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Queensland Law Reform Commission
PO Box 13312, George Street Post Shop
BRISBANE QLD 4003

By email only

Dear Commission,

Re: Review of Particular Criminal Defences

We thank you for your invitation to participate in the review of particular criminal defences. A representative from our service attended the practitioner's roundtable consultation, and appreciated the Commission's willingness to consult on the community standards, social impacts, and legal processes relating to these issues.

About LGBTI Legal Service

The LGBTI Legal Service is a statewide specialist community legal service established by and for the LGBTIQ+ community in Queensland. We provide information, referrals, advice and representation across a wide range of legal problems, particularly discrimination, employment, family law and domestic violence-related matters, and criminal law.

The LGBTI Legal Service is a generalist community assistance service and not a court-based practice, and as such is unable to comment on whether reviewing the proposed defences will enhance or expedite course procedures, or impact the fairness of pleadings, hearings, or other judicial processes.

Our service does however have unique insight into the experiences of LGBTIQ+ individuals and communities, who have historically been specifically impacted by certain court processes and legislated defences under the *Criminal Code*. As such, we provide considerations below to guide the Commission's reasoning in this review:

1) Self-defence, provocation as a defence to assault, and provocation as a partial defence to murder

Queensland's LGBTIQ+ communities share a collective memory of the so-called 'homosexual advance defence' (also known as the 'gay panic defence' and 'trans panic defence'), which was available until recently throughout all Australian jurisdictions. This defence was legislatively removed in Queensland in 2017, but was still available in certain other Australian jurisdictions as recently as 2021.

Historically, this defence has been relied upon as either a full or partial defence against murder and assault, where the sexuality or gender identity of the victim 'provokes' the offender after a social, romantic or sexual encounter. In the matter of *Green v The Queen*,¹ which consolidated the 'gay panic' defence under Australian common law, the Defendant successfully invoked the defence of provocation after repeatedly stabbing his friend to death with a pair of scissors in response to a non-violent sexual advance. In *Green*, and many other matters in which the 'homosexual advance defence' was successful (in either attaining a verdict of not-guilty, or having a murder verdict reduced to manslaughter), the subjective experience of the defendant and their negative attitudes towards sexual advances, gender identity and homosexuality were factors considered by the court.

While The Commission's current proposals do not, by our reading, overtly promote, endorse or recommend the reinstatement of a 'homosexual advance defence', the proposed amendments to ss271-273 of the *Criminal Code* do refer to the subjective experience of a defendant. It is important that any recommendation from the Commission is accompanied by guidance that, when applying this subjective test, the courts should never consider the defendant's attitudes towards the sexuality, gender identity, gender expression, transgender status, or intersex status of the victim.

Our Recommendations

Any recommendations made by the Commission should explicitly note that, where the defendant's subjective experience is considered by the court:

- if grounds are legislated under which a defence of provocation can be relied upon, 'gay panic' or 'trans panic'-type defences must be specifically excluded from this legislation;

¹ (1997) 191 CLR 334

- the victim's sexuality, gender identity, gender expression, transgender status or intersex status are never appropriate factors for the court to consider with regard to the defences of provocation and self-defence; and
- the victim's sexuality, gender expression, gender identity, transgender status or intersex status are specifically legislatively excluded as relevant factors when considering the defences of provocation and self-defence.

2) Domestic discipline

The use of corporal punishment in the school or domestic settings is increasingly understood to be both harmful and ineffective as a tool for learning or behaviour change, and out-of-step with community standards and attitudes.

