

THE HOMOSEXUAL ADVANCE DEFENCE AND THE CAMPAIGN TO ABOLISH IT IN QUEENSLAND: THE ACTIVIST'S DILEMMA AND THE POLITICIAN'S PARADOX

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Two recent murder trials in Queensland served as reminders that the 'homosexual advance defence' is still being employed in courtrooms as a species of provocation, resulting in verdicts of manslaughter instead of murder. The cases sparked a campaign for the abolition of the defence from Queensland law and very nearly succeeded. After setting out what the 'homosexual advance defence' is and how efforts to eradicate it have fared elsewhere in Australia, this article seeks to give a full account of the campaign in order to elucidate lessons for future law reform efforts as well as for queer theory.

I INTRODUCTION

In 2009 and again in 2011, the 'homosexual advance defence' raised its ugly head in two murder trials in the regional city of Maryborough in Queensland, Australia. In both trials, defence barristers explained that their clients flew into a homicidal rage because they had suffered the insult of a sexual overture from another man. In each case, the jury found the killer guilty of manslaughter rather than murder, assigning less culpability and enlivening a lower sentencing range. The Maryborough cases incited a campaign for the abolition of the defence from Queensland law, commencing with the lone voice of an academic in early 2011, its profile raised by the efforts of a community legal centre midyear, and coming to a head in early 2012 on the back of international publicity brought to the cause by a sympathetic priest.

Intrinsic value lies in recording an account of the campaign as part of an alternative counter-heteronormative history. The campaign also harbours lessons for queer theory in that it begs a myriad of challenging questions, not least of which concern the efficacy of identity-based politics. Likewise, lessons abound for future law reform advocacy, especially given that the promises of change extracted from one government remain unimplemented by its successor, not to mention that the homosexual advance defence remains good law in New South

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Wales and South Australia. Despite all this, the full story of the campaign remains untold.

This article seeks to remedy that gap. After first explaining what the homosexual advance defence is and how the various Australian jurisdictions have dealt with it to date, this article narrates the story of the recent campaign to abolish it in Queensland. Drawing extensively upon media sources, the campaign is presented through the characters that animated it: an academic, a community legal centre and a Catholic priest. In order to offer a tentative answer to but one of the many questions that arise, the final part of the article shifts its focus to the antagonist of the story – the politician – and explores the gap between their rhetoric of equality and their conclusions that fall far from that ideal.

II THE HOMOSEXUAL ADVANCE DEFENCE

A *What is the homosexual advance defence?*

The homosexual advance defence is essentially a defence strategy in murder cases whereby evidence of an unwelcome sexual advance made by the purportedly gay victim towards the accused is led in support of establishing the defence of provocation.¹ In England and Wales the legal tactic is called the ‘Portsmouth defence’ or ‘Guardsmen’s defence’.² In the United States a similar tactic exists called ‘gay panic defence’, though it relies upon the dubious psychological condition of ‘acute homosexual panic’³ to explain the accused’s violence, thereby implying a ‘real irrationality or a pathological defect on the part of the accused.’⁴ In contrast, the Australian variety draws on a culture of homophobic masculinity in order to place the blame squarely upon the victim.⁵ The narrative fed to the jury is that the lethal violence arose naturally enough from a loss of control the killer experienced when his heterosexual male honour was at stake.⁶

Provocation involves a subjective and an objective test. The jury must first be satisfied that the accused’s loss of control was because of the provocation and not pre-meditated, and second, that an ordinary person endowed with the accused’s

¹ Ben Golder, ‘The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform’ (2004) 11(1) *Murdoch University Electronic Journal of Law* [15]; Bronwyn Statham, ‘The homosexual advance defence: “Yeah, I killed him, but he did worse to me” *Green v R*’ (1999) 20(2) *University of Queensland Law Journal* 301, 301; Nathan Hodge, ‘Transgressive Sexualities and the Homosexual Advance’ (1998) 23(1) *Alternative Law Journal* 30, 31; Santo de Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26 *Melbourne University Law Review* 110, 113.

² Helen Power, ‘Provocation and culture’ (2006) Oct *Criminal Law Review* 871, 886; Roderick Munday, ‘The Quick and the Dead: Who Counts as a “Person” under s. 100 of the Criminal Justice Act 2003?’ (2007) 71 *Journal of Criminal Law* 238, 247.

³ Garry Comstock, ‘Dismantling the Homosexual Panic Defence’ (1992) 2 *Law and Sexuality* 81, 82-84.

⁴ Anthony Bendall and Tim Leach, *Homosexual Panic Defence and Other Family Values* (Lesbian and Gay Anti-Violence Project, 1995) 7.

⁵ Golder, above n 1, [14].

⁶ Stephen Tomsen, ‘“He Had to Be a Poofster or Something”: Violence, Male Honour and Heterosexual Panic’ (1998) 3 *Journal of Interdisciplinary Gender Studies* 44; Stephen Tomsen, ‘Hatred, Murder and Male Honour: Gay Homicides and the “Homosexual Panic Defence”’ (1994) 6 *Criminology Australia* 2.

‘special sensitivities’ could have formed an intention to kill or cause grievous bodily harm.⁷ If the jury is so satisfied, the partial defence of provocation then mitigates the charge of murder to the lesser crime of manslaughter, attracting a lower sentence.⁸

Although the homosexual advance defence cannot be found anywhere in legislation, its entrenchment in case law gives it the force of law. The first recorded case in Australia where the homosexual advance defence was employed was in Victoria in 1992.⁹ It was then entrenched by a cluster of cases in New South Wales between 1993 and 1995.¹⁰ Among the rearguard of those cases was *R v Green*.¹¹ In that case, Malcolm Green reacted to ‘gentle’ touching¹² by ‘punch[ing the victim] about thirty-five times, ram[ming] his head repeatedly against a wall and stab[bing] him ten times with a pair of scissors as [the victim] rolled off the bed.’¹³ He later told police, ‘Yeah, I killed him, but he did worse to me.’¹⁴ On appeal, the New South Wales Court of Appeal found that ‘amorous physical advances’ could not, as a matter of law, satisfy the objective test of provocation.¹⁵ Justice Priestley held, ‘I do not think that the ordinary person could have been induced by the deceased’s conduct so far to lose self-control as to have formed an intent to kill or inflict grievous bodily harm.’¹⁶ On further appeal, the High Court controversially found that a non-violent sexual advance could be sufficient to establish provocation.¹⁷

Without legislative intervention, cases such as *Green* bestow the homosexual advance defence with legitimacy. In this way, in those jurisdictions such as Queensland where the homosexual advance defence lingers, the law remains complicit in the argument that the use of fatal violence against gay men is

⁷ *R v Miller* [2009] QCA 11 (13 February 2009) [2] (McMurdo P), interpreting *Green v The Queen* (1997) 191 CLR 334, 369 (McHugh J). See also *Stingel v The Queen* (1990) 171 CLR 312; *Masciantonio v The Queen* (1995) 183 CLR 58.

⁸ For eg, in Queensland only murder is subject to a mandatory life sentence: *Criminal Code 1899* (Qld) s 305 cf s 310.

⁹ *R v Murley* (Unreported, Supreme Court of Victoria, Teague J, 28 May 1992).

¹⁰ *R v Jacky* (Unreported, Supreme Court of New South Wales, Campell J, 5 March 1993); *R v Chaouk* (Unreported, Supreme Court of New South Wales, 11 August 1993); *R v McGregor* (Unreported, Supreme Court of New South Wales, Newman J, 9 October 1993); *R v McKinnon* (Unreported, Supreme Court of New South Wales, Studdert J, 24 November 1993); *R v Turner* (Unreported, Supreme Court of New South Wales, Grove J, 6 to 11 April 1994); *R v G Diamond* (Unreported, Supreme Court of New South Wales, 15 April 1994); *R v Chapman* (Unreported, Supreme Court of New South Wales, 4 October 1994); *R v Stevenson* (Unreported, Supreme Court of New South Wales, Studdert J, 15 to 18 October 1994); *R v PA* (Unreported, Supreme Court of New South Wales, 10 February 1995); *R v Bonner* (Unreported, Supreme Court of New South Wales, Dowd J, 19 May 1995); *R v Dunn* (Unreported, Supreme Court of New South Wales, Ireland J, 21 September 1995); *R v CD* (Unreported, Supreme Court of New South Wales, 10 December 1995); *R v Green* (Unreported, Supreme Court of New South Wales, Abadee J, 7 June 1995).

¹¹ *R v Green* (Unreported, Supreme Court of New South Wales, Abadee J, 7 June 1995).

¹² *Green v The Queen* (1997) 191 CLR 334, 360 (McHugh J) (by the accused’s own evidence).

¹³ Statham, above n 1, 303.

¹⁴ *Green v The Queen* (1997) 191 CLR 334, 391 (Kirby J).

¹⁵ *R v Green* (Unreported, New South Wales Court of Criminal Appeal, 8 November 1995) 25-6 (Priestley JA, Ireland J agreeing), cf 23-4 of the dissenting judgment (Smart J).

¹⁶ *Ibid* 26 (Priestley JA).

¹⁷ *Green v The Queen* (1997) 191 CLR 334, 346 (Brennan CJ), 357 (Toohey J), 369-371 (McHugh J); cf 383-384 (Gummow J), 415-416 (Kirby J).

somehow excusable, certainly that it is not so reprehensible as to be labelled as 'murder', and that it should be punished less severely.

B Why does the homosexual advance defence exist?

The success of the homosexual advance defence depends upon juries finding that a reasonable person would react to a gay proposition with excessive violence premised on feelings of hatred, revulsion and disgust. Implicitly, juries must consider that homophobia is reasonable if the defence tactic is to work. In this connection, queer theorists point out that homophobia would not exist without an awareness of homosexuality. According to Michel Foucault, the emergence of the homosexual as a category of person is a relatively recent phenomenon.¹⁸ He points out that Ancient Greek sources describe a world in which free citizens enjoyed a full range of sexual pleasures, inside and outside of marriage with both men and women.¹⁹ Sexual classifications existed,²⁰ but they related to the intensity of a person's pleasures and their passive or active role within sex, rather than what sexual practices they performed or with whom they preferred to do them.²¹ On Foucault's account, the rise of Christianity brought with it an obsessive need to confess sexual behaviours, leading to a set of narratives about unusual or unorthodox practices that could be classified, with the subject disciplined accordingly.²² As the influence of the church waned throughout Europe in the late eighteenth and nineteenth centuries, its position was replaced by science. Foucault proposes that sexuality became a field of scientific knowledge as part of this process.²³ Scientific discourse built upon the narratives extracted in confession and morphed these into a means of identifying individuals and groups within the population via the inscription of sexuality so that they could be cured or purged.²⁴ In sum, 'the sodomite had been a temporary aberration; the homosexual was now a species.'²⁵ Sexual *acts* were replaced with sexual *identities*.²⁶

It was through this process that the heterosexual was also created. As Jacques Derrida points out, in Western thought meaning tends to be created through exclusion.²⁷ We discovered what was heterosexuality by discovering what it was not, through pathologising a plethora of other sexualities. Derrida makes two further useful points to which queer theory is indebted. First, this tendency to rely

¹⁸ Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume 1* (Robert Hurley trans, Penguin Books, 1998) 43 [trans of: *La Volonté de savoir* (first published 1976)].

¹⁹ Michel Foucault, *The Use of Pleasure: The History of Sexuality Volume 2* (Robert Hurley trans, Penguin Books, 1992) 23 [trans of: *L'Usage des plaisirs* (first published 1984)].

²⁰ Ibid 35.

²¹ Ibid 44-7.

²² Foucault, above n 18, 58-63.

²³ Ibid pt 3 ('*Scientia Sexualis*').

²⁴ Ibid 44-45, 65-69.

²⁵ Ibid 43.

