Criminal Law Consolidation (Provocation) Amendment Bill, Second Reading, 2 December 2015 (KL Vincent) 21:03.

III HIGH COURT AND PARLIAMENTARY RESPONSES TO HAD IN AUSTRALIA

A *The Stance of the High Court: Green and Lindsay*

The above outlined that HAD lives on in Queensland and South Australia and remains possible in the Territories and New South Wales depending on the existence of other relevant factors. The below analyses the stance of the High Court in relation to HAD over time by assessing the message behind the key decisions *Green* and *Lindsay*.

1 *Green v The Queen (1997)*

The law has proven to be surprisingly accommodating to the perpetrators of deadly violence in the context of HAD. In the notorious⁶² *Green v The Queen*,⁶³ the victim (36) and the offender (22) were good friends of about six years' standing. During this time, significant trust had been established. The victim had assisted the offender to obtain work, and had loaned small amounts of money. On the night of the killing, the victim had invited the offender to his house. They had watched television and consumed a significant quantity of alcohol. The victim asked the offender if he would like to stay overnight, and the offender agreed. The victim said the offender could sleep in his bed, and he would sleep in another room. When the offender was in bed, the victim entered the room and lay on the bed next to the offender. He began touching the offender. The offender told him not to do this, but the offender continued to do so, including near his genital area.

The offender picked up a pair of scissors nearby and struck the victim until he was not recognisable. He admitted punching the victim about 35 times and stabbing him about 6 times. Blood spatter was consistent with the victim's head being rammed into a wall. He had a fractured skull and broken bones in his neck.

The offender admitted to police that he had killed the victim, but claimed the victim had 'done worse to him'. He claimed he had come from an abusive family environment, where his father abused his mother and sisters. He

⁶² Ben Golder 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004) 11 *Murdoch University Electronic Journal of Law* 7, [18] describes *Green* as the High Court 'lend(ing) its support to the insidious jurisprudence of sexual hatred'.

⁶³ (1997) 191 CLR 334.

believed his father had sexually abused his sisters. As a result, when the victim made the unwelcome sexual advances, he 'lost it' and experienced flashbacks to the childhood incidents. The relevant legislation at the time permitted a partial defence of provocation involving loss of self-control induced by the victim's conduct (including words or gestures) which could have induced an ordinary person in the position of the offender to have so far lost control as to form an intent to kill or do serious injury.⁶⁴ The question was whether the jury should have been instructed in relation to this defence; in other words, whether it was potentially applicable to the factual situation. By a slim majority of 3-2, the High Court found the defence of provocation should have been left to the jury.

Brennan CJ said that the possible application of provocation should have been left to the jury. He found it might have concluded that the attempt by someone the offender trusted to violate the offender's sexual integrity, and the persistence of the victim's attempts, together with past abuse in the offender's family, was sufficient to attract the provocation defence.⁶⁵ He quoted the dissenting judge from the New South Wales Court of Appeal to the effect that the provocation was of a very grave kind, describing the victim's behaviour as revolting, concluding that some people would regard what the victim did as a 'serious and gross violation of their body and person'.⁶⁶ McHugh J concluded that any unwanted sexual advance may lay the foundation for a successful defence of provocation.⁶⁷ He claimed the homosexual nature of the advance here was 'only one factor'.⁶⁸ Kirby J dissented strongly:

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. He or she might, depending on the circumstances, be embarrassed; treat it at first as a bad joke; be hurt; insulted. He or she might (strongly protest); might use as much physical force as was necessary to effect an escape; and where absolutely necessary assault the persistent perpetrator to

⁶⁴ *Crimes Act 1900* (NSW) s 23(2).

⁶⁵ *Green v The Queen* (1997) 191 CLR 334, 345.

⁶⁶ *Green v The Queen* (1997) 191 CLR 334, 345-346.

⁶⁷ *Green v The Queen* (1997) 191 CLR 334, 370.

