‘But Words Can Never Hurt Me’: Untangling and Reforming Queensland’s Homosexual Advance Defence

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Abstract

This article examines the recent legislative reforms to the *Criminal Code Act 1899* (Qld) concerning the defence of provocation. Specifically, it is concerned with the so-called Homosexual Advance Defence (‘HAD’), and argues that the 2011 amendments, which excluded defendants from pleading provocation on the basis of ‘words alone’, have not eradicated HAD from the common law, which only serves to legitimise homophobia in contrast to more tolerant, prevailing social norms. Further amendments are necessary to make clear that a ‘non-violent sexual advance’ cannot form the basis of a defence of provocation. This article is in response to John Jerrard QC’s *Special Committee Report on Non-Violent Sexual Advances* of January 2012.¹ Crucially, the article contends that the arguments for the abolition of HAD and for the broader defence of provocation have become confused, and untangling these arguments is required for clarity in reform.

*I think it’s just a justice issue that all people — irrespective of sexuality, gender or race — should feel safe, should feel free from violence. And I don’t believe our society is sending the right message when it has defences that say, ‘Look, I lost it and bashed someone because of something that happened to me.’ I just think that is so archaic.*

I Introduction

The partial defence of provocation remains one of the key points of difference in the criminal law between the various Australian states and territories. Despite

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¹ John Jerrard, ‘Special Committee Report on Non-Violent Sexual Advances’ (Special Committee Report to the Queensland Attorney-General, Parliament of Queensland, 2012).

being repealed entirely in Tasmania, Victoria and Western Australia (and in New Zealand), the defence continues to operate in other states and territories, albeit in forms that have been amended in recent years. In 2011, Queensland became the most recent state to amend the defence, following recommendations contained in a 2007 audit and a 2008 Queensland Law Reform Commission (‘QLRC’) review. Most prominently, these amendments stipulated that provocation could no longer be based ‘on words alone, other than in circumstances of the most extreme and exceptional character’.

However, there has been continued criticism that the Queensland amendments have not gone far enough in reforming the defence provocation and, more specifically, the exculpatory common law ‘defence’ known as the ‘Homosexual Advance Defence’ (‘HAD’). These criticisms are generally underpinned by two competing contentions: first, that the current reforms have not done enough to eliminate HAD specifically from Queensland law; and second, that provocation in its entirety should no longer be regarded as an acceptable defence, and hence should be abolished from Queensland law. The two claims need to be untangled. While provocation arguably continues to play an important role in the Queensland justice system, no such claim can be made for HAD, which is no longer in sync with prevailing social norms and serves to legitimise — if indirectly — homophobia.

Part II sets out key concepts, including a working understanding of HAD as it has developed in Australia, and distinguishes HAD from its American counterpart, the ‘Gay Panic Defence’ or ‘Homosexual Panic Defence’ (‘HPD’). It traces the relevant Queensland reforms as they apply to provocation and HAD, and maps the current legal landscape. Part III begins with the central contention that the arguments for the abolition of HAD need to be untangled and separated from the broader arguments for the abolition of provocation altogether. In line with the recommendations made in January 2012 in a report by John Jerrard QC (who was appointed as Chair of a Working Party set up to examine possible reforms of HAD in Queensland), I conclude that the 2011 Queensland reforms have not progressed far enough in eliminating HAD from Queensland law. Inherent in this call for reform is a need to address the broader theoretical and academic reasons for abolishing HAD, in addition to the potential problems that have been identified.

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4 Crimes (Homicide) Act 2005 (Vic).
5 Criminal Law Amendment (Homicide) Act 2008 (WA).
6 Crimes (Provocation Repeal) Amendment Act 2009 (NZ).
7 Criminal Code and Other Legislation Amendment Act 2011 (Qld).
8 Department of Justice and Attorney-General, Discussion Paper Audit on Defences to Homicide: Accident and Provocation (2007).
10 Criminal Code 1899 (Qld) s 304(2).
11 Note, I do not contend that HAD is a stand-alone defence, separate to provocation. HAD serves as a ground or basis for establishing the defence of provocation. However, for brevity’s sake, I will refer to HAD as a ‘ defence’.
12 Jerrard, above n 1.
II  The Current Legal Landscape

A  The Homosexual Advance Defence (Distinguished)

When HAD started appearing as a ‘defence’ in Australian courtrooms in the early 1990s, it was quickly conflated with its American counterpart, HPD. However, there are some key differences between the two iterations of the ‘defence’ which are relevant for the purposes of this article.

HAD has its roots in the 1920s psychological work of Edward J Kempf, the basis of which has now been thoroughly criticised as lacking psychiatric validity. It was originally narrow in scope, applying to defendants whose ‘repressed homosexuality’ allegedly led to a ‘neurotic reaction when confronted by a homosexual advance’. In this sense, its focus is essentially on the subjective mental state of the accused. External social views as to the nature of homosexuality are not as relevant here, as HPD operates akin to insanity or diminished capacity and is thus fundamentally centred upon the mental state of the accused and what he (or she) thought when a person of the same sex made a sexual advance. One academic has hypothesised that this ‘internal-focus’ can be traced back to ‘the American tendency to overcome deficiencies in the law of self-defence and provocation by invoking mental illness or incapacity.’ Nonetheless, it is evident that this American approach represents an attempt to ‘pathologise’ the ‘defence’ in an excusatory fashion.

Conversely, like the broader defence of provocation in Australia, HAD involves both subjective and objective elements that operate to justify, rather than to excuse, the defendant’s behaviour. As such, HAD requires a consideration from the jury as to whether a reasonable person in the defendant’s position would have reacted in the same way to the same-sex sexual advance. This involves social considerations as to how, in 21st-century Australia, the reasonable person perceives homosexuality. As explored further below, this social grounding of HAD may ultimately serve to undermine the ‘defence’, given the increasingly tolerant views of most Australians towards homosexuality. Moreover, the idea that a violent response to a homosexual advance could be considered the behaviour of a reasonable or ordinary person serves to validate such conduct in modern society.