²⁶ For Foucault's contemporaries who similarly argued that sexuality is constructed see: Robert Padgug, 'Sexual Matters: On Conceptualizing Sexuality in History' (1979) 20 *Radical History Review* 3; Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present* (Quartet Books, 1977).

²⁷ Jacques Derrida, *Positions* (Continuum, 2004) 24 [trans of: *Positions* (first published 1974)]; Edith Wyschogrod, 'Derrida and Sartre: Hegel's death knell' in Hugh J Silverman (ed), *Derrida and Deconstruction* (Routledge, 1989) 177, 187.

on difference to make sense of the world gives rise to simplistic (and fictional) binaries: black *or* white, man *or* woman, gay *or* straight.²⁸ Second – and this is where we move from an innocent awareness of homosexuality to treating it differently – Derrida observes that the creation of these binary oppositions often involves privileging one term over the other. Thus we arrive at the paradigm of heteronormativity, in which heterosexuality is privileged as the ‘normal’ sexuality.²⁹ The killing of a person because of their perceived homosexuality is simply an extreme means of privileging heterosexuality, as is the excuse of such killing.

C *Developments in Australian jurisdictions other than Queensland*

Several Australian states and territories have either abolished the umbrella defence of provocation entirely or excluded non-violent homosexual advances from its ambit. Of those that have abolished provocation entirely, Tasmania was the first to do so in 2003.³⁰ The Victorian Law Reform Commission considered the homosexual advance defence in 2004,³¹ but ultimately recommended that the whole defence of provocation should be abolished and a partial defence of excessive self-defence be re-introduced.³² The Victorian Parliament accordingly abolished provocation in 2005,³³ but implemented the new crime of defensive homicide rather than the proposed defence.³⁴ Likewise, in 2007 the Law Reform Commission of Western Australia reviewed the law of homicide. Among other problems with provocation, it noted that killings provoked by a non-violent homosexual advance do not demonstrate reduced moral culpability.³⁵ The Commission encountered too many problems with provocation as a partial defence to murder and ultimately recommended its repeal,³⁶ which the Western Australian parliament did the following year.³⁷

Commentators writing with battered women in mind have questioned whether the problems associated with provocation might have outlived its abolition in these jurisdictions.³⁸ In Kate Fitz-Gibbon and Sharon Pickering’s recent study of

²⁸ Jacques Derrida, ‘Structure, Sign and Play in the Discourse of the Human Sciences’ in *Writing and Difference* (Alan Bass trans, University of Chicago Press, 1978) 278, 281-284.

²⁹ Michael Warner, ‘Introduction’ in Michael Warner (ed), *Fear of a Queer Planet: Queer Politics and Social Theory* (University of Minnesota Press, first published 1993, 2004 ed), i.

³⁰ *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

³¹ Victorian Law Reform Commission, *Defences to Homicide*, Final Report (October 2004) 43, 47.

³² *Ibid* 55-58.

³³ *Crimes Act 1958* (Vic) s 3B; *Crimes (Homicide) Act 2005* (Vic) s 3.

³⁴ *Crimes Act 1958* (Vic) ss 4, 9AD; *Crimes (Homicide) Act 2005* (Vic) ss 4, 6.

³⁵ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (September 2007) 219.

³⁶ *Ibid* 222, Recommendation 29.

³⁷ *Criminal Law Amendment (Homicide) Act 2008* (WA) s 12, replacing the former provocation provision in *Criminal Code Act Compilation Act 1913* (WA) s 281 with an offence of unlawful assault causing death. However, provocation remains a complete defence to assault, though not if the violent reaction was intended or is likely to cause death or grievous bodily harm: *Criminal Code Act Compilation Act 1913* (WA) s 246.

³⁸ Danielle Tyson, ‘Victoria’s New Homicide Laws: Provocative Reforms or More Stories of Women “asking for it”?’ (2011) 23(2) *Current Issues in Criminal Justice* 203; Kate Fitz-Gibbon and Sharon Pickering, ‘Homicide Law Reform in Victoria, Australia: From

defensive homicide in Victoria, it was found that provocation-style cases were still being run with ‘the same narratives dominating the courtroom.’³⁹ An anonymous Supreme Court judge in the study said, ‘juries will still acquit of murder if they think there is serious provocation. They’ll use some other concept.’⁴⁰ The recent Victorian case of *R v Johnstone*⁴¹ employed a cliché homosexual advance strategy in pursuit of providing the jury with one of these ‘other concepts’: manslaughter due to lack of intent or the new alternative verdict of defensive homicide. In that case, Aaron Johnstone ‘lost it’ when his gay housemate, Phillip Higgins made a sexually provocative remark. Johnstone began punching Higgins, then hit him with an office chair, and finally dropped a platypus statue over his head while he lay unconscious.⁴² Ultimately the strategy failed with the jury finding him guilty of murder both at first instance⁴³ and at retrial following a technical appeal.⁴⁴ By contrast, the New Zealand case of *R v Ahsee* is an alarming example of the homosexual advance defence working effectively in the absence of provocation, which New Zealand abolished in 2009.⁴⁵ Fed the usual narrative of a homosexual advance by a predatory older man, the jury found that Willie Ahsee did not intend to kill or cause grievous bodily harm⁴⁶ when he repeatedly stabbed Denis Phillips, so violently that the blade broke in two. The sentencing remarks in *Johnstone*⁴⁷ and *Ahsee*⁴⁸ also confirm fears that the stereotypes and prejudices that underpinned provocation will simply play out in front of the sentencing judge when assessing culpability.⁴⁹ Despite the reach of provocation beyond the grave, Fitz-Gibbon and Pickering found that the majority of stakeholders agreed that the abolition of provocation was at least a step in the right direction.⁵⁰

Of those Australian jurisdictions that have retained provocation, New South Wales was the first to consider addressing the homosexual advance defence specifically. In the wake of the High Court’s decision in *Green v The Queen*, the New South Wales Attorney-General convened a Working Party to consider

Provocation to Defensive Homicide and Beyond’ (2012) 52 *British Journal of Criminology* 159.

³⁹ Fitz-Gibbon and Pickering, above n 38, 169, quoting an anonymous Victorian policy advisor.

⁴⁰ Ibid 170.

⁴¹ *R v Johnstone* [2008] VSC 583 (18 September 2008) (Coghlan J) (re inferences of guilt from lies); *R v Johnstone* [2008] VSC 584 (19 December 2008) (Coghlan J) (first sentence); *Johnstone v The Queen* [2011] VSCA 60 (9 March 2011) (Nettle, Neave and Tate JJA); *R v Johnstone (Ruling No 1)* [2011] VSC 306 (8 June 2011) (Osborne J) (admissibility of video footage); *R v Johnstone (Ruling No 2)* [2011] VSC 307 (9 June 2011) (Osborne J) (application to discharge jury); *R v Johnstone* [2011] VSC 300 (30 June 2011) (Osborne J) (second sentence).

⁴² *Johnstone v The Queen* [2011] VSCA 60 (9 March 2011) [18] (Neave JA, Tate JA agreeing).

⁴³ *R v Johnstone* [2008] VSC 584 (19 December 2008) [3] (Coghlan J).

⁴⁴ *R v Johnstone* [2011] VSC 300 (30 June 2011) [1] (Osborne J).

⁴⁵ *Crimes Act 1961* (NZ) former ss 169, 170; *Crimes (Provocation Repeal) Amendment Act 2009* (NZ) ss 4, 5.

⁴⁶ The usual *mens rea* for murder in New Zealand: *Crimes Act 1961* (NZ) s 167.

⁴⁷ *R v Johnstone* [2008] VSC 584 (19 December 2008) [42]-[49], [52], [66] (Coghlan J); *R v Johnstone* [2011] VSC 300 (30 June 2011) [17], [20], [44] (Osborne J).

⁴⁸ *R v Ahsee* [2011] NZHC 2009 (15 December 2011) [27]-[29], [43] (Asher J).

⁴⁹ Felicity Stewart and Arie Freiberg, ‘Provocation in Sentencing: A Culpability-Based Framework’ (2008) 19(3) *Current Issues in Criminal Justice* 283, 284; Fitz-Gibbon and Pickering, above n 38, 175-176.

⁵⁰ Fitz-Gibbon and Pickering, above n 38, 174.

whether a need had arisen for amendment to the law on provocation. It concluded:

6.5 The Working Party has become convinced that ... change [to the position rendered by *Green v The Queen*] is necessary. The retention of a partial defence based on a homicidal response to a non-violent homosexual advance cannot, in the opinion of the Working Party, be countenanced any longer. If the High Court [in *Green v The Queen*], by a narrow majority, is not prepared to interpret the legislation in question as excluding such a possibility, then the legislation itself should be changed by the NSW Parliament.

6.7 Accordingly, the Working Party recommends the exclusion of a non-violent homosexual advance from forming the basis of the defence of provocation, by way of legislative reform of section 23 of the NSW Crimes Act.⁵¹

Unfortunately, the reformist zeal was lost in the lead up to a state election six months later, with the result that the homosexual advance defence remains the province of provocation in New South Wales.⁵² Rather, the ACT was the first Australian jurisdiction to take the initiative in 2004.⁵³ The provocation provision in the ACT is now subject to the proviso that a non-violent sexual advance cannot, by itself, constitute provocation.⁵⁴ The Northern Territory inserted a similar qualification to its provocation defence in 2006.⁵⁵ South Australia retains provocation courtesy of the common law⁵⁶ and without any fetters imposed by legislation.⁵⁷ Accordingly, at least officially, the homosexual advance defence continues to haunt the courtrooms of only New South Wales, South Australia, and – subject to the constraints outlined below – Queensland.

E Developments in Queensland prior to the recent campaign

In 2008 the Queensland Law Reform Commission conducted a long overdue enquiry into the partial defence of provocation. Ultimately the Commission ruled out abolishing provocation altogether on the basis that in Queensland there is mandatory life sentencing for the crime of murder but not for manslaughter, which to the credit of the Commission was not open for them to review under the terms of reference.⁵⁸ In the process of analysing provocation the Commission only briefly considered the homosexual advance defence.⁵⁹ The Commission agreed with Justice Kirby's dissent in *Green v The Queen* that such an advance, if

⁵¹ New South Wales Attorney-General's Working Party on the Review of the Homosexual Advance Defence, *Homosexual Advance Defence*, Final Report of the Working Party (September 1998)

<http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwPrint1/CLRD_had>.

⁵² *Crimes Act 1900* (NSW) s 23.

⁵³ *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) sch 2, pt 2.1.

⁵⁴ *Crimes Act 1900* (ACT) s 13(3).

⁵⁵ *Criminal Code Act* (NT) s 158(5).

⁵⁶ *The Queen v R* (1981) 28 SASR 321; *Masciantonio v The Queen* (1995) 183 CLR 58, 66, 70-71.

⁵⁷ Mitch Riley, 'Provocation: Getting Away with Murder?' (2008) 1(1) *Queensland Law Student Review* 56, 57. Except that the defence may be required to give notice that it intends to adduce evidence of provocation: *Criminal Law Consolidation Act 1935* (SA) s 285BB(1)(c).

⁵⁸ Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (September 2008) Recommendation 21-1.

⁵⁹ *Ibid* [21.89]-[21.97].

non-violent, may never be sufficient to deprive the reasonable person of their self-control not to commit murder.⁶⁰ However, the Commission was concerned that excluding non-violent sexual advances from the ambit of provocation might have the unintended consequence of making it difficult for battered women to rely on the partial defence where the sexual advance of their batterer constituted the ‘last straw’.⁶¹ In 2010 the Queensland Parliament enacted a new partial defence aimed at battered women in section 304B of the *Criminal Code 1899* (Qld), operating independently of the provocation defence in section 304.⁶² The introduction of this provision effectively solved the Queensland Law Reform Commission’s primary hesitation in recommending that the homosexual advance defence be eliminated.