⁶⁸ *Green v The Queen* (1997) 191 CLR 334-370; Toohey J was also in the majority.

secure escape. But the notion that the ordinary twenty-two year old male ... in Australia today would so lose self-control as to form an intent to kill or grievously injure the deceased because of a non-violent sexual advance by a homosexual person is unconvincing. It should not be accepted by this Court as an objective standard applicable in contemporary Australia.⁶⁹

The High Court quashed the conviction and a retrial was ordered ultimately leading to a manslaughter conviction.

Academic commentary on the outcome was sharp. Howe called it 'a new low point in the lamentable history of the provocation defence in Anglo-Australian law', and a 'deplorable' decision.⁷⁰ Statham said that, according to the majority,

there is effectively no distinction to be made between non-violent homosexual advances on the one hand and sexual attacks and sexual abuse on the other, a non-violent homosexual advance will not be treated as analogous to a non-violent heterosexual advance. What is also clear ... is that in the absence of judicial insistence on this analogy ... jury directions will never be enough to limit the influence of homophobic prejudice in HAD cases.

Almost 20 years after *Green* the High Court was called upon anew to decide questions relating to provocation and HAD in *Lindsay*. The below analyses the recent decision prior to considering the High Court's overall message on HAD through its decisions.

2 *Lindsay v The Queen* (2015)

A reminder of the use of provocation in the homosexual advance context occurred with the recent High Court decision in *Lindsay v The Queen*,⁷¹ where

⁶⁹ *Green v The Queen* (1997) 191 CLR 334408-409; Gummow J agreed that the acts relied upon were not sufficient so as to engage the possible application of the provocation defence, 387.

⁷⁰ Adrian Howe, 'Green v The Queen: The Provocation Defence: Finally Provoking its Own Demise?' (1998) 22 *Melbourne University Law Review* 466; John Heard criticised the law in this area as an instance where 'the law loses her stately grandeur, bowing down before primitive ideals': 'The Privilege of Anger' (2007) *Meanjin* 138, 143; David Donaldson, 'Masculinity and the Homosexual Advance Defence' (2011) *Overland's CAL-Connections* 82; Stephen Tomsen, 'Homophobic Violence, Cultural Essentialism and Shifting Sexual Identities' (2006) 15(3) *Social and Legal Studies* 389. Mack says the continued existence of the homosexual advance defence serves to 'legitimise and reinforce' the aggressive reaction of men towards homosexual advances: n 25, 170; more generally Allyson Lunny notes that Australian and American 'judicial opinion consistently display(s) examples of institutionalized and often blatant homophobia and (hetero)normativity: n 24, 328.

⁷¹ [2015] HCA 16.

all five members of the Court overturned the decision of the South Australian Supreme Court in finding that a defence of provocation ought to have been left to the jury. There the offender⁷² had been drinking at a hotel with his partner and a friend. The victim had been at the same pub with his (female) partner, and the two groups joined up. The victim's partner had then gone home after an argument. In the early hours of the following morning, they all went to the house of the offender to continue drinking. There were two boarders at the house, as well as family members of the offender. The group then commenced drinking. The victim's partner came to the house for a short time, remonstrating with the victim about his drinking. She then left after the offender offered to drive the victim home in the morning.

At about 2 am, the offender was seated on the patio. The deceased then straddled him in a sexually suggestive manner. The offender told the deceased he was not gay, and not to do 'stuff like that' or he would hit him. The offender's wife was also angry. The victim apologised and the offender said it was okay, but not to do it again. Later the victim was tired and the offender told him he could sleep in the spare room upstairs. The victim said he did not want to sleep there by himself and wanted the offender in there with him. He said he would pay the offender for sex. The offender asked him what he had said. The victim repeated his offer, saying he would pay several hundred dollars.

The offender then punched the victim, causing him to fall to the ground. The offender kicked and punched the victim. He then grabbed a knife and stabbed him. As a result the victim sustained damage to his aorta, with one cut completing severing it, and another causing a half thickness cut. These wounds caused substantial blood loss. The victim fell unconscious within 20-30 seconds and was dead within 2-3 minutes. The offender was convicted of murder. The issue was whether provocation should have been left to the jury. Provocation at common law, which applies in South Australia, requires that the matters relied on as provocative are capable of causing an ordinary person to lose self-control. This implied a role for the court in determining whether, as a matter of policy, a minimal evidentiary requirement of matters suggestive of provocation existed on the facts.⁷³

⁷² It may be relevant to note that the offender was Aboriginal, and the victim Caucasian.