Further, HAD is arguably rooted more strongly in homophobic attitudes towards traditional heteronormative concepts of ‘male honour’. By its very nature, the ‘defence’ establishes a picture of the defendant as a masculine creature ‘with goodwill pushed to the limit in being physically humiliated by homosexual

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13 The first recorded case is *R v Murley* (Unreported, Supreme Court of Victoria, Teague J, 28 May 1992).
desire'. It is thus the defendant’s masculinity and male honour that has been threatened through the homosexual advance — not his own latent homosexuality coming to the fore and overriding his judgment (as with HPD). The continued existence of HAD thus serves, through its very operation as a ‘defence’ of justification, to legitimise and reinforce the aggression shown by men who react aggressively to homosexual ‘threats’ to their ‘common “garden variety” straight masculinity [with its] reliance on codes of “male honour”’.

B Recent Queensland Provocation Reform

The defence of provocation was recently reformed in Queensland, and although the reforms did not specifically target HAD, they have specific implications for it. The Queensland reforms to provocation began in 2007, with the publication of a discussion paper by the Department of Justice and Attorney-General. The report was prompted by high levels of social concern following three trials in which provocation played a role in finding the defendants either not guilty of murder or guilty of the reduced charge of manslaughter. The QLRC was then asked to prepare a report recommending possible changes to the defence of provocation in the State.

Central to the QLRC report were two key recommendations: first, that the onus of proof be reversed so that the defendant bears the burden of establishing the defence of provocation, on the balance of probabilities, rather than the prosecution being required to negate the defence beyond reasonable doubt; and second, that the Criminal Code 1899 (Qld) s 304 be amended to reflect the Queensland Court of Appeal’s statement in R v Buttigieg that ‘the use of words alone, no matter how insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in “circumstances of the most extreme and exceptional character”’. This, in particular, was a topical recommendation given that there had been three cases in the State where provocation was successfully raised ‘on words alone’. This amendment was inserted into s 304 as subsection (2) on 4 April 2011, with the reversed onus also provided in subsection (7).

Crucially, the reform of HAD does not appear to have been the driving force behind the amendments, with the former Attorney-General, Cameron Dick, saying the goal was to ‘reduce the scope of the defence being available to those

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18 Bendall and Leach, above n 15, 7.
19 Department of Justice and Attorney-General, above n 8.
20 R v Sebo (2007) 179 A Crim R 24; R v Little [2007] QSC, referred to in Department of Justice and Attorney-General, above n 8, 2; R v Moody [2007] QSC, referred to in Department of Justice and Attorney-General, above n 8, 2.
21 QLRC, above n 9.
22 [1993] 69 A Crim R 21 (‘Buttigieg’).
23 Ibid 37.
who kill out of sexual possessiveness or jealousy’.\textsuperscript{25} Indeed, the QLRC report had considered whether non-violent sexual advances should be excluded from the defence other than in circumstances of an extreme or exceptional character, but decided against reform for two reasons: first, the Commission found it troubling to formulate a definition of ‘non-violent sexual advance’ (‘Does “non-violent” mean gentle touching or is it intended to mean an advance without physical contact at all? What is the boundary between a non-violent sexual advance and a sexual assault?’, the report asked.\textsuperscript{26}); and second, the Commission was concerned that a non-violent sexual advance from a homosexual might be considered ‘extreme or exceptional’.\textsuperscript{27}

Given this missed opportunity to reform HAD, critics of the 2011 amendments soon emerged, with Jerrard noting:

\begin{quote}
[P]assing those new laws has not satisfied some critics of the previous law, who would like to see the defence of provocation excluded completely, where it is pleaded in a defence to a charge of murder following a response to a homosexual approach by another.\textsuperscript{28}
\end{quote}

This criticism is best evidenced by the tabling of two petitions, containing a total of 4682 signatures, in the Queensland Parliament on 6 September 2011, calling for further reform to HAD.\textsuperscript{29} One of the men behind the petitions, Father Paul Kelly, told ABC Radio National he was also running an online petition that had gained 21 000 signatures as of 24 January 2012, after attracting the attention and support of the British comedian and intellectual Stephen Fry.\textsuperscript{30}

In November 2011, the then Queensland Attorney-General, Labor’s Paul Lucas, announced that a special committee would be formed to advise the government on the use of non-violent homosexual advances to establish a defence of provocation, with John Jerrard QC (a former Justice of the Queensland Court of Appeal) as its chair. The committee also included representatives from LGBTI Legal Service Inc, PFLAG (Parents, Families and Friends of Lesbians and Gays), the Anti-Discrimination Commission, Legal Aid Queensland, the Queensland Council for Civil Liberties, the Bar Association of Queensland and the Queensland Department of Public Prosecutions, among others. The chairman’s final report was issued in January 2012.

After reviewing the sentencing remarks from 110 manslaughter sentencing exercises between April 2005 and October 2011, Jerrard ‘was satisfied that defendants in Queensland did not frequently or successfully plead “gay panic”, or “non-violent homosexual advance”, as a defence to a charge of murder, based on provocation.’\textsuperscript{31} He did, however, identify two cases in which HAD had played a

\begin{footnotes}
\item[26] QLRC, above n 9, 481 [21.90].
\item[27] Ibid 481 [21.95].
\item[28] Jerrard, above n 1, 3.
\item[29] Ibid.
\item[31] Jerrard, above n 1, 3–4.
\end{footnotes}
role. Nonetheless, he concluded that the 2011 amendments ‘will make it more difficult to advance an unmeritorious defence based on a violent response to a homosexual overture.’