In 2011 the provocation provision was itself amended.⁶³ The result of these amendments was that the onus now rested with the defence to establish provocation rather than for the prosecution to disprove,⁶⁴ the basis of the provocation could no longer be mere words alone unless they are of an ‘extreme and exceptional character’,⁶⁵ and evidence relating to the ending of a relationship between the victim and the accused could not be used to show provocation.⁶⁶ While these changes effectively closed the loophole for murder arising in domestic violence situations, it did very little to curb the continued use of the homosexual advance defence, especially given that most such cases ‘involve more than a mere verbal proposition; [they] also generally allegedly involve a gentle touch.’⁶⁷

III THE CAMPAIGN TO ABOLISH THE HOMOSEXUAL ADVANCE DEFENCE IN QUEENSLAND

A *The first victim*

It is an unfortunate experience of history that it often takes a violent death to spur efforts to reform the law as it relates to lesbian, gay, bisexual, trans and intersex (LGBTI) people, and to shock the wider community into acceding. In 1972 members of the South Australian police force drowned a law lecturer named Dr George Duncan while indulging in ‘poofter-bashing’. The death threw South Australia into a debate that resolved three years later in decriminalisation of homosexuality for the first time in an Australian jurisdiction.⁶⁸ Similarly, in the

⁶⁰ Ibid [21.91]; *Green v The Queen* (1997) 191 CLR 334, 415-416 (Kirby J).

⁶¹ Queensland Law Reform Commission, above n 58, [21.93].

⁶² *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) s 3; *Criminal Code 1899* (Qld) s 304B.

⁶³ *Criminal Code and Other Legislation Amendment Act 2011* (Qld) s 5.

⁶⁴ *Criminal Code 1899* (Qld) s 304(7).

⁶⁵ Ibid s 304(2).

⁶⁶ Ibid s 304(3).

⁶⁷ Alan Berman, ‘A gay advance is no excuse for murder’, *Brisbane Times* (online), 27 April 2011 <<http://www.brisbanetimes.com.au/opinion/a-gay-advance-is-no-excuse-for-murder-20110426-1duyi.html>>.

⁶⁸ Clare Parker and Paul Sendziuk, ‘It’s Time: The Duncan Case and the Decriminalisation of Homosexual Acts in South Australia, 1972’ in Yorick Smaal and Graham Willett (eds), *Out Here: Gay and Lesbian Perspectives VI* (Monash University Press, 2011) 15-35; cf Tim Reeves, ‘The 1972 Debate on Male Homosexuality in South Australia’ in Robert Aldrich (ed), *Gay Perspectives II: More Essays in Australian Gay Culture* (Department of Economic

United States in 1998, a university student named Matthew Shepard was offered a lift home but instead driven to a remote area where he was strung up on a fence and tortured to death on account of his sexuality.⁶⁹ Matthew's legacy was the enactment of gay hate crime legislation at the federal level.⁷⁰ In the same sad tradition came the death of Wayne Ruks in 2008 in Maryborough, a regional centre on the Fraser Coast in South East Queensland.

On the evening of 3 July 2008, Wayne Warren Ruks followed Richard Meerdink and Jason Pearce into the churchyard of St Mary's Catholic Church, hoping to obtain some marijuana from them. All three men were intoxicated and were initially affable. The security camera footage shows that their interactions quickly soured. According to Pearce, Ruks grabbed his groin and made (homo)sexual overtures towards him. In questioning by a covert police officer in the watch house cells, Pearce recounted rolling a 'scoob' when Ruks 'started all this poofter shit'. Pearce rationalised that as he had been 'fucked with' as a kid, he simply 'snapped'.⁷¹ The video footage showed no evidence of any physical touching,⁷² and obviously the victim was unable to counter the suggestion that he came on to Pearce.⁷³

In any event, it transpired that Pearce made a threat and Ruks can be seen on the video footage sprinting, trying to make his escape. Pearce chased him and tackled him to the ground beside the church wall. Meerdink came up behind and delivered a swinging kick to Ruks's stomach, later explaining that he was simply 'trying to help [his] mate'.⁷⁴ Justice Applegarth, the trial judge, described what happened next:

[Pearce and Meerdink] violently assaulted Mr Ruks whilst he was on the ground near the garden bed. ... It was a prolonged and cowardly attack. At different times each of [them] left the place at which Mr Ruks was on the ground but then [they] returned. ... [They] left him exposed to the elements, now knowing that what [they] had done was going to kill him. [They] left the churchyard with no remorse for

History with the Australian Centre for Gay and Lesbian Research, University of Sydney, 1994) 149, 178-179.

⁶⁹ Casey Charles, 'Panic in the Project: Critical Queer Studies and the Matthew Shepard Murder' (2006) 18 *Law and Literature* 225; Bennett Capers, 'Real Rape Too' (2011) 99 *California Law Review* 1259, 1278.

⁷⁰ *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, Pub L No 111-184, §4707, 123 Stat 2190, div E (2009). In the UK context see also the gay hate crime provision that came into effect in April 2005: *Criminal Justice Act 2003* c 44, s 146.

⁷¹ *R v Meerdink and Pearce* [2010] QSC 158 (13 May 2010) [7] (Applegarth J).

⁷² The prosecutor is quoted as having drawn this to the jury's attention in Michael Madigan, 'Jason Andrew Pearce accused of murdering Wayne Robert Ruks', *The Courier Mail* (online), 7 October 2009 <<http://www.couriermail.com.au/news/queensland/jason-andrew-pearce-accused-of-murdering-wayne-robert-ruks/story-e6freoof-1225784002622>>. The trial and sentencing judge concluded likewise: *R v Meerdink and Pearce* [2010] QSC 158 (13 May 2010) [7] (Applegarth J).

⁷³ As Wayne Ruks' mother pointed out to the media, 'He's not here to defend himself': Stephen O'Grady, 'Murder alibi was a "lie"', *Fraser Coast Chronicle* (online) (12 October 2009) <www.frasercoastchronicle.com.au/story/2009/10/12/murder-alibi-was-lie/>. See also Jenny Morgan, 'Provocation law and facts: Dead women tell no tales, tales are told about them' (1997) *Melbourne University Law Review* 237.

⁷⁴ Peter Hackney, 'He asked for it', *Gay News Network* (online), 5 November 2009 <<http://gaynewsnetwork.com.au/features/he-asked-for-it.html>>.

[their] actions.⁷⁵

Ruks died from burst blood vessels in his stomach and was discovered dead the following morning by a parishioner.

The subsequent murder trial commenced over a year later in September 2009. In response to the charge of murder, Pearce's barrister argued that while homosexual advances might be lightly dismissed by many people, his client had been sexually interfered with as a child and accordingly a homosexual advance came as a grave insult. Pearce's barrister invited the jury to consider 'the gravity of the provocation' in making its decision.⁷⁶ The defence narrative was somewhat skewed by the revelation that the victim did not identify as gay. Perhaps the revelation served to reinforce the killer's version of events by playing into the discourse of homosexuality as the source of shame, inducing the jury to understand why Ruks might hide that part of himself. Whether or not the prejudice of homophobia worked its magic on the jury, both co-accused were found not guilty of murder.⁷⁷ Meerdink was found guilty of the lesser crime of manslaughter and sentenced to 10 years' imprisonment,⁷⁸ and Pearce, who had already pleaded guilty to manslaughter, was sentenced to nine years.⁷⁹

Ruks's mother could not fathom why allegations of his homosexuality excused his death when he was in fact heterosexual. She said, '[t]hat was an excuse and that's why I'm not satisfied with this situation.'⁸⁰ Elsewhere she emphasised, 'he certainly was no homosexual, I can assure you of that. That was devastating because he thought that [homosexuality] was unnatural. He had been in a [heterosexual?] relationship for 10 years.'⁸¹ She also said, '[t]o have that stigma on his character would have been very upsetting for him.'⁸² Her comments appear to accept – if unconsciously – the implicit logic that were her son in fact gay, his murder would have been in some way more forgivable.

The doubt raised about the victim's sexual orientation finds parallels in the 1989 murder of Alain Brousseau in Canada after his assailants misread his sexuality.⁸³ Brousseau too became the unwitting poster boy of a gay rights campaign. Moreover, the ambiguity surrounding Ruks's sexuality raises important questions about who has the power to assign sexual identity, whether the law functions in

⁷⁵ *R v Meerdink and Pearce* [2010] QSC 158 (13 May 2010) [13], [21] (Applegarth J).

⁷⁶ Madigan, above n 72.

⁷⁷ *R v Meerdink and Pearce* [2010] QSC 158 (13 May 2010) [1] (Applegarth J).

⁷⁸ *Ibid* [1], [87] (Applegarth J); an application for leave to appeal the sentence was refused in *R v Meerdink* [2010] QCA 273 (12 October 2010) (White JA, with whom McMurdo P and Jones J agreed).

⁷⁹ *R v Meerdink and Pearce* [2010] QSC 158 (13 May 2010) [1], [89] (Applegarth J).

⁸⁰ Andree Withey, 'Men jailed for Maryborough churchyard bashing death', *ABC News* (online), 14 May 2010 <<http://www.abc.net.au/news/2010-05-13/men-jailed-for-maryborough-churchyard-bashing-death/434656>>.

⁸¹ David Barbeler, 'Duo jailed for bashing manslaughter', *Sydney Morning Herald* (online), 13 May 2010 <<http://news.smh.com.au/breaking-news-national/duo-jailed-for-bashing-manslaughter-20100513-v0kv.html>>.

⁸² O'Grady, above n 73.

⁸³ Dawn Moore and Angus Rennie, 'Hated Identities: Queers and Canadian Anti-hate Legislation' (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 823, 826-829.

the absence of the victim's self-identity, and whether sexual identities truly are as fixed and essential as the perpetrators, judge and mother all assumed.

As to who gets to assign the victim's sexuality, Judith Butler might say that the victim starts the conversation about their sexuality by performing it.⁸⁴ Their killers, the media, the judge, the jury and others merely interpret that performance using socially constructed notions of sexuality. For Butler, gender and sexuality are nothing more than performances; a way of being and doing, rather than essential identity categories.⁸⁵ For queer theorists in Butler's tradition, the important point is not the concern of Ruks's mother that the performance may be misinterpreted or even invented, but rather that the performance and its interpretation have nothing to reveal about her son's innate sexuality. There is simply no deeper meaning to sexuality than that which is constructed by society through a constant re-enactment and re-experiencing of a set of symbols of what it means to be gay. Even if Butler and other queer theorists are wrong about that – and we show this by pointing out that underlying all this cultural rubric is something very real, to wit that some people desire the same sex – such a refined concept of homosexuality would be useless so far as understanding the real and prevalent discourses of homosexuality. After all, Ruks suffered the consequences of *being* gay even if he did not desire men or engage in sex with them.

The sexual accusations and the churchyard scene of Ruks's death captivated the Maryborough community, with the local press – the *Fraser Coast Chronicle* – covering most days of the trial.⁸⁶ The *Courier Mail* and *Brisbane Times* picked up the sensationalist theme of the homosexual advance,⁸⁷ ensuring it filtered through to the *Sydney Morning Herald* and *ABC News* with national coverage.⁸⁸ Curiously, the trial escaped the attention of much of the gay press.⁸⁹

When sentencing Pearce and Meerdink, Justice Applegarth said: '[a]lthough reference was made in the media to a so-called homosexual or gay advance, that is

⁸⁴ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990); Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997).

⁸⁵ Butler, *Gender Trouble*, above n 84, 140-141. Butler adapted her analysis from the work of the linguist John Austin on 'speech acts': JL Austin, *How to Do Things With Words* (Harvard University Press, 1962).