⁷³ *Lindsay v The Queen* [2015] HCA 16 [24]; *Packett v King* (1937) 58 CLR 190, 217 (Dixon J).

All members of the Court concluded that the defence ought to have been left to the jury.⁷⁴ The joint reasons said caution was required before any court could find that contemporary attitudes to sexual relations were such that provocation was no longer available.⁷⁵ The provocation defence ‘recognised human frailty’.⁷⁶ It found the 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*.⁷⁷ The joint reasons said it was open for the jury to ‘consider that the sting of the provocation lay in the suggestion that, despite his earlier firm rejection of the deceased’s advance, the appellant was so lacking in integrity that he would have sex with the deceased in the presence of his family in his own home in return for money’.⁷⁸ Another possible aggravating factor was that the offer of money for sex was made by a Caucasian male to an Aboriginal male; this created a possible ‘pungency’ that an uninvited invitation to have sex for money might not otherwise possess.⁷⁹ Nettle J agreed the circumstances had a larger dimension than ‘merely an unwanted homosexual advance on a heterosexual man’.⁸⁰ It included that the offender was hosting the victim in his house, had ‘reacted with anguish and loathing’ at the first advance, and was then insulted in the presence of his family with an offer to prostitute himself.⁸¹ It was possible the offender perceived the offer as racially biased and so especially insulting.⁸² It was for the jury to determine what powers of self-control an ordinary person might possess, ‘not what academics, the press, pressure groups or judges might hope or wish were the minimum powers of self-control of an ordinary person’.⁸³

3 *The Message Behind the High Court Decisions*

In the area of the homosexual advance, we see the caricature of the gay man as the evil, sex-crazed aggressor, seeking to attack the honour of the masculine, heterosexual man. Certainly, a reading of *Green* and *Lindsay* fits this mould. In

⁷⁴ French CJ Kiefel Bell and Keane JJ in a joint judgment; Nettle J in a separate concurring judgment.

⁷⁵ *Lindsay v The Queen* [2015] HCA 16 [28].

⁷⁶ *Lindsay v The Queen* [2015] HCA 16 [28].

⁷⁷ *Lindsay v The Queen* [2015] HCA 16 [39].

⁷⁸ *Lindsay v The Queen* [2015] HCA 16 [37].

⁷⁹ *Lindsay v The Queen* [2015] HCA 16 [37].

⁸⁰ *Lindsay v The Queen* [2015] HCA 16 [81].

⁸¹ *Lindsay v The Queen* [2015] HCA 16 [81].

⁸² *Lindsay v The Queen* [2015] HCA 16 [81].

⁸³ *Lindsay v The Queen* [2015] HCA 16 [82].

Green, Kirby J (in dissent) is the only judge to dwell in any detail on the horrific injuries suffered by the ‘victim’ (namely the person killed). Elsewhere the focus is on the offender, the ‘revulsion’ he must have felt when approached by the victim, the ‘terror’ he suffered during the attack. In *Lindsay*, the insult the offender *might* have felt when offered money for sex, the fact it was a Caucasian male offering money to an Aboriginal man which *might* have exacerbated the insult. Others have noted the stereotype in this context of a homosexual predator and an innocent heterosexual victim, exacerbated in the case of *Green* by the fact the deceased was 14 years older than Green.⁸⁴ Golder notes the

[i]mmense cultural power of the predatory penetrator is hence able to account not only for the near physical impossibility of a half-dead man (libido intact) continuing his unwanted sexual advances in a physically threatening manner, but also to contradict the obvious indication that the heterosexual victims (the real victims in these cases) were far superior physically to their homosexual tormentors. It is at this juncture that the forensic verges on the cinematic, as the defence projects figures of the homosexual villain as phantom, zombie and vampire, in appeal to cultural understanding of homosexuality as a (literally) monstrous aberration. Even where there is a clear statement from the accused ... (like) in *Green* that the advance was non-threatening ... the figure of the predator ultimately reasserts itself in the minds of the judge and jurors.⁸⁵

