28 June 2015

Gay & Lesbian Health Alliance of SA Inc
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Submission to the South Australian Law Reform Institute's Review of South Australian laws and regulations to identify discrimination on the grounds of sexual orientation, gender, gender identity or intersex status.

We have read the Fact Sheets prepared by the SALRI Review Committee and we are satisfied that we outlined our main concerns in the meeting we had with you earlier this year. However we wish to bring to your attention the current situation in two areas of South Australian law which are of concern to us.

1. Expungement of criminal record

On this issue the Australian Human Rights Commission National Consultation Report 2015 *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* states that:

> 'South Australia was the first state to expunge historical gay sex convictions in 2013 with the *Spent Convictions (Decriminalised Offences) Amendment Act 2013* (SA). However, since its passage **the process for expungement has not been resolved** [highlighting added].'*(p 64)*

If this is indeed the case, then it is a very unsatisfactory situation.

The members of GLHA call on the Government to act immediately to determine and put in place the process for the expungement of decriminalized homosexual offences under the *Spent Convictions(Decriminalised Offences) Amendment Act 2013* (SA).

2. Common law partial defence of provocation ('gay panic defence')

In his written submission to the Legislative Review Committee's 2014 Inquiry into the Partial Defence of Provocation, the Attorney-General John Rau stated that:

> 'The "gay panic defence" is a common law notion which is no longer part of the law in South Australia.

> 'It has already been abolished.
>
> 'This was recently reaffirmed by the Court of Criminal Appeal in *R v Lindsay*. This is the most recent consideration of provocation in the context of the "gay panic defence", and
>
> 'It should be reiterated that the Common Law defence of 'gay panic' provocation has been clearly abolished by *R v Lindsay*.'

The majority of the Legislative Review Committee concurred. Its *Report into the Partial Defence of Provocation* tabled on 2 December 2014, states:

> ' … the Committee has determined that following 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.'** [highlighting added] *(Section 8.1)*

However, in May this year the High Court of Australia overturned the decision of the SA Court of Criminal Appeal. In its decision of *Lindsay v The Queen [2015] HCA 16 (6 May 2015)*, it concluded:

> 'The orders of the Court of Criminal Appeal should be set aside, and in their place it should be ordered that the appeal to that Court be allowed, the conviction quashed and a new trial be had.' *(50. Orders)*

In other words, the Justices of the High Court ruled that, even though the homosexual advance was of a non-violent nature, the jury erred in not taking the provocation defence into account.

Therefore we can no longer accept the Attorney-General's statement that the 'Common Law defence of "gay panic" provocation has been clearly abolished' in South Australia, nor the opinion of the Legislative Review Committee that 'it is now very unlikely that a non-violent homosexual advance, of itself, will ever constitute sufficient grounds to establish a provocation defence.'

The members of GLHA call on the Government to abolish the partial defence of provocation.

Yours sincerely

Ian Purcell AM
Chairperson