The committee was equally divided on the need for reform of HAD. The division was ascribed to three factors: first, the lack of evidence of abuse of the potential ‘defence’; second, a view that the term ‘non-violent sexual advance’ was an ‘amorphous concept capable of describing a wide range of conduct’; and third, uncertainty as to the effect of the recent amendments. However, in view of the committee’s division, Jerrard made his own recommendations in the report in support of amendments to the Criminal Code 1899 (Qld). He proposed the addition of a subsection (9), which would read, ‘Subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance towards the defendant or other minor touching.’ This concession to ‘exceptional circumstances’ was designed to act as a catch-all for defendants whose actions were in part prompted by a mental condition, such as post-traumatic stress disorder resulting from a history of sexual abuse. Jerrard noted the need for reform was based in part on the concern ‘about the possibility of homophobic or unsympathetic juries, and the goal of having a Criminal Code which does not condone or encourage violence against the LGBTI community’.

Paul Lucas quickly supported these proposals and pledged to enact the amendments. He noted that although the committee was divided, the ultimate recommendation endorsed by the chair was in favour of reform. ‘There is no place for these kinds of acts in a civilised society,’ Lucas said. ‘These amendments make it crystal clear that someone making a pass at someone is not grounds for a partial defence and by no means an excuse for horribly violent acts.’

However, following the election victory of the Liberal National Party (‘LNP’) in the March 2012 Queensland elections, the State’s new Attorney-General, Jarrod Bleijie, scrapped the plans for reform, citing his view that amending the laws was ‘not a priority’ given that the provocation laws had already been strengthened and the new amendments ‘are yet to be tested’.

It is in response to this stalled position that I advocate for the reform of HAD. First, the arguments for the abolition of HAD must be separated and distinguished from the broader arguments for the abolition of provocation as a

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32 R v Peterson and Smith (Unreported, Maryborough Circuit Court, 14 October 2011); R v Meerdink and Pearce (Unreported, Maryborough Circuit Court, 13 May 2010).
33 Jerrard, above n 1, 8.
34 Ibid.
36 Ibid.
37 Department of the Premier and Cabinet (Qld), ‘State Government to Change “Gay Panic” Defence’ (Media Release, 25 January 2012).
38 Ibid.
whole. Second, while the 2011 amendments have reduced the scope for defendants to invoke HAD, the reforms have not gone far enough in removing HAD from Queensland law. Third, several arguments are advanced to show further reform is necessary to remove HAD from Queensland law. Finally, necessary amendments and reforms are suggested to abolish HAD, and possible problems raised as barriers to the reform of HAD are confronted.

III Reforming the Homosexual Advance Defence

A Untangling the Arguments

While it is not my intention to treat HAD as a distinct defence and suggest it has an identity other than as a ground of provocation, the arguments for the abolition of HAD should be kept distinct from the broader arguments for the proscription of provocation as a whole. Too often critics hold HAD up as an example of why provocation must be abolished in its entirety. Consider the comments of prominent opponent of provocation, Adrian Howe, who in her deconstruction of HAD, writes that she was ‘driven by a desire to lurch back into an attack on the law of provocation.’ Further,

[T]he ‘discovery’ of the operation of HAD in Australia provides an ‘excuse’ to re-visit the provocation defence in order to reinforce my argument that provocation operates as a deeply sexed excuse for murder and should be abolished.

It is not only those who oppose provocation who tend to conflate the arguments. For example, Joshua Dressler, a proponent of the defence, concedes that HAD raises issues which ‘go beyond the subject of prejudice against gay males’ and instead highlights ‘fundamental questions about the rationale of the provocation defence.’

My desire to untangle the arguments against provocation and against HAD stems from the recognition that provocation is a broad defence containing several different iterations that are not easily compared. To suggest that a non-violent homosexual advance is similar in fact to an incident of infidelity among married partners or the insults endured by a sufferer of battered women’s syndrome is to conflate wildly different grounds of the provocation defence. Indeed, HAD operates at a particularly narrow level (which may help explain the relative infrequency of cases identified by Jerrard in his report), involving complex and shifting social interactions regarding sexuality and tolerance of minorities. Moreover, as illustrated above in the distinction between HAD and HPD, HAD is a

41 See above, n 11.
43 Ibid 337 (emphasis added).
relational ‘defence’ in that its very nature involves a consideration of whether heteronormative masculinity has been ‘threatened’ or ‘weakened’ as a result of its encounter with a non-violent homosexual advance. It deals with the social relationship between two distinct groups: heterosexuals and homosexuals. While it is arguable that a man who catches his wife being unfaithful also feels his masculinity has been challenged, such a scenario does not involve, like HAD, the conflict and tension felt by one group of society (heterosexuals) towards another (homosexuals). Thus, arguably more than the other grounds of provocation, HAD is a fundamentally social or relational ‘defence’.

While some states have moved to abolish provocation, the defence retains its supporters in other states, and the debate about its future remains far from settled. Indeed, there are many who still see significant value in the continued operation of provocation. An ongoing New South Wales Parliamentary Inquiry into provocation has attracted various public submissions in support of the defence. In their submission, Thomas Crofts and Arlie Loughnan argue that provocation functions as an important tool of ‘labelling’ for society:

Offence labels … are of profound significance to the accused, to the criminal justice system, [to] society at large … and also to the victim and his/her family. The principle of fair labelling requires that distinctions between offences and their proportionate wrongfulness be recognised in the label attached to the offence.45

However, as will be discussed further in pt C, although Crofts and Loughnan identify only positive value in these labels, the social labels that emerge as a result of HAD operate exclusively in a negative sense as they exclude and marginalise an historically oppressed minority and legitimise homophobia under the law — further evidence that arguments for abolition must be untangled.

Finally, the broader defence of provocation arguably contains specific value for Queensland because of the State’s unique criminal justice system. Given that Queensland stipulates a mandatory life sentence for murder, the retention of provocation is arguably important so the courts can properly distinguish between different categories of unlawful killing. Ultimately, while a more thorough evaluation of the arguments for and against provocation is beyond the scope of this article, it is sufficient to say provocation retains value (at least in terms of social labelling), while HAD has none.