These caricatures are not new. Eskridge wrote that the

[v]ampire lesbians and the homosexual child molester were tropes in place by World War I and were deployed vigorously before and after World War II to justify state campaigns that not only condemned and penalized homosexuals but limited them and medically treated their hypersexualised bodies with electricity, chemicals and scalpels.⁸⁶

Particularly in the law, where words are the tools of trade, the way in which ideas and concepts are expressed assumes particular importance. They can

⁸⁴ Adrian Howe notes the ‘power of the culturally loaded, heterosexist, stereotyped image of the predatory older man and his vulnerable younger male prey’: n 70, 490; Ben Golder n 62 ‘for some years now, the familiar story of a (homicidal) heterosexual hero overpowered by a predatory ‘poofter’ has played to critical acclaim in Australian criminal courtrooms. Judges and juries alike have listened with unquestioning awe to tales of bodily impeachment and male honour, as defence barristers have constructed this primal, almost cinematic narrative of Australian heterosexual masculinity under attack’: [1]; Kara Suffredini ‘Pride and Prejudice: The Homosexual Panic Defense’ (2001) 21 *Boston College Third World Law Journal* 279, 284 refers to gay men being ‘stereotyped as sex-crazed predators’.

⁸⁵ Golder, n 62, [38].

⁸⁶ William Eskridge, ‘No Promo Homo: The Sedimentation of Antigay Discourse and the Channelling Effect of Judicial Review’ (2000) 75 *New York University Law Review* 1327, 1340; Mack, n 25, 180-181.

implicitly betray values and ideas unconscious to the speaker. They can send messages far bigger than the resolution of the particular case before the judges.

One of the noteworthy features of the Australian case law on the 'homosexual advance defence' is the wording used to describe the unwanted sexual advance. The most recent example of this occurs in *Lindsay v The Queen*.⁸⁷ There, in the case of finding that the defence of provocation ought to have been left to the jury, Nettle J described the 'anguish and loathing' with which the offender reacted to the victim's first sexual advance.⁸⁸ Recall that this first sexual advance was the victim straddling the offender; according to the joint reasons, the offender told the victim he was not gay and not to do 'stuff like that' or he would hit him. The victim apologised; the offender then said: 'that's okay, just don't go doing stuff like that'.⁸⁹ With respect, the description of the incident in the joint reasons is hard to square with Nettle J's description of the offender's response as involving 'anguish and loathing'. The use of the word 'loathing', a synonym of 'hatred', is particularly unfortunate given the level of homophobia in society.

The mere fact a person reacts to an unwanted sexual advance (of any nature) by telling the other person they are not of the appropriate sexual persuasion, and not to do it again or else violence would be used, is far too easily linked with feelings of 'anguish' and 'loathing'. If someone was subject to an unwanted sexual advance, most would politely decline. The person approached might tell the instigator they were not interested, not of the appropriate sexual persuasion, already partnered etc. Most would not, but some might, threaten violence if the action were repeated, particularly if that person was conditioned to the use of violence to 'solve' problems. But surely none of this amounts to 'anguish', still less 'loathing'.

Would Nettle J describe a lesbian's response to an unwanted sexual advance by a heterosexual man which involved telling the man she was gay, and not to approach her again or she would use violence, as involving 'anguish' and 'loathing'? With respect, we doubt it. It is submitted the use of such language can suggest underlying homophobia, and might reflect how the decision maker might feel if such an approach were made to them, rather than how the

⁸⁷ [2015] HCA 16.

⁸⁸ *Lindsay v The Queen* [2015] HCA 16 [81].

⁸⁹ *Lindsay v The Queen* [2015] HCA 16 [8].

offender did in fact feel. Was there evidence that the offender was homophobic, which might explain a response of ‘loathing’? Or was that assumed?

