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By email

The Hon Vickie Chapman MP
Attorney General
e AttorneyGeneral@sa.gov.au

Dear Attorney-General

Statutes Amendment (Provocation, Self Defence and Sentencing) Bill 2020

Thank you for inviting our feedback on the draft Statutes Amendment (Provocation, Self Defence and Sentencing) Bill 2020 (the **Bill**).

For your convenience, and because both of our organisations seek to protect LGBTIQ+ people, we have worked together to provide our comments on the Bill jointly.

The South Australian Rainbow Advocacy Alliance (**SARAA**) and Equality Australia welcome the proposed amendments to the *Criminal Law Consolidation Act 1935* (SA), which abolish the so-called 'gay panic' or 'homosexual advance' defence through the abolishment of the common law defence of provocation. We congratulate the South Australian government for progressing this important reform. To further improve this reform, we suggest an additional and minor amendment to the *Sentencing Act 2017* (SA) also be incorporated into the Bill, recognising prejudice-motivated conduct as a factor which can be taken into account in sentencing.

Given our areas of expertise, our submission primarily focuses on these aspects of the reforms only. We encourage careful consideration be given to submissions from other stakeholders to ensure that any amendments do not unintentionally cause harm to other communities, particularly survivors of family and domestic violence and First Nations' people. We support appropriate discretion be available in all sentencing and parole decisions, so that the individual facts of every case can be taken into account.

Our thoughts on specific areas of the Bill to which we wish to provide comment are set out in further detail below.

Abolishing the common law defence of provocation

SARAA and Equality Australia welcome the Bill's abolishment of the common law defence of provocation which has allowed 'gay panic' or an 'unwanted homosexual advance' to be used as a defence to murder. The defence has been used in cases where gay or bisexual men have been killed, as recently as in 2015.

The defence has effectively allowed gay or bisexual men to be partially blamed for their own murders because a (heterosexual male) offender has been so enraged by an

unwanted sexual advance from another man as to justify killing him. It is an archaic defence which provides an excuse for toxic masculinity imbued with homophobia. It places blame for murder at the feet of its victims.[1]

South Australia is the last state in Australia where the 'gay panic' defence continues to apply, since the Queensland Parliament legislated for the removal of the defence in 2017. While South Australia has a proud history of LGBTIQ+ reform (notably, being the first state to decriminalise male homosexuality), the continued existence of the gay panic defence is one of the ways in which homophobia remains entrenched in South Australia's legal system.

The ramifications of the gay panic defence reach far beyond the immediate consequences of its use in a murder trial. In leaving to a jury the question of whether an ordinary person could be provoked by a so-called 'homosexual advance' to the point that they form an intent to kill or cause grievous bodily harm, the defence implies that there are still situations where homophobic violence is justifiable. By legitimising violent homophobia in this way, the gay panic defence is inconsistent with the notion of a non-discriminatory criminal law and perpetuates ongoing discrimination against, and marginalisation of, LGBTIQ+ people, particularly gay and bisexual men.

Further, the underlying rationale for the defence of provocation could be developed by the common law in future to justify the murder of others (such as trans and gender diverse people who make unwanted sexual advances towards (cisgender) men).

Accordingly, the Bill's approach of abolishing the provocation defence entirely, while leaving a defence recognising acts done in self-defence (including by survivors of domestic violence who believe a threat of harm will be carried even if not immediately or imminently), seems to us to be a sensible way of proceeding. Whether those amendments to the law on self-defence achieve the intended objectives of protecting survivors of family and domestic violence is an issue on which we would prefer to leave to others with relevant expertise to comment on.

Importance of discretion in sentencing

We do agree with the South Australian Law Reform Institute (**SALRI**) that a greater degree of flexibility in sentencing is warranted.[2] We do not support mandatory sentences or minimum non-parole periods, whether for murder or any crime.

Permitting the judiciary a level of discretion in sentencing facilitates justice by ensuring factors impacting upon an offender's culpability can be considered, including any genuine mitigating personal circumstances. For example, a murder following an

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[1] Gail Mason and Andrew Dyer (2013) '*A Negation of Australia's Fundamental Values': Sentencing Prejudice-Motivated Crime*, Vol 36: 871, p. 903.

[2] David Plater et al, *The Provoking Operation of Provocation: Stage 2* (South Australian Law Reform Institute, Adelaide, 2018) (**SALRI Report 2**) p. xvi.

unwanted sexual advance by a person of whatever gender or sexuality may have been influenced by previous experiences of sexual abuse.

On the other hand, the experience in other jurisdictions has been that unwanted homosexual advances have also been a factor in potentially mitigating sentencing.[3] Allowing the rationale for the gay panic defence to reassert itself in sentencing would thereby defeat the purpose of abolishing the defence. It is therefore important to make clear the strong parliamentary intent to remove the gay panic defence, and its underlying rationale, from reducing culpability for murder, whether at trial or in sentencing, by undertaking a further modest reform to sentencing laws, which we set out below.

Motives of prejudice – a factor in sentencing

Evidence of a motive (wholly or partly) based in prejudice or hatred toward a particular group of people, such as LGBTIQ+ people, should be considered as a factor for the judiciary to take into account in sentencing.

New South Wales, Victoria and the Northern Territory have legislated to codify the common law principle that a motive of prejudice or hatred against a group of people – with whom the victim shared characteristics or was believed to belong – is to be taken into account, usually as an aggravating factor, in sentencing.[4]

We encourage South Australia to similarly consider amending section 11(1) of the *Sentencing Act 2017* (SA) to codify this common law position, with the insertion of the following individual sentencing factor:

> *(c1) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular race, religion, sex, sexual orientation, gender identity, age, or people having an intersex variation or a particular disability);*

Given the structure of the *Sentencing Act*, this individual factor would merely be a factor to consider (although not expressly an aggravating factor) in sentencing. This provision would closely mirror the law in Victoria and New South Wales.

Thank you again for the opportunity to comment on the proposed Bill. We would be very happy to discuss these matters with you further.

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[3] See, for example, *R v Johnstone* [2011] VSC 300 at [18]-[21]; *R v Hodge* [2000] NSWSC 897 at [8]-[14].

[4] See ibid pp. 876-7 and case law referred to in fn 19; *Sentencing Act 1995* (NT) s 6A(e); *Sentencing Act 1991* (Vic) s 5(2)(daaa); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h). Tasmanian legislation states that racial motivation should be taken into account as an aggravating factor in sentencing: *Sentencing Act 1997* (Tas) s 11B.

If you wish to discuss these matters further, please contact Matthew Morris, Chair, SARAA on chairsaraa@gmail.com or [redacted] and Ghassan Kassisieh, Equality Australia Legal Director, on [redacted] or [redacted]

Yours sincerely,

Anna Brown
Chief Executive Officer
Equality Australia

Matthew Morris
Chair
SARAA