B The Inadequacy of Previous Reforms

As outlined above, the 2011 amendments were not designed specifically to reform HAD.46 Any reform of HAD has been purely incidental. It is also worth highlighting that no HAD cases have come before Queensland courts since the

46 Queensland, Parliamentary Debates, above n 25.
2011 reforms, so any analysis of the effect of the previous amendments on HAD lacks judicial authority and, at this stage, is only academic conjecture.

This analysis of the 2011 reforms, insofar as they affect the operation of HAD, will concentrate on two key areas: the ‘words alone’ amendment and the ‘extreme and exceptional circumstances’ proviso.

1 ‘Based on Words Alone’

The central question is whether the Criminal Code 1899 (Qld) s 304(2) has done enough to eliminate HAD from the common law. In order to assess this properly, it is relevant to scrutinise the analysis and discussion in the 2008 QLRC report which recommended legislating the Buttigieg limitation.

The report begins by noting that, historically, words were not capable of amounting to provocation, citing a 1707 case which held ‘no words of reproach or infamy … are sufficient to provoke another to such a degree of anger as to strike, or assault the provoking party with a sword’.47 By 1946, however, the House of Lords had held that words could amount to provocation, but only if they were ‘violently provocative’.48 The QLRC makes clear that its desire to limit once again the availability of words as provocation is designed to ‘reinforce the expectation of a peaceful modern community that individuals will take appropriate steps to maintain self-control in all but the most extreme and exceptional circumstances’ and to ‘recognise the right of all people to sexual and personal autonomy’.49

Regrettably, despite this reference to ‘sexual and personal autonomy’, the QLRC devoted little attention to non-violent homosexual (or even heterosexual) advances in its report. While the QLRC did note the need to limit the words that could be relied upon to establish a defence of provocation in the context of ‘words that threatened physical violence’,50 ‘insults thrown in the course of an argument and statements made about relationships’,51 and even words that ‘amounted to a threat to commit, or an admission of, a serious criminal offence’,52 the Commission’s main focus was on limiting the availability of provocation where words are used to indicate the end of a relationship.53 ‘Sexual autonomy’ is thus to be defined not as a reference to a sexual advance but as an expression that one partner wishes to assert his or her autonomy and end a relationship.

Given this lack of consideration paid to non-violent sexual advances in the discussion of the ‘words alone’ reform, it is unsurprising that the amendment that resulted from the QLRC report does not seem to eliminate the possibility of such an advance being used as the basis of a claim of provocation.54 Indeed, while the

47 R v Mawgridge (1707) Kel 119; ER 1107, 112–13, in QLRC, above n 9, 476 [21.63].
48 R v Holmes [1946] AC 588, 600, in QLRC, above n 9, 477 [21.64].
49 QLRC, above n 9, 479 [21.76].
50 Ibid 478 [21.69].
51 Ibid.
52 Ibid 478 [21.72]. The QLRC makes clear that here it is contemplating admissions of incest or threats to commit sodomy or rape.
53 Ibid 478–9 [21.75].
54 Crofts and Loughnan, Submission, above n 45, 16.
possibility has no doubt been reduced (given that an accused can no longer rely on verbal propositions, such as, ‘Want to come back to my place?’), the reality of sexual advances (in either homosocial or heterosocial situations) is of course far more complex. Alan Berman has noted:

[M]ost common law cases dealing with [a] non-violent homosexual advance involve more than a mere verbal proposition. It also generally allegedly involves a gentle touch. Thus, one is left with a situation in which the defendant can manufacture testimonial evidence against a dead victim.55

Thus, it is clear that the amendment in s 304(2) was not designed to completely eliminate, and nor has it done so in effect, the possibility that a defendant might rely on a non-violent homosexual (or even heterosexual) advance to establish a defence of provocation.

2 ‘Circumstances of the Most Extreme and Exceptional Character’

It has already been explained that the ‘words alone’ provision in the new s 304(2) has not completely removed the possibility that a non-violent homosexual advance may be used as the basis for a defence of provocation. However, it is also possible to see that the second element of the subsection (the modifier that words alone may form the basis for a defence ‘in circumstances of the most extreme and exceptional character’) may actually increase the possibility of HAD being raised successfully — even in the context of a non-violent homosexual advance involving mere words.

This contention is not merely speculative — in fact, it is underpinned by statements from the QLRC, the very body whose recommendations formed the basis for the 2011 amendments. In its discussion of a ‘non-violent sexual advance’, the QLRC began by stating that it agreed with the comments of Kirby J (in minority) in Green v The Queen56 that ‘any unwanted sexual advance, heterosexual or homosexual, can be offensive’, but felt it was not for the court to send a message that a violent response to such an advance is acceptable.57 However, just a few paragraphs later, the QLRC makes a point of distinguishing between heterosexual and homosexual advances in explaining its reasoning for not

56 (1997) 191 CLR 334 (‘Green’). Malcolm Green was charged with murdering Donald Gillies, and stood trial in the New South Wales Supreme Court in June 1993. Green claimed that Gillies had made a sexual advance towards him by getting into bed with Green and touching parts of his body, including his groin. Green then punched the victim approximately 15 times, stabbed him 10 times with a pair of scissors and banged his head into a wall. He was convicted of murder and sentenced to imprisonment for 15 years. On appeal, the Crown conceded that the trial judge had erred in not leaving evidence to the jury of Green’s family background of sexual assault and had erred in his direction as to the meaning of the ordinary person ‘in the position of the appellant’: Green v The Queen (Unreported, New South Wales Court of Criminal Appeal, Priestley JA, Smart and Ireland JJ, 8 November 1995) 10–11 (Priestley JA). However, the appeal was ultimately dismissed and the jury’s verdict upheld. It proceeded to the High Court, where five separate judgments were handed down and Green’s appeal was ultimately successful. For a full discussion of the case, see, Adrian Howe ‘Green v The Queen: The Provocation Defence: Finally Provoking its Own Demise?’ (1998) 22 Melbourne University Law Review 466.
recommending a specific exclusion for non-violent sexual advances: ‘The Commission was however dissatisfied with the description “non-violent sexual advance” and concerned that a homosexual advance might be considered extreme or exceptional.’58

It is not my intention to argue that this statement belies homophobia within the QLRC, as the Commission may simply have been stating its concern that some members of the community might consider a homosexual advance extreme or exceptional. Nevertheless, absent precedent on the new amendments, it is not unlikely that a court may turn to the original QLRC report for guidance on what is to be understood by ‘extreme and exceptional’. In fact, such an allowance is expressly provided for in the Acts Interpretation Act 1954 (Qld) s 14B(3)(b), which states that a Law Reform Commission report ‘laid before the Legislative Assembly before the provision concerned was enacted’ may be used to assist the court in determining an obscure provision’s meaning.59 As such, it would be possible for a court to characterise a homosexual advance — even one based on mere words — as extreme and exceptional, and hence such an advance could still form the basis for a defence of provocation.