An international meta-analysis of spanking and other domestic corporal punishments found that these practices are linked to negative ongoing health and wellbeing outcomes for the child in 99% of cases.² The regular use of corporal punishment against children can often escalate to more severe physical abuse and neglect, can normalise violence in the household, and create an environment in which intimate partner violence and other domestic violence is more likely to occur.^{3 4 5}

In the specific context of LGBTIQ+ young people and their families, physical violence and abuse is often perpetrated under the guise of corporal punishment and corrective domestic discipline. LGBTIQ+ young people experience violence, abuse and neglect from their family of origin at a higher rate than the broader population, with gender-diverse people aged 14-15 years being the cohort most particularly susceptible to severe, multi-form maltreatment and neglect in a family setting.⁶

Family rejection and fleeing unsafe family circumstances are the leading causes of homelessness among LGBTIQ+ young people, who are significantly more likely to

² E.T. Gershoff, A. Grogan-Kaylor, *Spanking and child outcomes: old controversies and new meta-analyses*, J Fam Psychol, 30 (2016), pp. 453-469

³ Poulsen A. (2018). The role of corporal punishment of children in the perpetuation of intimate partner violence in Australia. *Children Australia*, 43, 32–41.

⁴ Afifi, T. O., Mota, N. P., Dasiewicz, P., MacMillan, H. L., & Sareen, J. (2012). Physical punishment and mental disorders: Results from a nationally representative US sample. *Pediatrics*, 130(2), 184–192.

⁵ Afifi, T. O., Fortier, J., Sareen, J., & Taillieu, T. (2019). Associations of harsh physical punishment and child maltreatment in childhood with antisocial behaviors in adulthood. *JAMA Network Open*, 2 (1), e187374, 1–10.

⁶ Higgins DJ, Lawrence D, Haslam DM, Mathews B, Malacova E, Erskine HE, Finkelhor D, Pacella R, Meinck F, Thomas HJ, Scott JG. (2024) Prevalence of diverse genders and sexualities in Australia and associations with five forms of child maltreatment and multi-type maltreatment. *Child Maltreatment*.

experience homelessness than their heterosexual and cisgender peers.⁷ LGBTIQ+ people comprise roughly 7% of the youth population, but account for 40% of young people experiencing homelessness,⁸ with family violence and rejection cited as the most frequent causes of homelessness among this cohort.⁹

It is vital that any review of these laws does not result in a framework where abuse and neglect of LGBTIQ+ young people can be lawfully perpetuated under the grounds of ‘domestic discipline’.

Our Recommendations

We recommend that the Commission’s report provides guidance to legislators that:

- there is no grounds under which ‘domestic discipline’ should be considered a valid defence against assault against a child; and
- LGBTIQ+ young people experience disproportionate rates of violence, abuse and neglect in a familial setting, often under the guise of ‘domestic discipline’.

3) The partial defence to murder of killing for preservation in an abusive domestic relationship

The LGBTI Legal service broadly endorses the Commission’s proposal to review these sections of the *Criminal Code*, to balance the interests of the parties with growing community understandings of the impacts of and responses to domestic violence.

We do however have concerns that any defences available to a victim-survivor of domestic violence will be reliant on documented evidence of that violence, and on the investigating police and presiding judicial officer correctly identifying the perpetrator of violence.

Misidentification of DFV perpetrators by police is a persistent and ongoing justice concern, particularly when dealing with marginalised communities. A review of 600 DFV matters by Women’s Legal Service Victoria found that that the perpetrator was misidentified by police

⁷ Gaetz et al, (2016) in McNair, R, Andrews, C, Parkinson, S, Dempsey, D, LGBTQ Homelessness: Risks, Resilience, and Access to Services in Victoria, GALFA, 2017

⁸ Choi, S. K., Wilson, B. D., Shelton, J., & Gates, G. J. (2015). Serving our youth 2015: The needs and experiences of lesbian, gay, bisexual, transgender, and questioning youth experiencing homelessness.