Lindsay is not the only case where charged and value-laden language is used in this context. In *Green*,⁹⁰ the dissenting justice in the New South Wales Supreme Court (Smart J) was quoted by some members of the High Court, in the course of the High Court overturning the majority decision. For example, Brennan CJ in *Green* expressly noted, without apparent disagreement, Smart J’s description of the unwanted sexual advance as revolting, and that it must have been a ‘terrifying’ experience for the offender. Notably, there was no mention of the ‘terror’ the victim might have felt during an assault consisting of at least 35 punches, being stabbed up to 10 times, having his head rammed against a wall, having bones in his neck crushed, and having his skull fractured. Another example here is *R v Murley*⁹¹ where the victim was nearly decapitated after being stabbed seventeen times in the head, neck and chest after an unwanted homosexual advance to the accused. The unwanted sexual advance apparently consisted of the victim putting his arms around the accused. This occurred after the accused had gone with the victim back to his house, an invitation that followed the victim placing his hand on the offender’s backside whilst at a bar. The defence barrister referred to his client as being a ‘normal man’ in a ‘normal relationship’ who did not appreciate being thought to be gay. He asked his client whether he knew the victim was gay. His response was: ‘no, not at all. He seemed like a genuine person .. he seemed like a very nice man’. Ironically, the wording in the New South Wales Attorney General’s Working Party on the Review of the Homosexual Advance Defence tends to perpetuate the stereotype whilst referring to the ‘unusual sexuality’ of the victim.⁹²

The inescapable message from the decisions in *Green* and *Lindsay* is that it *might* be partly legally acceptable or justifiable to respond to an unwanted homosexual advance with deadly violence. Of course the High Court is careful not to say that it *is* legally acceptable or justifiable. They don’t need to. However, they have the power to mark out the ‘field’ of factual circumstances in which provocation is a legally viable defence. By expressly and repeatedly declining to remove deadly violence as a response to an unwanted homosexual advance from that field, these words are the most hurtful of all, and serve to

⁹⁰ *Green v The Queen* (1997) 191 CLR 334, 345-346.

⁹¹ Unreported, Supreme Court of Victoria, 28/5/1992, Teague J

⁹² New South Wales Attorney General’s *Homosexual Advance Defence: Final Report of the Working Party* (Criminal Law Division, 1998) [6.11].

perpetuate homophobic attitudes that some in society continue to place around gay people and homosexuality.⁹³

B The Role of Parliament

1 Parliamentary Action in Queensland and South Australia

As demonstrated above, High Court decisions such as *Green* and *Lindsay* contribute to legitimising HAD by leaving the question of whether an ordinary person could have been provoked by a homosexual advance to the point that they formed an intent to kill or do grievous bodily harm to the jury to decide. In order to limit the prejudicial interpretation of provocation in Queensland and South Australia, and also in other jurisdictions in which provocation in the context of HAD may be possible depending on *other* factors, law reform is necessary. Clear law reform limiting the scope of provocation has the advantage that it will no longer be necessary for a court to determine, as a matter of law, whether contemporary attitudes prevent provocation in the context of HAD from being put to the jury.

Immediately after the two Maryborough cases, an unsuccessful campaign was initiated to reform the law of provocation in Queensland and exclude non-violent homosexual advances from its scope.⁹⁴ In 2011 and 2012, the Queensland Labor government considered amending the law of provocation by including that provocation does not apply ‘other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted

⁹³ See also Robert Mison, ‘Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation’ (1992) 80 *California Law Review* 133, 135-136: ‘The continued use and acceptance of this defense sends a message to juries and the public that if someone sends a homosexual overture, such an advance may be sufficient provocation to kill that person. This reinforces both the notions that gay men are to be afforded less respect than heterosexual men, and that revulsion and hostility are natural reactions to homosexual behaviour ... the homosexual advance defense is a misguided application of provocation theory and a judicial institutionalisation of homophobia’; Cynthia Lee, ‘The Gay Panic Defense’ (2008) 42 *University of California Davis Law Review* 471, 566: ‘there is no question that when murder defendants argue gay panic, they seek to tap into deep-seated biases against and stereotypes about gay (males) as deviant sexual predators who pose a threat to innocent young heterosexual males’; Kate Fitz-Gibbon *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan 2014) 30: ‘the use of the provocation defence in this context engenders significant concerns surrounding the law’s legitimisation of homophobia, the ongoing stigmatisation of homosexual behaviour and the responsibility of the criminal law to establish clear parameters for unacceptable masculine violence’.