C Why Further Reform is Necessary

Reforming HAD is necessary from either of the two competing perspectives of the symbiotic relationship of law and society. On the one hand, it is possible to see that the continued existence of HAD in law serves to legitimise homophobia in society. In this sense, one can see how law is capable of shaping society and social norms. Conversely, one might argue that society is equally capable of shaping and influencing the law, and that the criminal law in particular should reflect prevailing modern social standards and values. From this perspective, the increased tolerance towards homosexuals in society needs to be reflected in law.

Arguments for reforming provocation as a defence are not in any sense revolutionary. Perhaps more than any other defence, provocation reflects social views towards certain categories of behaviour through the objective limb of the test. Historically, provocation has never been a static defence. It is instead malleable and open to constant criticism and evaluation. This is perhaps best evidenced by the fact that recently both Queensland and New South Wales opened reviews into the defence because of the outcry over certain cases which the public and the media deemed to defy modern social views.60 Crofts and Loughnan note in their submission to the New South Wales review that ‘the modern defence of provocation has changed significantly and is open to further, legislative reform that

58 QLRC, above n 9, 483 [21.95].
59 The equivalent provision also operates at the federal level via the Acts Interpretation Act 1901 (Cth) s 15AB(2)(b).
60 In Queensland, the 2007 Department of Justice and Attorney-General report was prompted by three specific cases: see above n 20. In New South Wales, the current Parliamentary Select Committee Inquiry followed on from the case Singh v The Queen [2012] NSWSC 637. In this case, the accused had killed his wife after an argument in which she confessed to loving another man. He was acquitted of a murder charge by a jury and found guilty of manslaughter. He was sentenced to eight years imprisonment, with a non-parole period of six years.
would go a significant way toward eliminating many of the problematic aspects of this defence.’ 61

1 Law and Society: the Legitimisation of Homophobia

(a) Cementing the Hetero/Homo Binary

To understand fully how HAD’s continued existence in Queensland law legitimises homophobia — and, hence, to understand why reform is warranted and urgent — it is necessary to embrace an analysis framed by queer theory. Consistent with queer theory’s objectives, this is an attempt ‘to deconstruct the categories of identity and render them problematic … [and] to transcend barriers, so it can be used to confuse the notion between the hetero and the other’. 62

Through this poststructuralist framework, it is possible to see how the very nature of HAD relies on cementing distinctions between a ‘heterosexual normality’ and a ‘homosexual other’. The ‘defence’ relies on reactions to perceived threats or insults to a personal male honour which has somehow been weakened or challenged as a result of the non-violent homosexual advance. In this sense, as Ben Golder has argued, HAD is constructed upon a legal conception of ‘the body’ that is fundamentally a ‘gendered and heterosexed one: the bounded male heterosexual body’, 63 which the so-called threat of ‘penetration’ would destroy or tarnish. The ‘defence’ is thus emblematic of a legal system that privileges respect for a hegemonic male heterosexuality at the expense of homosexuality, which is painted as dangerous and threatening.

Moreover, the characteristic of homophobia is ascribed to the ordinary person as per the objective limb of the provocation defence:

Whilst it purports to be representative, the ordinary person standard is constructed within the dominant white, middle-class, Christian, heterosexual, male culture which operates to surreptitiously perpetuate … a homophobic intolerance of the homosexual other. 64

Whether this construction of the ‘ordinary person’ is reflective of the multicultural and multi-sexual identities existing within contemporary Australia is questionable. It raises concerns about the ability of the law to keep pace with the complexity of modern Australian identities.

61 Crofts and Loughnan, Submission, above n 45, 13.
64 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.
HAD’s continued operation serves to solidify homophobic social divisions through its reinforcement and legitimisation of ‘the hetero/homo binary’. By placing heterosexual males in a position that involves the legal system implicitly empathising with their horror at having their male honour ‘threatened’, the Queensland legal system is emblematic of the ‘heterosexual/homosexual binarism’ described by American gender theorist David Halperin, in that it accords heterosexuality a ‘privileged’ and ‘unmarked’ status by ‘problematising’ and “marking” homosexuality.

This is not to deny that heterosexuality is a representative sexuality for the majority of Australians, nor to contend that the law should ignore this majority. Indeed, as Jef Sewell concedes, ‘Australia is a heterocentric society in that it is centred on the heterosexual view of sexuality.’ However, ‘heterocentrism’ gives way to ‘heterosexism’ when ‘a society not only celebrates the dominant culture or attitude but also moves to protect its privilege by condemning and denigrating subcultures’. Thus, the operational nature of HAD, which privileges heterosexuality, can be seen to legitimise heterosexism and homophobia.

Some would argue that the extent to which HAD legitimises homophobia is overstated. In Green, McHugh J argued that ‘any unwanted sexual advance … may lay the foundation for a successful defence of provocation’. However, such an argument overlooks the social division that is necessarily inherent in HAD and wrongly suggests that a defence of provocation founded upon a non-violent heterosexual advance can be viewed as similar in nature to a defence of provocation founded upon a non-violent homosexual advance. In fact, as has already been shown:

Whenever evidence of a nonviolent homosexual advance is led to mitigate a murder charge, the provocative act is constituted by the homosexualised victim’s incorrigible affront to the accused’s heterosexual identity … An institutionalised provocation defence surely acts as a prop for the unspoken divide between heterosexuality and homosexuality. In HAD cases generally, Green being a salient example, heterosexuality is never problematised; it is always homosexuality that is devalued by the law.