⁸⁶ For eg 'Trial starts for churchyard murder', *Fraser Coast Chronicle* (online), 30 September 2009 <www.frasercoastchronicle.com.au/story/2009/09/30/trial-starts-for-churchyard-murder/>; Averyll Loft, 'Guilty of manslaughter', *Fraser Coast Chronicle* (online), 10 October 2009 <www.frasercoastchronicle.com.au/story/2009/10/10/jurys-verdict-murder-not-guilty-manslaughter-guilt/>; Loretta Bryce, 'Fatal attack etched in mum's mind', *Fraser Coast Chronicle* (online), 24 June 2010 <www.frasercoastchronicle.com.au/story/2010/06/24/fatal-attack-etched-mums-mind-forever-beaten-death/>.

⁸⁷ Glenis Green, 'Gay advance led to murder of Wayne Ruks, court told', *The Courier Mail* (online), 30 September 2009 <<http://www.couriermail.com.au/news/gay-advance-led-to-murder-of-wayne-ruks-court-told/story-e6freon6-1225780955100>>; Tony Keim, 'Richard Meerdink and Jason Pearce jailed for killing Wayne Ruks in Maryborough churchyard after "homosexual advance"', *The Courier Mail* (online), 13 May 2010 <<http://www.couriermail.com.au/news/richard-meerdink-and-jason-pearce-get-up-to-10-years-jail-for-killing-wayne-ruks-in-maryborough-churchyard/story-e6freon6-1225865947188>>; Stephen O'Grady, 'Homosexual murder defence "a pack of lies"', *Brisbane Times* (online), 12 October 2009 <<http://www.brisbanetimes.com.au/queensland/homosexual-murder-defence-a-pack-of-lies-20091012-gt6b.html>>.

⁸⁸ Barbeler, above n 81; Withey above n 80.

⁸⁹ For one of the few eggs see, Hackney, above n 74.

an unhelpful and misleading tag.⁹⁰ Others may likewise be tempted to suggest that *Ruks's case* did not truly involve a homosexual advance defence.⁹¹ On the facts of the case it may well have been possible to conclude, without enquiring into the alleged sexual advance, that the accused did not intend to kill Ruks or cause him grievous bodily harm.⁹² However, it is evident that the accused's legal team employed a trial strategy highly reminiscent of that in *R v Green*, right down to the erroneous conflation of paedophilia with homosexuality, inviting judge, jury and community to do the same.⁹³ It is submitted that the hallmark of a homosexual advance defence case is whether the strategy is employed, not whether it can be identified that the strategy had its intended effect upon the jury's deliberations. The 'mischief' of the homosexual advance defence is that it excuses the use of violence against the LGBTI community and legitimises anti-homosexual sentiment. These ramifications are produced if the legal system even permits an attempt to raise the homosexual advance defence, whether or not such an attempt is successful in any particular case. These broader implications were not lost on two people. Fr Kelly, who remained deeply affected by the death of Ruks on his church's doorstep, told local media that he found the mere existence of the defence 'alarming' and that it had the potential to incite hate crimes.⁹⁴ Alan Berman, a law lecturer teaching at the University of Newcastle, understood the impacts of a homophobic legal system only too well.

B The academic

Dr Alan Berman had experienced homophobic violence at a crucial stage in his life when he was first 'coming out'. The traumatic experience led him to a 'return to the closet' and to a renewed period of personal anguish associated with denial. Berman's personal appreciation of the effects of homophobia informed and animated his later work as an academic.

In 2009, Berman joined Dr Shirleene Robinson in an ambitious research project exploring the prevalence of homophobic and transphobic abuse in Queensland. Their study became the largest of its kind, with nearly 1,100 LGBTI Queenslanders participating.⁹⁵ The results, published in 2010, found that 73 per cent of respondents had been subjected to homophobic verbal abuse and 23 per cent had experienced physical violence.⁹⁶ In the previous two years alone, 18 per cent had been subject to threats of physical violence and nine per cent had been assaulted.⁹⁷ In the concluding chapter, penned by Berman,⁹⁸ the authors offered suggestions on how to reduce the devastating impact of homophobia and transphobia. They made 36 recommendations covering law reform, policing responses, educational initiatives, governmental reform initiatives and social

⁹⁰ *R v Meerdink and Pearce* [2010] QSC 158 (13 May 2010) [6] (Applegarth J).

⁹¹ Letter from JA Jerrard to Paul Lucas MP, Attorney-General, January 2012, 4-5, 8.

⁹² The usual *mens rea* for murder in Queensland: *Criminal Code 1899* (Qld) s 302(1)(a).

⁹³ Statham, above n 1, 309-310.

⁹⁴ 'Backlash of hate crimes feared', *Fraser Coast Chronicle* (online), 14 October 2009 <<http://www.frasercoastchronicle.com.au/story/2009/10/14/fears-gay-defence-could-lead-to-crimes-of-hate/>>.

⁹⁵ Shirleene Robinson and Alan Berman, *Speaking out: Stopping homophobic and transphobic abuse in Queensland* (Australian Academic Press, 2010) 17.

⁹⁶ *Ibid* 33, 36.

⁹⁷ *Ibid* 62, 63.

⁹⁸ *Ibid* 11.

reform. In recognition of the pervasive and symbolic value of the homosexual advance defence in legitimating homophobic violence, the foremost recommendation urged the introduction of legislation prohibiting ‘evidence of “gay panic” and “non-violent homosexual advance” to sustain the defence of provocation.’⁹⁹ The authors then went a step further and advocated the incorporation of hate crimes within the Criminal Code of Queensland.¹⁰⁰ They contended that crimes committed on the basis of animus toward homosexual orientation involve both greater moral culpability and a greater need for community condemnation. The study received a great deal of media attention,¹⁰¹ but the Queensland Government showed little interest in implementing its recommendations.

Frustrated with political inaction, Berman ventured outside of academic journals and into the mainstream press in order to raise awareness. In April 2011 he published an opinion piece in the *Brisbane Times*, drawing attention to the ‘outmoded and retrograde’ homosexual advance defence. He cited the Maryborough churchyard case and openly claimed that the jury had been successfully persuaded that ‘the defence of non-violent homosexual advance was warranted to acquit [the killers] from a murder charge, reducing the finding of guilt to a charge of manslaughter.’¹⁰² Berman acknowledged recent changes made to the law of provocation – the shift in the burden of proof and the insufficiency of ‘words alone’ as provocation – but declared that ‘such changes had absolutely nothing to do with eliminating the non-violent homosexual advance defence’; they were prompted by a (heterosexual) domestic violence case.¹⁰³ The homosexual advance defence had survived the changes and the requirement of a physical provocation was unlikely to abate its use given that most cases in which it is deployed ‘also generally allegedly involve ... a gentle touch.’¹⁰⁴ He concluded by suggesting to readers that it was ‘time to start lobbying [their] representatives in Parliament.’¹⁰⁵

The Attorney-General, Paul Lucas MP, responded in an opinion piece the same day. He claimed that the recent changes had closed all loopholes in the law of provocation.¹⁰⁶ He said that provocation operated without discrimination as between heterosexual and homosexual people, though clearly this was from his privileged perspective as a heterosexual and contrary to the vast bulk of academic opinion.¹⁰⁷ Even if he was wrong, Lucas pointed out that ‘a person who

⁹⁹ Ibid 203.

¹⁰⁰ Ibid 208, Recommendation 2.

¹⁰¹ See for eg, ‘Anti-gay hate crime rife in Qld: study’, *Sydney Morning Herald* (online), 3 June 2010 <<http://news.smh.com.au/breaking-news-national/antigay-hate-crime-rife-in-qlld-study-20100603-x2d4.html>>; Nicole Butler, ‘Study shows gay hate crime rife in Queensland’, *ABC Radio: The World Today* (online), 4 June 2010 <<http://www.abc.net.au/worldtoday/content/2010/s2918353.htm>>.

¹⁰² Berman, above n 67.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Paul Lucas, “‘Gay advance’ provocation loophole closed: Lucas’, *Brisbane Times* (online), 27 April 2011 <<http://www.brisbanetimes.com.au/opinion/gay-advance-provocation-loophole-closed-lucas-20110427-1dwah.html>>.

¹⁰⁷ See Robert Mison, ‘Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation’ (1992) 80 *California Law Review* 133; Dean Kiley, ‘I Panicked and Hit Him with

successfully argues [the] defence is only able to have their murder charge reduced to manslaughter.’¹⁰⁸ He warned that tinkering with provocation would have adverse impacts upon the law’s treatment of battered women who kill their partners.¹⁰⁹ This argument ignored the introduction in 2010 of a new independent partial defence aimed at battered women,¹¹⁰ all the more curious given that Lucas’ department oversaw the introduction of the Bill to Parliament less than 18 months earlier.¹¹¹ The second half of the opinion piece regurgitated political rhetoric about the government’s unrelated efforts to ‘ensure equality for all Queenslanders regardless of their sexuality’ in superannuation entitlements and workers’ compensation.¹¹²

Berman followed his own advice and began lobbying members of Parliament. He found a willing conspirator in Grace Grace MP and in June 2011 instituted a petition through the parliamentary website calling for Queensland ‘to pass legislation eliminating completely “non-violent homosexual advance” from the ambit of evidence considered in establishing if the partial defence of provocation is justified in cases involving murder.’¹¹³ The petition was initially only covered by *Brisbane Times*,¹¹⁴ evidently at Berman’s insistence, and then picked up in newspapers closer to Maryborough,¹¹⁵ though word quickly spread through LGBTI networks.

C The community legal centre

The Lesbian, Gay, Bisexual, Trans and Intersex Legal Service Inc was launched in Brisbane in July 2010 as the first community-based legal service in Australia to

a Brick’ (1994) 1 *Law/Text/Culture* 81, 89; Robert Bagnall et al, ‘Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody and Anonymous Parties’ (1984) 19 *Harvard Civil Rights and Civil Liberties Law Review* 499, 515; Jeff 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; Helen Brown, ‘Provocation as a Defence to Murder: To Abolish or to Reform?’ (1999) 12 *Australian Feminist Law Journal* 137, 141; Steven Tomsen, ‘The Political Contradictions of Policing and Countering Anti-Gay Violence in New South Wales’ (1993) 5 *Current Issues in Criminal Justice* 209; Allen George, “Roll a Fag and Go Free”: Competing Discourses of Sexuality and Sexual Identity’ (1995) 1 *Journal of Interdisciplinary Gender Studies* 49; Peter Johnston, “More than Ordinary Men Gone Wrong”: Can the Law Know the Gay Subject?’ (1996) 20 *Melbourne University Law Review* 1152; Adrian Howe, ‘More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses – Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)’ (1997) 19(3) *Sydney Law Review* 336.

¹⁰⁸ Lucas, above n 106.

¹⁰⁹ Ibid.

¹¹⁰ *Criminal Code 1899* (Qld) s 304B, introduced by *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) s 3.

¹¹¹ Queensland, *Parliamentary Debates*, 53rd Parliament, 26 November 2009, Vol 401, 3669 (Cameron Dick, Attorney-General) (first and second reading of *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009* (Qld)).

¹¹² Lucas, above n 106.

¹¹³ Queensland Parliament, *Closed e-petitions* <<http://www.parliament.qld.gov.au/work-of-assembly/petitions/closed-e-petitions>>.

¹¹⁴ Dan Nancarrow, ‘Moves to end homosexual murder defence’, *Brisbane Times* (online), 10 June 2011 <<http://www.brisbanetimes.com.au/queensland/moves-to-end-homosexual-murder-defence-20110609-1fupv.html>>.