⁹⁴ Blore, n 29, 36.

sexual advance towards the defendant or other minor touching'.⁹⁵ After the Liberal National Party won the 2012 Queensland elections, however, those plans were not deemed urgent.⁹⁶

Similar reform efforts were made in South Australia. In 2013 the *Criminal Law Consolidation (Provocation) Amendment Bill 2013* was initiated by Greens MP the Hon. Tammy Frank MLC aimed at abolishing HAD in South Australia. A review by the Legislative Review Committee in December 2014 rejected the necessity of the Bill by noting that after

the South Australian Court of Criminal Appeal judgment of *R v Lindsay*, it is now very unlikely that a non-violent homosexual advance, of itself, will ever constitute sufficient grounds to establish a provocation defence.⁹⁷

After the High Court handed down *Lindsay* on 6 May 2015 it became apparent that it was not the case, as some had assumed, that the 'gay panic defence was a common law notion that no longer formed part of the law in South Australia'.⁹⁸ As a consequence, the *Criminal Law Consolidation (Provocation) Amendment Bill* was reintroduced to the South Australian Legislative Council on 13 May 2015, but proved unsuccessful on second reading in December 2015.⁹⁹ In addition, a second inquiry into the situation by the Legislative Review Committee was initiated.¹⁰⁰ No results of this inquiry have been published yet, and it is unlikely that this will occur prior to the end of the ordered retrial in *Lindsay*, scheduled for March 2016.¹⁰¹

In Queensland, after Labor won the 2015 elections, Attorney-General Yvette D'Ath announced in April that the Queensland Labor government was intending to reintroduce the amendments to provocation concerning HAD and

⁹⁵ John Jerrard, 'Special Committee Report on Non-Violent Sexual Advances' (Special Committee Report to the Queensland Attorney-General, Parliament of Queensland, 2012) cited in Mack, n 25, 172.

⁹⁶ For a detailed overview of the developments see Blore, n 29, 36.

⁹⁷ South Australia, Report of Legislative Review Committee into the Partial Defence of Provocation (2014) 40.

⁹⁸ Submission from Hon. John Rau, Attorney-General, to the South Australian Parliamentary Legislative Review Committee's Inquiry into the Partial Defence of Provocation, 23 July 2014, 3 as cited in in South Australian Law Reform Institute, n 60, 111.

⁹⁹ South Australia, Parliamentary Debates, Legislative Council, Criminal Law Consolidation (Provocation) Amendment Bill, Second Reading, 2 December 2015.

¹⁰⁰ South Australia, Legislative Council, Minutes of the Proceedings of the Legislative Council, 13 May 2015 [7].

¹⁰¹ South Australia, Parliamentary Debates, Legislative Council, Criminal Law Consolidation (Provocation) Amendment Bill, Second Reading, 2 December 2015 (The Hon. G A Kandelaars) 20:56.

affirmed the stance in August 2015.¹⁰² Yet so far no legislative action has been taken in Queensland.

Unfortunately, campaigns and lobbying in Queensland and South Australia regarding HAD appear to have lost their momentum without any legal change occurring almost one year after the *Lindsay* decision.

2 *Why is Parliamentary Action Necessary?*

The Australian Human Rights Commission in a 2015 report called specifically on South Australia and Queensland to legislate to abolish HAD.¹⁰³ It seems necessary that Parliament leads the way on this as the High Court appears unwilling to take a clear stand in this context. While the required scope of law reform is debatable and not subject to the analysis in this paper,¹⁰⁴ 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 arisen 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.