Moreover, there seems to be no similar ‘special sensitivity’ to a sexual advance afforded to a gay man or a heterosexual woman who might react to a male heterosexual advance with similar violence. The social division propounded by HAD is thus fundamentally different in nature to a non-violent heterosexual advance that forms the basis of a defence of provocation.

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Hodge, above n 62, 31.
Sewell, above n 64, 54–5.
Ibid.
De Pasquale, above n 66, 136.
While it is tempting to think that such homophobia can be relegated to the purely hypothetical realm of academia, it can have a very real impact on Australian homosexuals. The law is instrumental in shaping culture and, as the New South Wales Gay and Lesbian Rights Lobby submitted to that State’s Select Committee inquiry into provocation, ‘[HAD’s] existence continues to foster homophobia both in the criminal law and the broader community.’\(^{72}\) In his study of male violence and male honour, Stephen Tomsen examined the driving forces behind anti-gay assaults, concluding: ‘Much of this violence ... suggests an underlying compensatory search for masculine status among perpetrators and an important cultural paradox which appears to shape many of these attacks.’\(^{73}\) Once again, the exact criminological forces that connect law, culture and behaviour are beyond the confines of this article, but it can nevertheless be said that the continued existence of HAD in Queensland law plays some role in the cultural promulgation of homophobia in the community — and, consequently, anti-homosexual violence.

(b) Victim Blaming

HAD also affects social views in the emphasis on and depiction of the behaviour of the homosexual victims of murders where the ‘defence’ is pleaded. This operates in two main ways: first, by portraying the victim’s non-violent sexual advance as an offensive or disgusting threat; and second, by suggesting the victim has ‘preyed’ upon the heterosexual, who has in turn responded to this ‘threat’ with violence.

Some critics have described the High Court’s decision in Green as producing the result that ‘homosexual men, or more precisely, dead men who are alleged to have made a sexual advance towards their killers, can be said, at law, to have “provoked their own demise”’\(^{74}\). Others have argued more generally that HAD communicates a simple message to the community: ‘unwanted homosexual overtones are an abomination and the perpetrators deserve everything they get’.\(^{75}\) While such statements are emotionally charged, they highlight the idea that HAD relies on a non-violent homosexual advance being painted in a pejorative light. In addition to calling into question the behaviour of a deceased victim who can no longer defend himself, this element of blaming can be seen further to entrench homophobia in society and, in turn, ‘[frustrate] positive social change’\(^{76}\) and ‘[subvert] legislative initiatives condemning hate-motivated violence.’\(^{77}\) This focus on the ‘wrongfulness’ of the homosexual victim’s behaviour may ultimately prejudice a juror who ‘in a homophobic and heterocentric [society] … will evaluate the homosexual victim and homosexual overture with feelings of fear, revulsion and hatred’,\(^{78}\) and thus prejudice the fairness of the trial. If the defendant is ultimately successful in establishing provocation on the basis of HAD, courts

\(^{72}\) Ibid 3 (emphasis added).


\(^{74}\) Howe, above n 56, 466.


\(^{77}\) Ibid 173.

\(^{78}\) Ibid 158.
and juries are arguably simply reinforcing the view in society that ‘homosexuality is culpable behaviour and that gay men do not deserve the respect and protection of the criminal justice system’. 79

Finally, it can be argued that in many HAD cases the characterisation of the homosexual victim’s behaviour is one of a predatory nature, which only serves to reinforce harmful stereotypes about gay men as overly sexualised creatures, ‘possessing an uncontrollable and voracious appetite for sex’. 80 In many HAD cases, there exists a blurred distinction between a sexual advance and a sexual attack and such ‘predator/prey imagery … moves the characterisation of the advance from amorous to violence/violation.’ 81 The image of homosexuality that the Queensland law thus paints through HAD can be seen to be, by its very nature, an ‘extravagant caricature, sensationalised and magnified’. 82 Jef Sewell writes:

The construction of the predator/prey binary exposes that, while privileged heterosexuality masquerades as normal, natural and immutable, it is also precarious, precious and fragile, under the constant threat of homosexuality which can devour and transform unwitting and unwilling (young) men, dragging them kicking and screaming into the realm of the unnatural other. Heterosexuality shrieks in terror at the menace and has little hesitation in sanctioning continual predatory encroachments of its contained other. 83

Thus, HAD requires a consideration of the ‘wrongfulness’ of a homosexual advance, even if it is non-violent, and this requirement of victim-blaming is another means through which the continued existence of HAD in Queensland law will continue to shape society negatively.

2  Society and Law: Modern Laws for Modern Times

It is now apt to consider the need for reform from the inverse perspective of society’s influence on the law. From this standpoint, reform is necessary because of the critical requirement that the law (and particularly the criminal law) reflects modern social values.

The defence of provocation has never been static, and by its very nature requires juries’ objective consideration of prevailing and evolving social standards. Courts and legislators must continuously scrutinise provocation from a social standpoint, as the QLRC did in its 2008 report where it opined:

If we accept that extreme circumstances may provoke the ordinary person to fatal violence, then that raises questions whether our modern society should treat the end of a relationship or a non-violent homosexual advance as such an extreme circumstance. 84

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79 Ibid 174.
80 Sewell, above n 64, 58.
81 Hodge, above n 62, 32.
82 Sewell, above n 64, 58.
83 Ibid 69–70.
84 QLRC, above n 9, 262 [13.152].
Although the Commission concluded that homosexuality could be considered an ‘extreme’ or ‘exceptional’ circumstance (as discussed above), further interrogation suggests this was inappropriate.