¹¹⁵ Dan Nancarrow, ‘Gay flirting no excuse for murder’, *Central Queensland News* (online), 10 June 2011 <<http://www.cqnews.com.au/story/2011/06/10/gay-flirting-no-excuse-murder/>>.

focus specifically on the legal needs of the LGBTI community.¹¹⁶ Nearly a year into operating it established a Law Reform Committee to tackle systemic issues faced by its beneficiaries. Around the same time that Berman instituted his petition to Parliament, the Law Reform Committee was looking for its first law reform campaign on which to cut its teeth. Berman's petition had already created some momentum and the Committee jumped on board. On 5 August 2011, the day that the petition closed, the LGBTI Legal Service issued a media release, drawing attention to the existence of the homosexual advance defence and calling on the Queensland Government to follow the lead of other states and territories in abolishing it.¹¹⁷ *City News* – a newspaper with circulation in inner-Brisbane – ran the story on its front page under the heading '4600 say dump law', in reference to the number of people who had signed the petition.¹¹⁸ The Attorney-General's response to the petition was due on 6 October 2011. Emboldened by the media attention, the Committee set about preparing a law reform submission to place the Attorney-General under further pressure to alter his stance.

The law reform submission was sent to the Attorney-General and Grace Grace MP in the week leading up to the response. It gave three reasons for removing the non-violent homosexual advance defence from the scope of provocation. First, the submission argued it is discriminatory because it effectively treats the victimhood of gay and straight men differently.¹¹⁹ Second, the defence encourages and excuses the use of violence against the LGBTI community. In this regard the submission pointed out that the 'law's justification of *any* level of homophobic violence serves to justify *all* levels of homophobic violence.'¹²⁰ It also noted an internal inconsistency in the law, in that vilification of LGBTI people accompanied by threats of physical violence amounted to an offence under anti-discrimination legislation.¹²¹ Yet '[t]he law cannot send a nuanced message to the community that in some cases homophobic violence is in some way excusable and in others it is very much inexcusable.'¹²² Third, the defence legitimates anti-homosexual sentiment in the community: '[w]henever the law treats gay people differently without a justifiable reason, the community is invited to do the same, by virtue of the normative value of the law in laying down what is and what is not legitimate.'¹²³ The submission compared the position in other Australian jurisdictions and recommended that if the government remained unwilling to abolish provocation entirely, it should insert a new subsection in the provocation provision emulating the example provided by the ACT and the Northern Territory.¹²⁴ The LGBTI Legal Service repeated these arguments in an

¹¹⁶ LGBTI Legal Service Inc <<http://sites.google.com/site/lgbtilegalservice/home>>.

¹¹⁷ Kent Blore, 'Smart State or Homophobic State – QLD Parliament to Decide' (Media Release, 5 September 2011).

¹¹⁸ Peta Fuller, '4600 say dump law', *City News (Quest Newspapers)* (Brisbane), 15 September 2011.

¹¹⁹ Kent Blore and Tristan Butler-Keegan, *Law Reform Submission Calling for the Removal of the 'Non-Violent Homosexual Advance Defence' from the Ambit of Provocation* (LGBTI Legal Service Inc, Brisbane, 2011) 3.

¹²⁰ *Ibid* 4.

¹²¹ *Anti-Discrimination Act 1991* (Qld) s 131A.

¹²² Blore and Butler-Keegan, above n 119, 4.

¹²³ *Ibid* 5.

¹²⁴ *Ibid* 7.

opinion piece in the *Courier Mail* – a newspaper with state-wide circulation, published on the morning of the deadline for the Attorney-General’s response.¹²⁵

The Attorney-General’s response was sent to each person that signed Berman’s petition. He commenced by stressing that his government ‘abhors any attack on any person that occurs as a result of that person’s sexual preference’, but then went on to justify taking no action.¹²⁶ He did so by relying on three grounds he extracted from the Queensland Law Reform Commission’s 2008 review of provocation. First, difficulties exist in defining what conduct is captured by a ‘non-violent sexual advance’.¹²⁷ In light of the Attorney-General’s response, the LGBTI Legal Service issued an addendum to its law reform submission. In it the LGBTI Legal Service pointed out that ‘[n]oting the difficulty of defining “non-violence” does not lead to the conclusion that it *cannot* be defined’; indeed, that ‘it would be far from novel for Parliament to introduce a concept that requires interpretation’¹²⁸ and that judges had already characterised advances as ‘violent’ or ‘non-violent’ in cases such as *Green v The Queen*.¹²⁹ Second, the Attorney-General once again suggested that battered women might be affected. The LGBTI Legal Service’s addendum replied that the new partial defence in section 304B of the Criminal Code had been introduced since the Law Reform Commission’s report and that ‘[a]ny apparent risk ha[d] been completely eliminated.’¹³⁰ Last, the Attorney-General considered that ‘conduct cannot be categorised as sufficient or insufficient to amount to provocation in the absence of a consideration of the circumstances in which it occurred.’¹³¹ The addendum countered that the ACT and Northern Territory provisions that exclude the homosexual advance defence do ‘not eliminate consideration of the circumstances in which the conduct occurred; [they] merely stipulate ... that where the *only* circumstance is a non-violent homosexual advance, such conduct should never be sufficient by itself to amount to provocation.’¹³² In any event, the Attorney-General concluded that no further legislative changes were necessary. He then launched into the ‘proud record’ of his government in acknowledging the rights of gay and lesbian people, including access to ‘streamlined legal proceedings ... if their relationships fail’, child custody, property division and superannuation.¹³³ One might have thought the right to life preceded these in importance. Prophetically, the LGBTI Legal Service’s addendum concluded by urging the Attorney-General to reconsider his position ‘before the defence is raised in yet

¹²⁵ Julie Howes, ‘Law says it’s not murder if the victim is gay and “comes on to you”’, *The Courier Mail* (online), 6 October 2011 <<http://www.couriermail.com.au/news/opinion/better-laws-needed-to-protect-gays/story-e6frerdf-1226160221310>>.

¹²⁶ Letter from Paul Lucas MP to Neil Laurie, the Clerk of the Parliament, 6 October 2011, 1.

¹²⁷ *Ibid* 2.

¹²⁸ Kent Blore, *Addendum to Reform Submission Calling for the Removal of the ‘Non-Violent Homosexual Advance Defence’ from the Ambit of Provocation* (LGBTI Legal Service Inc, Brisbane, 2011) 1.

¹²⁹ See *Green v The Queen* (1997) 191 CLR 334, 369 (McHugh J) (‘the advance, although initiated in a non-violent manner, soon became quite rough and aggressive’); cf 389 (Kirby J) (‘the deceased initially did so gently and not aggressively or brutally...[but later did so] more insistently’); *R v Green* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Priestley JA, 8 November 1995) 25 (‘the touching was amorous, not forceful’).

¹³⁰ Blore, above n 128, 1.

¹³¹ Lucas, above n 126, 2.

¹³² Blore, above n 128, 2.

¹³³ Lucas, above n 126, 3.

another Queensland courtroom.’¹³⁴ Rumours soon surfaced of a second homosexual advance defence case in Maryborough.

D The second victim

Stephen John Ward was an itinerant man in his early 60s, hitchhiking along a main road at Curra near Maryborough when John Petersen and Seamus Smith offered him a lift. They decided to go to Smith’s house where they drank, smoked marijuana and shared a roast dinner together.¹³⁵ They took Ward to a truck stop where it was agreed he would continue hitchhiking, however somewhere along the line he allegedly touched Petersen ‘in a homosexual way’.¹³⁶ Petersen had been abused as a teen and ‘freaked out’.¹³⁷ When Petersen took the stand he explained, ‘I just snapped and started hitting him, quite a few times’.¹³⁸ Petersen and Smith drove off leaving Ward beside the road but then returned to place Ward, now ‘covered in blood’, into the back of the pick up truck.¹³⁹ According to the local press, the defendants gave evidence that ‘Ward was moaning or gurgling when they put him in the back of the ute and drove him into the Bauple State Forest.’¹⁴⁰ The prosecutor told the jury that ‘[t]here [was] no doubt that Mr Ward was still alive – unconscious and helpless, but alive – when he was dumped in the bush.’¹⁴¹ Smith’s barrister explained away his role as loyalty to a mate: ‘[h]e knew his best friend was in trouble and he knew he needed to help him.’¹⁴² A month later, Ward’s partially mummified and badly decomposed body was discovered by a trail-bike rider in a ditch in the forest.

At the trial in October 2011, there can be no doubt that Petersen’s barrister ran a homosexual advance defence strategy. Petersen had been the target of a predatory older man, he had been abused and raped as a teen by men just like Ward, so it was understandable that he would fly into a murderous rage and hit Ward 20 to 30 times. It was even understandable, after his frenzied punching subsided and calmer heads prevailed, that he would drive Ward some distance to a shallow grave as Ward moaned or gurgled. Of course, there is no evidence that Ward was a man just like those who had abused Petersen as a child. It is convenient for the defendants that Ward is unable to provide his own version of events, but even if Petersen’s allegations were true, Ward exhibited homosexual desire, not paedophilic desire. Even allowing for Petersen’s (perhaps understandable) conflation of homosexuality with paedophilia, on his version of events he was provoked for an awfully long time. As it were, the jury agreed with Petersen’s

¹³⁴ Blore, above n 128, 2.

¹³⁵ ‘10 years for hitch-hiker death’, *Fraser Coast Chronicle* (online), 14 October 2011 <<http://www.frasercoastchronicle.com.au/story/2011/10/14/10-years-hitchhiker-death/>>.

¹³⁶ ‘Accused loyal to mate’, *Fraser Coast Chronicle* (online), 8 October 2011 <<http://www.frasercoastchronicle.com.au/story/2011/10/08/accused-loyal-to-mate/>>.

¹³⁷ Above n 135.

¹³⁸ *Ibid.*

¹³⁹ Clementine Norton, ‘Men found not guilty of murder’, *Fraser Coast Chronicle* (online), 13 October 2011 <<http://www.frasercoastchronicle.com.au/story/2011/10/13/court-told-petersons-actions-meant-that-he-wanted-/>>.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Clementine Norton, ‘Gay advance led to death: court’, *Fraser Coast Chronicle* (online), 5 October 2011 <<http://www.frasercoastchronicle.com.au/story/2011/10/05/gay-advance-led-to-mans-death-court/>>.

barrister. After only three hours' deliberation they returned a verdict for Petersen of not guilty of murder but guilty of manslaughter and for Smith, not guilty of accessory to murder but guilty of accessory to manslaughter.¹⁴³ Justice Atkinson sentenced Petersen to 10 years' imprisonment, and Smith to two.¹⁴⁴

It is important not to overlook that people who have suffered child abuse and rape, as Petersen and Pearce had, are victims in their own right. The challenge of the law is to acknowledge their victimhood without excusing their actions in such a way that homophobia is legitimated to the wider community. It is not the purpose of this article to explore the ideal solution to the homosexual advance defence in Queensland, but suffice to say the above challenge is not impossible to meet. For example, without mandatory sentencing for murder, other Australian jurisdictions are able to meaningfully take the defendant's antecedents into account in the sentencing process.¹⁴⁵

Peculiarly, the trial of Petersen and Smith failed to attract the same attention as the earlier trial held in Maryborough. The hitchhiker case remained largely confined to the pages of the *Fraser Coast Chronicle*,¹⁴⁶ with a few forays into other regional Queensland newspapers.¹⁴⁷ Nevertheless, the Attorney-General recognised the case's potential political impact and went into damage control. On 25 October 2011 he called an emergency meeting with Alan Berman, Grace Grace MP and the LGBTI Legal Service. In a remarkable change of tack he assured those present that the law would be reviewed by an expert panel early in the new year. He confirmed this in a media release on 9 November 2011.¹⁴⁸ In it he now accepted the existence of the homosexual advance defence and that concerns remained about its potential use in spite of recent changes to the law of provocation.¹⁴⁹ Despite these concessions, he repeated the three concerns he raised in his response to Berman's petition, and in particular dwelled at length on possible unintended consequences for battered women.¹⁵⁰ As can be seen by now, the Attorney-General employed a formula of saying that gay people should be treated equally and then disavowing that proposition, either expressly or by

¹⁴³ Norton, above n 139.

¹⁴⁴ Above n 135.