⁹ Gattis, M. N. (2013). An ecological systems comparison between homeless sexual minority youths and homeless heterosexual youths. *Journal of Social Service Research*, 39(1), 38–49

in 10% of cases;¹⁰ while a 2017 Queensland report found that, in just under half of all reviewed deaths of Indigenous women due to DFV, that “the woman had been identified as a respondent to a protection order on at least one occasion”.¹¹

The risk of potentially misidentifying the perpetrator of violence is significantly heightened in LGBTIQ+ relationships.¹² Research shows that police frequently employ gendered stereotyping or assumptions based on physicality and gender expression when determining the perpetrator of violence (for example, where both parties are men, police might make gendered assumptions based on the size or the gender presentation of parties and assume that the more ‘masculine’ party must be the perpetrator).¹³

Violence and coercive control in LGBTIQ+ relationships often take specific forms and use unique tactics which police struggle to effectively identify, such as exploiting a victim-survivor's fear of exposure (“outing”), or their experience of discrimination and internalised homophobia or transphobia.¹⁴ Many LGBTIQ+ survivors of domestic violence report difficulty receiving appropriate assistance from police, with one research report noting that in 27% of cases police refused to assist with a legitimate enquiry, requiring those LGBTIQ+ victim-survivors to seek a private application for protection orders.¹⁵

A current QPS LGBTI Liaison Officer noted in submissions to the 2021 *Inquiry into Queensland Police Service responses to domestic and family violence* that:

“Currently, QPS officers do not receive adequate training in relation to DFV in LGBTQ+ relationships, which results in inadequate responses to these incidents. An example of an inadequate response that can result is where police officers assume in relation to DFV in an LGBTQ+ relationship

¹⁰ Women’s Legal Service Victoria and Monash University, Policy Paper 1: “Officer She’s Psychotic and I Need Protection”: Police Misidentification of the ‘Primary Aggressor’ in Family Violence Incidents in Victoria, (Melbourne: Women’s Legal Service Victoria, 2018)

¹¹ Australia’s National Research Organisation for Women’s Safety (‘ANROWS’) (2020) Accurately identifying the “person most in need of protection” in domestic and family violence law: Key findings and future directions (Research to policy and practice, 23/2020))

¹² No to Violence (2019) *Predominant aggressor identification and victim misidentification*: discussion paper

¹³ Reeves, Ellen; Scott, Ben (2022). ‘Can’t you girls work this out?’: LGBTQ+ victim-survivors’ experiences of Victoria’s family violence intervention order system. Monash University. Report. <https://doi.org/10.26180/21530898.v1>

¹⁴ Gray, R., Walker, T., Hamer, J., Broady, T., Kean, J., & Ling, J. Bear, B. (2020). Developing LGBTQ programs for perpetrators and victims/survivors of domestic and family violence (Research report, 10/2020). Sydney, NSW: ANROWS.

¹⁵ Reeves, E., & Scott, B. (2022). ‘Can’t you girls work this out?’: LGBTQ+ victim-survivors’ experiences of Victoria’s family violence intervention order system. Monash Gender and Family Violence Prevention Centre, Monash University.

that the bigger or masculine partner must be the perpetrator, and the smaller or more feminine partner must be the victim”

In order to promote fairness and appropriate justice outcomes for all defendants impacted by domestic and family violence, it is imperative that both QPS and the judiciary are able to accurately identify the perpetrator of that violence in all instances. This is particularly important when one or both parties identify as LGBTIQ+, or the violence and control specifically exploits vulnerabilities relating to gender identity or expression, intersex status and sexuality.

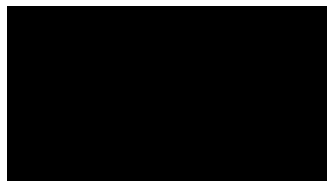
Our Recommendations

We propose that the Commission’s report recommends that, as a supplement to other reforms in this area:

- training on the proper identification of domestic violence in LGTBIQA+ relationships is delivered to QPS and the judiciary, by an appropriately qualified, LGBTIQ+ community-controlled legal and/or domestic violence organisation.

Thank you again for the opportunity to participate in this consultation. If you would like further information or clarification, or to further engage with our service as part of this review, please don’t hesitate to contact my colleague [REDACTED] at [REDACTED].

Kind regards,



Julie Howes

Director & Principal Solicitor
LGBTI Legal Service Inc.