Of course, not all — or perhaps not even a majority — of Australians are accepting of homosexuals. However, it cannot be denied that tolerance of homosexuals in society and the law has undergone rapid evolutions since the early days of proscribing homosexual conduct based on ‘moral panics’.

Indeed, Australian states have been decriminalising homosexual acts since 1972 and the federal government has been debating changes to the Marriage Act 1961 (Cth) which would allow same-sex marriage. Heather Douglas has argued that:

\[\text{laws should be a statement of where we are at as a society and as a culture.}\]
\[\text{In a situation where we have a debate in Parliament about gay marriage,}\]
\[\text{clearly we’re saying that we must be tolerant as a society of homosexuality.}\]
\[\text{It’s a message that I think the law should reflect.}\]

This argument is particularly relevant in Queensland, where civil partnerships for same-sex couples were introduced by the former Labor government and ultimately retained (albeit in an amended form) by the new LNP government. Thus, Queensland ought to reflect modern social tolerance towards homosexuals (even if widespread acceptance of LGBTIQ people has not yet been achieved) by removing from its criminal law a ‘defence’, drawn from intolerance, which buttresses the fear of homosexuals.

The need for the law to reflect social standards is particularly important for the criminal law, a ‘liberal democratic society’s most condemnatory tool’. As noted above, in their submission to the New South Wales Select Committee in support of the retention of the provocation defence, Crofts and Loughnan discussed the concept of ‘offence labels’ and the importance of ‘labelling’ different forms of wrongdoing to the accused, the victim and to society at large. They argued that offence labels allow the public to identify ‘the degree of condemnation that should be attributed to the offender’ and to determine how the offender should be regarded by society. However, this argument can be seen to ‘cut both ways’ in that, while

\[\text{According to the creator of the term, Stanley Cohen, a ‘moral panic’ occurs when ‘[a] condition,}\]
\[\text{episode, person or group of persons emerges to become defined as a threat to societal values and}\]
\[\text{interests’: Stanley Cohen, Folk Devils and Moral Panics (Paladin, 1973) 9.}\]

\[\text{South Australia was the first state to decriminalise homosexual acts through legislative}\]
\[\text{amendments in 1972: see Melissa Bull, Susan Pinto and Paul Wilson, Homosexual Law Reform in}\]
\[\text{Australia (Australian Institute of Criminology, 1991) 2. Tasmania was the final state to}\]
\[\text{decriminalise sodomy, following the Commonwealth Government’s intervention after the United}\]
\[\text{Nations Human Rights Committee case of Human Rights Committee Communication No 488/1992}\]
\[\text{(Toonen v Australia).}\]

\[\text{Matt Wordsworth, ‘Amended Civil Union Laws Retained in Queensland’, Australian Broadcasting}\]
\[\text{Corporation (online), 13 June 2012 <http://www.abc.net.au/news/2012-06-12/civil-union-laws-}\]
\[\text{retained-but-changed/4066748>.}\]

\[\text{‘LGBTIQ’ is an initialism for ‘Lesbian, Gay, Bisexual, Transgendered, Intersex, Queer or}\]
\[\text{Questioning’.}\]

\[\text{Ibid 8.}\]

\[\text{Review 217, 226, quoted in Crofts and Loughnan, Submission, above n 45, 9.}\]
it ascribes social value to the defence of provocation in helping the community distinguish the most heinous forms of unlawful killing from those that are less heinous, in relation to HAD it operates to communicate solely negative values that, as has been demonstrated, legitimise homophobia. If the criminal law and offence labels play a role, as Crofts and Loughnan suggest, in helping ‘us to make moral sense of the world’,93 then the ‘moral’ messages communicated to society at large as a result of a successful HAD ‘defence’ concern the ‘danger’ posed to heterosexual males by non-violent homosexual advances. The condemnatory nature of criminal law makes it all the more urgent that the law reflect modern social values and tolerance.

Rather than communicating such negative moral messages to the people of Queensland, it is important that the State’s legislature reform its criminal law so that HAD is excluded. The increased tolerance towards homosexuality in broader society should be reflected in Queensland law, given the role that objective social considerations play in the broader defence of provocation.

D The Necessary Reforms (and Potential Problems)

This section canvasses two suggestions from the Jerrard report: the addition of a non-violent sexual advance exclusion in s 304(2) or the introduction of a new subsection excluding ‘an unwanted sexual advance’ or other ‘minor touching’. Clarification of the objective limb of the provocation test is advocated.

The first possible reform path, mentioned only in passing in the Jerrard report, was the simple addition of the words ‘or non-violent sexual advance’ after ‘on words alone’ in s 304(2). It was argued this would be the simplest means of preventing defendants from relying on either a heterosexual or homosexual non-violent sexual advance to establish a defence of provocation. This measure would address the shortfall in the ‘on words alone’ amendment, which arguably would not cover a sexual advance that involved minor touching, as has been suggested above. It was suggested that the modifier in subsection (2) (‘circumstances of an extreme or exceptional character’) would mean that a person suffering from post-traumatic stress disorder connected with earlier sexual abuse (as was the case for the defendant in Green) who then responded violently to a sexual advance ‘could fairly argue that the person was in an extreme or exceptional circumstance.’94

Such an amendment would still come up against the troubling definition of ‘non-violent sexual advance’ that the QLRC and the Jerrard Special Committee noted posed difficulty. However, as Mark Thomas of the LGBTI Legal Service Inc told the Jerrard Special Committee, ‘the Parliament should not shy away from changing it because it was difficult to describe the desired result.’95 Indeed, both the Australian Capital Territory96 and the Northern Territory97 have used these

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94 Jerrard, above n 1, 7.
95 Ibid.
96 Crimes Act 1900 (ACT) s 13, as amended by the Sexuality Discrimination Legislation Amendment Act 2004 (ACT).
words and made amendments to their criminal legislation which excludes provocation being argued on the basis of a ‘non-violent sexual advance’.