¹⁴⁵ *Pearce v The Queen* (1983) 9 A Crim R 146, 150; *R v Tuimanga* [2003] VSCA 218 (9 December 2003) [12]-[14]; *R v Khan* (1996) 86 A Crim R 552, 556-558; *Tyne v Tasmania* [2005] TASSC 119 (1 December 2005) [22]; Stewart and Freiberg, above n 49, 297-298, 301.

¹⁴⁶ Norton, above n 142; Clementine Norton, 'Man cleaned car after killing', *Fraser Coast Chronicle* (online), 6 October 2011 <<http://www.frasercoastchronicle.com.au/story/2011/10/06/man-cleaned-car-after-hitchhikers-killing-court/>>.

¹⁴⁷ Clementine Norton, 'Gay advance led to death: court', *Queensland Times* (Ipswich) (online), 5 October 2011 <<http://www.qt.com.au/story/2011/10/05/gay-advance-led-to-mans-death-court/>>; Clementine Norton, 'Men found not guilty of murder', *Central Queensland News* (Emerald) (online), 13 October 2011 <<http://www.cqnews.com.au/story/2011/10/13/court-told-petersons-actions-meant-that-he-wanted-/>>.

¹⁴⁸ Paul Lucas, Attorney-General, Minister for Local Government and Special Minister of State, 'Provocation defence under examination' (Media release, 9 November 2011) <<http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=77552>>. See also Margaret Wenham, 'Call to end gay kill defence', *The Courier Mail* (online), 9 November 2011 <<http://www.couriermail.com.au/ipad/call-to-end-gay-kill-defence/story-fn6ck51p-1226189396888>>.

¹⁴⁹ Lucas, above n 148.

¹⁵⁰ *Ibid.*

needlessly raising hurdles such as making out that competing minority interests are at stake, when in fact they are not.

Over the coming weeks the Attorney-General appointed Justice Jerrard, a retired Justice of the Queensland Court of Appeal, to chair the panel. The remainder of the panel comprised representatives from several legal bodies and community organisations, including the spokesperson of Parents and Friends of Lesbians and Gays (PFLAG), Shelley Argent, as well as two nominees from the LGBTI Legal Service.¹⁵¹ The LGBTI Legal Service nominated its principal, Merran Lawler, and Mark Thomas, a law lecturer at the Queensland University of Technology. Conspicuously absent was Berman, or for that matter any other academic who had written about the homosexual advance defence or homophobic violence more generally. Berman's exclusion may have been the revenge exacted for raising publicity on the issue, or it may be that the Attorney-General appreciated that Berman saw the defence as a systemic issue in need of far-reaching solutions beyond the political contingencies at the time. The Deputy Premier had recently announced support for same sex civil unions¹⁵² and the deadline for the next state election loomed. The Attorney-General needed an immediate solution to this issue before it generated an image in the electorate of disagreement within party ranks and before it alienated inner city votes on the eve of the election.

It soon became apparent that another conspicuous absence from the panel was that of a self-identified gay man. The straight rumours among some disgruntled gay men spilled over into the gay press early in the new year. Shelley Argent from PLAG, confirmed to *Gay News Network*, '[i]t is true that there are no openly gay men on the panel.'¹⁵³ Within a few days, *QNews* published its own opinion piece arguing, '[a]lthough it is great that there is a committee looking at gay panic defence, Attorney-General Paul Lucas missed the boat by not appointing one openly gay member.'¹⁵⁴ As the defence exclusively victimises gay men, the panel clearly needed 'to hear the fear and concerns of gay men about gay panic defence.'¹⁵⁵ The LGBTI Legal Service never publicly defended its decision not to nominate an openly gay man to the expert panel, though all it had done was refuse to discriminate on the basis of sexuality. Homophobic violence demonstrates how dangerous a gay identity can be and the existence of the homosexual advance defence shows that the law and society conspire with perpetrators to privilege heterosexuality. Yet for a group of people for whom identity constructs have

¹⁵¹ Paul Lucas, Attorney-General, Minister for Local Government and Special Minister of State, 'Gay provocation defence under review' (Media release, 10 January 2012) <<http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=78391>>; Paul Lucas, Attorney-General, Minister for Local Government and Special Minister of State, 'State Government to change "gay panic" defence' (Media release, 25 January 2012) <<http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=78540>>.

¹⁵² Andrew Fraser, Deputy Premier, Treasurer and Minister for State Development and Trade, *Speech by Andrew Fraser re Civil Partnerships Bill* (25 October 2011) <<http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=77238>>.

¹⁵³ Serkan Ozturk, 'No gay men on panel to review "gay panic" defence', *Gay News Network* (online), 11 January 2012 <<http://gaynewsnetwork.com.au/news/news-2/4094-no-gay-male-on-panel-to-review-gay-panic-defence.html>>.

¹⁵⁴ Stephen Page, 'Gay panic defence committee has no gay members', *QNews* (online), 15 January 2012 <<http://qnews.com.au/article/gay-panic-defence-committee-has-no-gay-members>>.

¹⁵⁵ *Ibid.*

been a constant source of oppression, sexual identity sure seemed to mean a lot to these disgruntled gay men, to the extent that they appeared to consider sexual identity as a credential. There is intuitive value in people of a certain identity making decisions about issues that affect them exclusively. This raises the prospect that a gay identity may actually be empowering, at least in some sets of circumstances.

The meetings of the expert panel were shrouded in secrecy, including the contributions of the LGBTI Legal Service's nominees. The composition of the panel and the lack of transparency in its workings only served to fuel concerns among some stakeholders that the panel had been stacked in order to vindicate the Attorney-General's original position – that the homosexual advance defence did not need addressing. Fr Kelly, the Catholic priest from Maryborough, had been quietly watching these developments from afar. The indications of a negative result spurred the priest into action and into the limelight.

E The priest

Fr Paul Kelly first 'c[a]me out' to his local newspaper in late November 2011 as 'strongly against the use of the so-called gay panic defence.'¹⁵⁶ The *Fraser Coast Chronicle* faithfully portrayed Fr Kelly as a humble priest with a Christian concern for his fellow human being and who had simply been caught up in the issue by Ruks's death on the doorstep of his church. In a cultural context where advocacy of gay rights almost inevitably leads to questions about the advocate's sexual orientation,¹⁵⁷ this portrayal helped to confirm Fr Kelly's (ostensibly) neutral sexuality. In the article, Fr Kelly sympathised with the need of Ruks's mother to 'defend her son's sexuality', but emphasised that the more important point was that 'it should not matter whether Mr Ruks made a homosexual advance that night or not – the gay panic defence simply should not exist.'¹⁵⁸ Fr Kelly even laced his interview with a discrimination analysis. He said that the 'ultimate test' was whether 'society would tolerate a man beating a woman who made a pass at him.'¹⁵⁹ These reasoned arguments against homophobia and discrimination sounded novel from the mouth of a Catholic clergyman. It was perhaps this novelty that would eventually attract national and international media attention, though as he would later point out in interviews, '[i]t's not about gay rights, it's about human rights' and '[t]he church has always defended basic human rights, it's never said intolerance or violence should be tolerated.'¹⁶⁰

¹⁵⁶ Carlie Walker, 'Priest hits out at defence', *Fraser Coast Chronicle* (online), 19 November 2011

<<http://www.frasercoastchronicle.com.au/story/2011/11/19/gay-panic-defence-deplorable-priest/>>.

¹⁵⁷ A recent example is when comedian Magda Szubanski released a statement in support of same-sex marriage on Valentine's Day 2012. As a result, Lisa Wilkinson, the co-host of Today on Channel Nine, said on television in a tone full of concern, 'I've never really thought about what Magda's sexuality is': replayed on Chanel Ten, *The Project*, 14 February 2012.

¹⁵⁸ Walker, above n 156.

¹⁵⁹ Ibid.

¹⁶⁰ Bridie Jabour, 'Priest backs "gay advance" law change', *Brisbane Times* (online), 30 December 2011 <<http://www.brisbanetimes.com.au/queensland/priest-backs-gay-advance-law-change-20111230-1pf6t.html>>.

In the last week of December 2011, Fr Kelly launched a petition on Change.org, calling on the Labor Government to cut through the political rhetoric and ‘actually and effectively eliminate’ the homosexual advance defence.¹⁶¹ The verbiage about which the priest was most concerned was the ‘emotion-laden ... distraction’ of how battered spouses may be affected.¹⁶² His petition recorded his anger that ‘this persistent red herring keeps being thrown in when it clearly can be dealt with in other ways.’¹⁶³ Far from politically naïve and conscious of the upcoming election, Fr Kelly also called on the (more) conservative opposition party to match the Government’s commitments. Fr Kelly was also clearly influenced by the wording of Berman’s earlier petition in that it had called for the inadmissibility of any *evidence* of a non-violent homosexual advance, let alone the inadmissibility of an argument to that effect. Fr Kelly noted that ‘[b]y [just] mentioning [homosexuality] might be a factor, it seems to increase the tolerance that violence has been used.’¹⁶⁴ Both Berman and Fr Kelly agreed it was this prejudicial impact that constituted the ‘mischief’ in need of remedy, and a patch-up amendment that only excluded the form of the defence and not the substance would likely leave room for a de facto homosexual advance defence to persist.¹⁶⁵ The launch of the Change.org petition was accompanied by publicity by *Brisbane Times*, just as it had provided to Berman’s earlier petition.¹⁶⁶

The fact that Berman’s message was essentially the same as the priest’s raises the question of why the latter held more appeal to the public. One possibility may be the novelty of the alliance between Catholicism and gay rights. An alternate or additional explanation may lie in the vow of chastity taken by Catholic priests. It may have provided a cultural illusion of sexual neutrality that gave the priest’s opinions on the issue greater weight. Whatever the cause, word of Fr Kelly’s petition soon spread like wildfire through regional newspapers¹⁶⁷ and blogs,¹⁶⁸ forcing the Attorney-General to release yet another media release which reassured voters that ‘[w]ell before Father Kelly decided to start his online petition, ... [the Attorney-General had] referred the matter to the expert panel for its advice.’¹⁶⁹ Coverage soon spilled over into most gay news sources around Australia¹⁷⁰ and

¹⁶¹ Rev Fr Paul Kelly, *Eliminate the 'gay panic' defence from Queensland law* <<http://www.change.org/petitions/eliminate-the-gay-panic-defence-from-queensland-law-gaypanic>>.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Jabour, above n 160.

¹⁶⁵ Cf Kelly, above n 161 with Queensland Parliament, above n 113.

¹⁶⁶ Jabour, above n 160.

¹⁶⁷ “‘Gay panic’ defence should go: priest’, *Bundaberg News* (online), 3 January 2012 <<http://www.news-mail.com.au/story/2012/01/03/gay-advance-as-murder-defence-must-go-priest/>>; ‘Gay provocation defence reviewed’, *Sunshine Coast Daily* (online), 10 January 2012 <<http://www.sunshinecoastdaily.com.au/story/2012/01/10/gay-provocation-defence-reviewed/>>.

¹⁶⁸ Bridgette LaVictoire, ‘Catholic Priest Wants “Gay Panic” Defense Struck From Queensland’s Laws’, *Lezgetreal* (30 December 2011) <<http://lezgetreal.com/2011/12/catholic-priest-wants-gay-panic-defense-struck-from-queenslands-laws/>>.

¹⁶⁹ Lucas, above n 151 (Media release, 10 January 2012).