Some point out that as long as homophobic attitudes and stereotypes exist in society, the issue of lethal violence after a homosexual advance is likely to arise again in one context or another, for example intent, regardless of whether the provocation defence is abolished or reformed.¹⁰⁵ This has arguably occurred

¹⁰² David Alexander, 'Queensland Attorney-General Moves to Abolish State's Gay Panic Defence' *Star Observer* (online), 10 April 2015 <<http://www.starobserver.com.au/news/local-news/queensland-news/queensland-attorney-general-moves-to-abolish-states-gay-panic-defence/134942>>; David Alexander, 'With the Return of Civil Unions, Where to Now with LGBT Rights in Queensland' *Star Observer* (online), 17 December 2015 <<http://www.starobserver.com.au/news/local-news/queensland-news/with-the-return-of-civil-unions-where-to-now-for-lgbti-rights-in-queensland/144051>>.

¹⁰³ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights National Consultation Report* (2015) 3 [suggestion 6].

¹⁰⁴ Some argue that only the abolition of provocation will solve the problem while others contend that this has unforeseen consequences in other cases including battered women. For the complete abolition of provocation in South Australia see for example Kellie Toole, 'Call to abolish "gay panic" defence for murder trials' 18 May 2015 <<http://www.adelaidenow.com.au/news/opinion/kellie-toole-sa-should-abolish-provocation/news-story/8cfdaf87a3ccba0f56bee0961c3a7f15>>: 'We need to follow Tasmania, Victoria, Western Australia and New Zealand and abolish provocation completely, so that a person who intentionally kills, unless they are acting in self-defence, will be convicted of murder and be unable to blame the words or actions of their victims.'

¹⁰⁵ Discussed in Blore, n 29, 41.

in New Zealand where provocation was abolished in 2009. In *R v Ahsee* a jury convicted the defendant of manslaughter rather than murder due to lack of intent. In the case it was submitted that the lethal attack occurred after a homosexual advance by the victim, an older male. The manslaughter conviction was based on a lack of intent to cause death or grievous bodily harm, despite the fact that the defendant stabbed the victim so vigorously that the blade broke.¹⁰⁶

This may lead some to conclude that there is no need for law reform in this area in Australian jurisdictions, as the New Zealand example demonstrates that law reform on the issue does not necessarily transform well into practice whilst prejudicial attitudes remain. Yet, while law reform in this area alone may not be sufficient to bring about the desired changes, in practice it can be seen as a first step in the right direction, as moral guidance and a reflection of contemporary attitudes. Ultimately, it needs to be acknowledged that the success of law reform in any area of law is closely connected to changed societal attitudes and acceptance of new concepts and values, because significant change can rarely be achieved in isolation. The changed legal situation, may, at the very least, generate discussion and lead to increased awareness of the bias and prejudice gay people face in the criminal justice system, and send the message that homophobic violence is unacceptable in 21st century Australia.

IV CONCLUSION

The law has progressed significantly in its acceptance of homosexuality and homosexual practice. However, recent decisions of the High Court of Australia on the homosexual advance defence suggest that, at least among some sections of Australian society, negativity surrounding homosexuality remains. This is partly due to heterosexist cultural norms which will take time to break down. Attempts to blame the victim of violent murder, and the words in which some judges express themselves, indicate that insidious attitudes towards homosexuality remain embedded in some parts of our culture, including our most educated and enlightened. Given the evident reluctance of the Australian High Court to take a lead in this area, it falls upon legislators to consider further legislative reforms in this area to further reduce the ability of a

¹⁰⁶ *R v Ahsee* [2011] NZHC 2009 (15 December 2011) [27]-[29], [43] (Asher J), case discussed in Blore, n 29, 41.

perpetrator of deadly violence to resort to this defence. While one can understand an individual in the dock from resorting to any argument, however spurious, to attempt to have their charge reduced or sentence lessened, the law can play a stronger role in moves towards greater equality. The law prevents discrimination on irrelevant grounds, including homosexuality, in many spheres; it speaks with a forked tongue when it perpetuates discrimination here.