In an attempt to combat this problem of definition, Jerrard proposed the addition of a new subsection (9) which would embrace a composite phrase (‘unwanted sexual advance towards the defendant or other minor touching’) so as ‘to ensure that conduct amounting to an assault was not a basis for refusing a plea of provocation’. Jerrard’s recommended new subsection would thus read, ‘Subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance towards the defendant or other minor touching.’ Indeed this composite phrase may go some way towards elucidating what conduct may not be relied upon to establish provocation (especially in its reference to ‘minor touching’, which is a major hole in the current legislation), but Jerrard’s decision to omit the words ‘non-violent’ is questionable when the words may clarify, especially in distinguishing between sexual advances and sexual attacks. Ultimately though, the courts are well equipped to determine the facts of individual cases and conclude objectively whether the alleged homosexual advance can be said to have been violent in the circumstances. A potentially problematic definition should not be seen as a roadblock to reform, as it has always been the role of the courts to discern meaning from the law on a present set of facts.

This proposal is arguably weakened, however, by Jerrard’s second recommendation that subsections (2) and (3) be amended to omit the words ‘of a most extreme and’, and instead insert ‘an’, thus limiting the scope of modifying circumstances wherein words alone may be relied upon to form the basis of a defence of provocation to ‘exceptional circumstances’ and not ‘extreme circumstances’. For Jerrard, this was because the words added difficulties of definition and example to the requirement that provocation by words alone only applies in circumstances of an exceptional character. However, if one were to remove ‘extreme’ from the legislation and focus only on circumstances that are ‘exceptional’ this may mean the legislation will make allowances for homosexual advances (which are exceptional and different to heterosexual advances due to the fundamental social prevalence of heterosexuality) to form the basis for a defence of provocation. As argued above, this proviso increases the likelihood of HAD being accepted even as a reaction to words alone, and further allowances seem unwarranted here. Nonetheless, Jerrard maintains the amendment is necessary for clarity and to remove what he sees as a tautology, and is adamant that it ‘would not have the effect of lowering the “bar”’.

Jerrard’s recommendations for reform can be extended and improved to ensure that HAD no longer plays a role in Queensland law by the introduction of a judicial direction. This proposal is based on a recommendation from the 1996 New

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97 Criminal Code Act 1983 (NT) s 158, as inserted by the Criminal Code Reform Amendment (No 2) Act 2006 (NT).
98 Jerrard, above n 1, 8.
100 Ibid 8.
South Wales Attorney General’s Working Party on the Review of the Homosexual Advance Defence\textsuperscript{102} and would involve the jury being instructed that, under the objective limb of the provocation defence test, the ordinary person is not to be imbued with homophobia. The proposed direction is to read, in part:

\begin{quote}
In this regard, the law does not treat a homosexual advance if you find one was made by the deceased as an act of provocation to any lesser or greater degree than if he had made a comparable sexual advance upon a woman.\textsuperscript{103}
\end{quote}

The effect of such a legislated judicial direction would be to ensure that the jury would not consider a homosexual advance as being different from a heterosexual advance, effectively eliminating the possibility of HAD.

Further, such a judicial direction would ensure HAD would not simply reappear in some other form. One of the reasons given by the Victorian Law Reform Commission in favour of abolishing that State’s provocation defence altogether was that it felt the ‘provocative conduct would simply be redefined in a way that allows it to fall within the scope of the defence’.\textsuperscript{104} However, were this judicial direction to be introduced it would ensure that homosexual conduct would be treated no differently from heterosexual conduct as a potentially provocative act within the entire scope of the provocation defence.

If one were to combine Jerrard’s first recommendation of a new subsection (9) with this judicial direction, it would no doubt both exclude (heterosexual and homosexual) sexual advances from forming the basis of a defence of provocation and ensure that homophobic juries would not be permitted to classify a non-violent homosexual advance as ‘exceptional’ in character.

\section*{IV Conclusion}

This article has demonstrated the need for the reform of HAD in Queensland law, and has outlined possible forms amendments could take. HAD is a ‘defence’ hinging on social considerations of tolerance. Modern social standards must be reflected in the modern criminal law — particularly given the objective test requirements inherent in provocation. HAD operates as a justification for violence which centres upon victim-blaming, and in turn legitimises social division and homophobia. Ultimately, the arguments for the exclusion of HAD from the criminal law are distinct from the broader arguments for the abolition of provocation altogether.

In line with the findings in the Jerrard report, the 2011 amendments to Queensland’s \textit{Criminal Code} have not gone far enough in ensuring HAD can no longer be relied upon as a ‘defence’. Further amendments are necessary to ensure Queensland is a state that is fully tolerant and accepting of homosexual Australians. The current Queensland Attorney-General’s justifications for his government’s unwillingness to implement the proposed reforms (that is, that the

\begin{footnotesize}
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\item \textsuperscript{103} Ibid [1].
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laws have already been strengthened and are yet to be tested in court)\textsuperscript{105} are fundamentally misguided. Ultimately, it is the responsibility of government to ensure its laws are watertight and not to allow ‘test cases’ to reveal legal loose ends. If a defendant is successful in arguing HAD under these new amendments and having his charge reduced from murder to manslaughter it will be too late to achieve true justice for the homosexual victim and his family. The apparent lack of clear-cut HAD cases in Queensland law at present should not be allowed to be a consideration in the argument for the necessity of reform. One case should be seen as more than enough to warrant urgent reform, particularly where that case involves the treatment of minorities.

This is not to suggest that a person is not entitled to be personally offended by a non-violent homosexual advance or even respond with an angry rejection. However, the fact that the Queensland criminal law continues to make allowances for charges of murder to be reduced to charges of manslaughter on the basis of the alleged ‘harm’ done to male heterosexual masculinity by a non-violent homosexual advance is woefully out of step with modern social standards. As a social tool of condemnation and as a tool that can influence social values and behaviour, it is of fundamental importance that the law be reformed to exclude HAD from Queensland once and for all.

\textsuperscript{105} Caruana, above n 40.