¹⁷⁰ James Besanvalle, ‘What’s up with Queensland?’ *SameSame* (online), 10 January 2012 <<http://www.samesame.com.au/features/7837/Whats-up-with-Queensland.htm>>; ‘Priest’s “gay panic” fight’, *Star Observer* (online), 10 January 2012 <<http://www.starobserver.com.au/news/2012/01/10/priest%E2%80%99s-%E2%80%98gay-panic%E2%80%99-fight/69142>>.

then the UK.¹⁷¹ As the petition passed 10,000 signatures, British comedian Stephen Fry tweeted his support to his 3.7 million Twitter followers, which finally brought it to the attention of the mainstream press back in Australia.¹⁷² On 24 January 2012 as Fr Kelly's petition neared 25,000 signatures, ABC radio broadcast a follow up story on the homosexual advance defence¹⁷³ and that evening, Channel Ten's *The Project* aired the first television coverage of the issue.¹⁷⁴

Providentially, the following morning the Attorney-General announced that the expert panel had recommended a change to the law of provocation.¹⁷⁵ The unspecified 'changes' would 'remove doubts about the so-called "gay panic" defence.'¹⁷⁶ The closest the Attorney-General came to publicly providing details of the proposed amendments was to say that any exclusion of the homosexual advance defence would be subject to 'exceptional circumstances'.¹⁷⁷ The Attorney-General later privately released to stakeholders a letter written to him by the chair of the expert panel, Justice Jerrard. It set out the panel's recommendation to amend the provocation provision such that the defence would 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.'¹⁷⁸ Berman had previously pointed out that to a homophobic judge, jury or society, '[e]xceptional circumstances could be a gay proposition.'¹⁷⁹ Fr Kelly later told his local newspaper that he was concerned that 'the "exceptional circumstances" provision [if enacted, would] still allow defence lawyers to pollute juries by raising the gay panic defence.'¹⁸⁰ Even the threat of such pollution might predispose the prosecution to charge manslaughter instead of murder. For good measure, the Attorney-General concluded his announcement by saying that '[i]t is not possible to remove sexual advances completely without

¹⁷¹ Stephen Gray, '8,500 sign Catholic priest's petition to end "gay panic" defence', *Pink News* (online), 10 January 2012 <<http://www.pinknews.co.uk/2012/01/10/8500-sign-catholic-priests-petition-to-end-gay-panic-defence/>>.

¹⁷² 'Stephen Fry promotes Father Paul Kelly's online petition to end Queensland's "gay panic" defence for murder', *The Courier Mail* (online), 11 January 2012 <<http://www.couriermail.com.au/news/queensland/maryborough-catholic-priest-paul-kelly-sets-up-online-petition-to-remove-homosexual-panic-as-partial-provocation-defence-to-violent-crimes/story-e6freoof-1226241055197>>; Annie Guest, 'Priest fights for end to "gay panic" defence', *ABC News* (online), 11 January 2012 <<http://www.abc.net.au/news/2012-01-11/petition-calls-for-end-to-gay-panic-defence/3767446>>; Annie Guest, 'Gay panic under focus again', *ABC Radio* (online), 11 January 2012 <<http://www.abc.net.au/pm/content/2012/s3406230.htm>>; 'Stephen Fry supports end to "homosexual panic" defence', *Brisbane Times* (online), 12 January 2012 <<http://www.brisbanetimes.com.au/queensland/stephen-fry-supports-end-to-homosexual-panic-defence-20120111-1pvon.html>>.

¹⁷³ ABC Radio National, 'The "Gay Panic" partial defence to murder', *The Law Report*, 24 January 2012 (Damien Carrick) <<http://www.abc.net.au/radionational/programs/lawreport/law-report-24-january-2012/3788568>>.

¹⁷⁴ Channel 10, *The Project*, 24 January 2012.

¹⁷⁵ Lucas, above n 151 (Media release, 25 January 2012).

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ Jerrard, above n 91, 9.

¹⁷⁹ Jabour, above n 160.

¹⁸⁰ 'Govt to amend "gay panic" defence', *Fraser Coast Chronicle* (online), 26 January 2012 <<http://www.frasercoastchronicle.com.au/story/2012/01/26/govt-to-amend-gay-panic-defence/>>.

affecting situations such as that of a battered woman', and noting tangentially that the Liberal National Party opposed same-sex civil unions.¹⁸¹

Despite the extreme ambiguity of the result, the mainstream and gay press congratulated the Attorney-General and portrayed the problem – unique to Queensland – as case closed.¹⁸² Of course, the homosexual advance defence also lingers as part of provocation in New South Wales and South Australia, and perhaps elsewhere as a de facto defence. Moreover, the case was far from closed even in Queensland. No observant journalist pointed out that the Attorney-General's vague commitment to introduce changes 'this year' would inevitably fall beyond the election that pundits were predicting the Government would lose. No journalist even bothered to ask what the proposed changes might be. As for the Opposition, the Shadow Attorney-General promised only to consider the amendments, but foreshadowed his conclusion by stating that 'it was impossible to completely remove the partial defence.'¹⁸³ The Liberal National Party has since ruled out any amendments to remove the homosexual advance defence.¹⁸⁴ At the state election on 24 March 2012, Labor was swept from office before it could deliver on its vague promises to remove the homosexual advance defence. The 2010-12 campaign to abolish the defence in Queensland, led by an academic, a community legal centre and a priest, was back to square one. At the time of writing, the status of the campaign remains unchanged, save that community groups in New South Wales have rediscovered that the homosexual advance defence also applies in their state and, inspired by Fr Kelly, have begun agitating for its abolition through a petition on Change.org.¹⁸⁵

IV THE PARADOX OF THE ATTORNEY-GENERAL'S POSITION: A SIGN OF DEEPER CHANGES?

The campaign to abolish the homosexual advance defence was imbued with the dilemma facing all gay rights advocacy. The dilemma is that a political voice seems to require a collective identity – the LGBTI Legal Service needed an identity on whose behalf to speak and Fr Kelly needed an identity for whom to fight for equal treatment – and yet queer theory has very convincingly argued that identity is itself the source of the problem.¹⁸⁶ Are identity-based politics self-

¹⁸¹ Lucas, above n 151 (Media release, 25 January 2012).

¹⁸² 'Qld to close "gay panic" legal loophole', *Nine msn News* (online), 25 January 2012 <<http://news.ninemsn.com.au/national/8408650/qld-to-close-gay-panic-legal-loophole>>; Toby Longhurst, 'Queensland set to abolish "gay panic" defence', *QNews* (online), 25 January 2012 <<http://qnews.com.au/article/queensland-set-abolish-gay-panic-defence>>; ' "Gay panic" defence to go', *Star Observer* (online), 25 January 2012 <<http://www.starobserver.com.au/news/2012/01/25/gay-panic-defence-to-go/70400>>; Matt Akersten, 'Queensland will close "gaypanic" loophole', *SameSame* (online), 25 January 2012 <<http://www.samesame.com.au/news/local/7911/Queensland-will-close-gay-panic-loophole.htm>>.

¹⁸³ Above n 180.

¹⁸⁴ Drew Sheldrick, 'Gay panic to stay', *Star Observer* (online), 3 July 2012 <<http://www.starobserver.com.au/news/2012/07/03/gay-panic-to-stay/80192>>.

¹⁸⁵ Andrew Potts, 'Push to end "gay panic" defence', *Star Observer* (Sydney), 10 February 2012, 1; Beat Project NSW, *Abolish the 'Gay Panic' defence from NSW law* <<http://www.change.org/petitions/nsw-attorney-general-abolish-the-gay-panic-defence-from-nsw-law-nswgaypanic>>.

¹⁸⁶ Joshua Gamson, 'Must Identity Movements Self-Destruct? A Queer Dilemma' (1995) 42(3) *Social Problems* 390, 400-401.

defeating or a necessary evil? Do arguments and strategies such as those employed by Berman and the LGBTI Legal Service only achieve myopic victories at the expense of entrenching the very sexuality binary that allows homophobia to exist? Or might those small strategic victories add up to a point in the future where differences in sexuality no longer matter? Ultimately, these questions are best answered with the benefit of hindsight. However, we may find hints of their answers in the politician's paradox, at the disjuncture between the rhetoric they employ and the conclusions they draw.

From the above account of the campaign to abolish the homosexual advance defence it can be seen that the same paradoxical formula appeared in every public statement that the Attorney-General issued, regardless of whether the effect was to refuse to consider change, to concede the need for change or even to apparently advocate for change. The formula was to explicitly state that gay people should be treated equally – the government ‘abhors any attack on any person that occurs as a result of that person’s sexual preference’¹⁸⁷ and look at our ‘proud record’¹⁸⁸ of efforts to ‘ensure equality for all Queenslanders regardless of their sexuality’¹⁸⁹ – but then disavow that position, either expressly – but ‘no further legislative changes [are necessary]’¹⁹⁰ – or by raising disingenuous hurdles – ‘[i]t is not possible to remove sexual advances completely without affecting ... battered wom[e]n’,¹⁹¹ when in reality not only is it possible but it had already been achieved.¹⁹²

Neither is this formula unique in recent times. For example, at its national conference in December 2011, the Australian Labor Party voted to include in its platform: ‘Labor will amend the Marriage Act to ensure equal access to marriage under statute for all adult couples irrespective of sex who have a mutual commitment to a shared life.’¹⁹³ Yet Labor simultaneously ensured it would be thwarted from achieving same-sex marriage by adopting a conscience vote known to be doomed to fail in the overall political climate prevailing at the time. Note also the party platform of Queensland Labor since 2008 that it ‘will ensure uniformity of age among laws relating to the age of consent for lawful sexual activity.’¹⁹⁴ Yet despite being in power for the next four years in Queensland, Labor never attempted to equalise the age of consent for gay and straight males.¹⁹⁵

¹⁸⁷ Lucas, above n 126, 1. See also Lucas, above n 148; Lucas, above n 151 (Media release, 10 January 2012).

¹⁸⁸ Lucas, above n 126, 3. See also Lucas, above n 106 (‘strong history’).

¹⁸⁹ Lucas, above n 106.

¹⁹⁰ Lucas, above n 126, 3.

¹⁹¹ Lucas, above n 151 (Media release, 25 January 2012).

¹⁹² *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) s 3; *Criminal Code 1899* (Qld) s 304B.

¹⁹³ ‘Labor votes in favour of gay marriage’ *The Age* (online), 3 December 2011 <<http://www.theage.com.au/national/labor-votes-in-favour-of-gay-marriage-20111203-1oc4a.html>>.

¹⁹⁴ Australian Labour Party (Queensland Branch), *Official Policy Platform* (2010) Justice and Governance Chapter 7.9.

¹⁹⁵ *Criminal Code 1899* (Qld) s 208 (age of consent for anal intercourse is 18), cf s 215 (age of consent for penetrative vaginal intercourse is 16); cf *Crimes Act 1900* (ACT) s 55; *Crimes Act 1900* (NSW) s 66C; *Criminal Code 1983* (NT) s 127(1); *Crimes Act 1958* (Vic) s 45; *Criminal Code Act 1913* (WA) s 321; *Criminal Law Consolidation Act 1935* (SA) s 49; *Criminal Code 1924* (Tas) s 124.

Queer theorist Kate Foord encountered the same paradox in the Victorian Law Reform Commission's approach to the legal recognition of same-sex parenting. She found that the Commission departed from its commitment to non-discrimination precisely where equality endangered heterosexuality 'as a general principle underpinning social order.'¹⁹⁶ Foord noted that, on the surface, this failure to apply the principle of equality despite adherence to its spirit seemed to follow 'the "logic" of the mechanism of disavowal.'¹⁹⁷ That 'logic' went along the lines: 'I know very well that this principle should be applied to heterosexuals and homosexuals, but still it cannot be applied in this case.'¹⁹⁸ Delving beneath this facile 'logic', Foord focused on the gap in thinking as crucial to unravelling the paradox:

The gaps so often seen between declared principles and what is proposed in their name is all too easily interpreted simply as a marker of hypocrisy or political pragmatism, but it can often be more precisely understood as a gap in thinking itself, an indication of something that cannot be thought.¹⁹⁹

Foord's explanation for the gap was rooted in Lacanian psychoanalysis, a strand of thought distinct from Foucault and Derrida's and which later theorists in the queer tradition have labelled, 'a queer theory in its own right'.²⁰⁰ At the risk of caricaturing Jacques Lacan's work, it was in part a queer take on Freud, founded upon an insistence that in the subconscious there is no gender and no proper object of desire. Foord was particularly interested in Lacan's work on anxiety and how it can cause a person to rush to a conclusion before language has time to catch up, giving rise to the appearance of a gap in thought.²⁰¹ Though laced with the difficult language of psychoanalysis, Foord's conclusion bears repeating in full:

The name of that gap [between the treatment of gay and straight people], and the identity preserved in that name, is heterosexuality; the name of its closure is homosexuality. The closure of a gap between the subject and the object arouses an anxiety that is structural to the subject, in Lacanian psychoanalysis. Where there is a subject, there is an anxiety generated at the point of the over-proximity of the object: there, where there should be a gap, there isn't, and the subject's existence is overwhelmingly threatened. This anxiety, then, precedes any name that comes to describe it [giving rise to an apparent gap in thought], yet it is always already displaced onto 'homosexuality' in the heterosexual matrix. Homophobia, then, is a defence against the anxiety of this closure, and not itself the cause of anxiety. The necessity to preserve the distinction between heterosexuality and homosexuality, underpinned ... by such a displaced anxiety, function[s] as an impediment to conferring [equality].²⁰²

¹⁹⁶ Kate Foord, 'Imagine There Are No Lesbians: Psychoanalysis, Queer Theory and the Legal Recognition of Same-Sex Parenting' (2007) 27 *The Australian Feminist Law Journal* 3, 11.

¹⁹⁷ Ibid.

¹⁹⁸ Žižek Slavoj, *The Sublime Object of Ideology* (Verso, 1989) 18.

¹⁹⁹ Foord, above n 196, 12.

²⁰⁰ Tim Dean, *Beyond Sexuality* (Chicago University Press, 2000) 265.

²⁰¹ Jacques Lacan, *Seminar X: Anxiety* (Cormac Gallagher trans, Karnac Books, 2002) [trans of unedited French manuscripts 1962-63]; see also Joan Copjec, *Read My Desire* (MIT Press, 1994) 116-139.

²⁰² Foord, above n 196, 14 (references omitted). Note that the 'heterosexual matrix' is an idea borrowed from Butler: above n 84 (*Gender Trouble*), 151.

Of course, this understanding of anxiety is based on speculation on the way the brain processes threats to heteronormativity, albeit a plausible speculation. The value of Foord's analysis of the politician's paradox is that she shines light on the possibility that there is more going on in the apparent gap in thought than first meets the eye. While Foord's focus on the gap between the first and second step of the paradoxical formula is illuminating, attention also needs to be drawn to the first step: the rhetoric of equality and human rights.

If we accept that these tongue-tied politicians are unconsciously endeavouring to maintain the privileged position of heterosexuality, why are they finding themselves mired in the language of equality and rights? Surely there is other rhetoric available that is more conducive to perpetuating the inequality of the sexualities. Indeed, until only recently the public discussion of homosexuality was in terms of the 'normality' of procreative desire and the medical/psychological language of 'perversion' or 'disorder' regarding same-sex attraction. What are we really witnessing in this shift in language? Could it be that the heteronormativists have lost control over the discourse?

Returning to Foucault, for him discourse, knowledge and power are intricately connected concepts.²⁰³ Discourses are:

ways of constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and relations between them. Discourses are more than ways of thinking and producing meaning. They constitute the 'nature' of the body, unconscious and conscious mind and emotional life of the subjects they seek to govern.²⁰⁴

That is to say, in the Foucaultian worldview, altering the discourse has direct implications for the altering of power-relations and truth itself.

There are two likely culprits for this shift in discourse towards equality: human rights advocates and homosexuals themselves – Fr Kelly in one camp, and Berman and the LGBTI Legal Service in the other. As for the overarching influence of human rights, there can be no doubt that a human rights paradigm regained discursive prominence internationally, but especially in the West, in the wake of the world wars and the Holocaust.²⁰⁵ Perhaps in Foucaultian terms, the horrors of those historic events caused an epistemic shift, a shift in the invisible sets of rules that govern what systems of thought and discourses are possible.²⁰⁶ Since then, the discursive power of human rights has been fortified by the ever-expanding framework of human rights norms and the complex network of international organisations committed to their promotion. The principle of

²⁰³ Foucault, above n 18, 101: 'Indeed, it is in discourse that power and knowledge are joined together.'

²⁰⁴ Chris Weedon, *Feminist Practice and Poststructuralist Theory* (Blackwell Publishing, 2nd ed, 1997) 105.

²⁰⁵ Andrew Moravcsik, 'The origins of Human Rights regimes: Democratic delegation in post-war Europe' (2000) 54(2) *International Organization* 217; Kirsten Sellars, *The Rise and Rise of Human Rights* (Sutton Publishing, 2002).

²⁰⁶ Michel Foucault, *The Order of Things* (Alan Sheridan trans, Routledge, 1989) [trans of: *Les Mots et les choses* (first published 1966)]; Michel Foucault, *The Archaeology of Knowledge* (AM Sheridan Smith trans, Routledge, 2002) [trans of: *L'Archéologie du savoir* (first published 1969)].

equality has always held a special place in the constellation of human rights,²⁰⁷ in that it is a condition precedent for the enjoyment of most other human rights.²⁰⁸ In fact, although few other human rights have trickled down into domestic Australian law,²⁰⁹ the obligation of non-discrimination has been codified in every Australian jurisdiction.²¹⁰ Concomitant with the spread of the right to equality has been a narrowing of the legitimate bases for deviating from that principle, and this has occurred both internationally²¹¹ and domestically.²¹² The civil rights movement in the United States, and to an extent in Australia, garnered the language of human rights to extend equal treatment to increasing categories of people: African Americans, women, Indigenous peoples and LGBTI peoples. Queer theorists charge the civil rights movement with sourcing the right of gay

²⁰⁷ See for eg *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948) arts 1, 2, 7; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) arts 2(1), 26 ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 2(2), 3; *International Convention on the elimination of all forms of racial discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of discrimination against Women*, opened for signature on 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *European Convention of Human Rights*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 14.

²⁰⁸ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009) [106] (Bell J, President) ('Equality permeates every pore of the [Victorian] Charter'); see also the individual opinion of the Human Rights Committee in *Toonen v Australia*, where Bertil Wennergren considered that violation of the right to equality under art 26 enlivened the right to privacy under art 17 of the ICCPR, rather than the reverse: *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994).

²⁰⁹ Cf *Charter of Human Rights and Responsibilities 2006* (Vic); *Human Rights Act 2004* (ACT).

²¹⁰ At the state level see: *Anti-Discrimination Act 1991* (Qld); *Discrimination Act 1991* (ACT); *Human Rights Act 2004* (ACT) s 8(2); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act* (NT); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Charter of Human Rights and Responsibilities 2006* (Vic) s 8(2); *Equal Opportunity Act 1984* (WA). At the federal level see: *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

²¹¹ See for eg how sexual orientation has come to be included in the term '... or other status' in art 26 of the ICCPR and art 14 of the *European Convention of Human Rights*: *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [6.9]; *Dudgeon v United Kingdom* [1981] ECHR 5 (22 October 1981) [64] ff; *Norris v Ireland* [1988] ECHR 22 (26 October 1988); *Modinos v Cyprus* [1993] ECHR 19 (22 April 1993) (the latter two cases taking for granted that sexuality is an 'other status'). Re the extension of equality on the basis of sexuality see also: International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007); *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights, Human Rights Council*, 19th sess, Agenda Items 2 and 8, UN Doc A/HRC/19/41 (17 November 2011).

²¹² Note the creeping grounds of discrimination at the federal level: *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth). The trajectory appears to be headed towards including sexuality as a ground of discrimination: Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination*, Consultation report (2011) 43 <http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/report/>.

people to equality in the fiction of immutability.²¹³ This is largely due to the accident of history that Blacks and women had already demanded their equality on this basis.²¹⁴ The more important point is that the discourse of human rights and equality requires an identity in whose name to fight.

As for the possibility that gay men are responsible for the shift in discourse, Foucault himself conceded that discourses may be used subversively for ends for which they were not intended.²¹⁵ Once sexology brought the homosexual into existence by naming him, the power of that naming became available to the newly created homosexual himself, for his own designs. Sexology's creation of homosexuality not only made it possible to introduce:

social controls into this area of 'perversity'; but it also made possible the formation of a 'reverse' discourse: homosexuality began to speak [on] its own behalf, to demand that its legitimacy or 'naturalness' be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.²¹⁶

Perhaps not even Foucault appreciated the power to alter an identity from within through a reverse discourse. In his view, reverse discourses at most allow for limited emancipatory campaigns because they ultimately reinforce the primary discourse that undergirds the oppression.²¹⁷

Foucault certainly did not consider the possibilities that lurk within the particular discourse of equality.²¹⁸ Central to the principle of equality is the edict to treat all persons in the same way unless there is a rational reason not to. What is defensible as a 'rational reason' is of course subject to its own discourses. But equality, properly understood as a discourse that downplays or even erases irrelevant differences, may be a Trojan Horse, equipped with the means of obliterating the need for boundaries between (some?) sexualities and therefore the value in maintaining the notion of sexuality itself. Crucially, and contrary to the received wisdom of queer theory, this discursive route opens up *through* embracing a homosexual identity – homosexuals get to demand equality and thereby an end to sexuality precisely because they are speaking *as* homosexuals. To the same effect, human rights advocates get to demand equality *for* homosexuals and thereby an end to sexuality precisely because of the existence of the homosexual identity. As Dennis Altman framed his hope in the 1970s, 'gay

²¹³ See for eg M Katherine Baird Darmer, "'Immutability' and Stigma: Towards a More Progressive Equal Protection Rights Discourse' (2010) 18 *American University Journal of Gender, Social Policy and the Law* 439.

²¹⁴ In regards to race see: *Loving v Virginia*, 388 US 1, 11 (1967); *Strauder v West Virginia*, 100 US 303, 307-08 (1879). In regards to gender see: *Mississippi University for Women v Hogan*, 458 US 718, 723-24 (1982). Cf in regards to sexuality: *Woodward v US*, 871 F 2d 1068, 1076 (CA Fed, 1989).

²¹⁵ Foucault, above n 18, 95-6, 100-2.

²¹⁶ *Ibid* 101.

²¹⁷ *Ibid* 101. See also Lisa Downing, *The Cambridge Introduction to Michel Foucault* (Cambridge University Press, 2008) 90.

²¹⁸ I have here treated the principle of equality as just another discourse. For attempts to reconcile queer theory with equality as a universal value see: Carlos A Ball, 'Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory' (2001) 26 *Law and Social Inquiry* 271.

liberation will succeed as its *raison d'être* disappears'.²¹⁹ In seeing politicians bind themselves in paradoxes, we may be witnessing the first signs that identity-based politics work. The next step is for the principle of equality to be followed to its own conclusion.

V CONCLUSION

Homophobic violence and its excuse through the homosexual advance defence are extreme products of a system which privileges heterosexuality. Heteronormativity is founded upon the existence of sexual identities which Foucault has shown need not exist and indeed have not always existed.²²⁰ A dilemma then arises for those who advocate for change. On the one hand they only seem to be heard if they speak *as* or *for* people of a certain identity, and yet, on the other hand, to do so seems to reinforce the sexuality binary as an investment in heteronormativity itself. Whether consciously or otherwise, the recent campaign in Queensland to abolish the homosexual advance defence faced this same predicament.

The impetus for the campaign was the successful deployment of the homosexual advance defence in two trials in Maryborough, one for the killing of Wayne Ruks and the other of Stephen Ward. The principal protagonists of the campaign – the academic, the community legal centre and the priest – all spoke the liberalist language of equal treatment of the sexualities rather than a queer demand for equality through the destruction of sexual identities. Yet the solution they propounded – removing non-violent sexual advances from the ambit of provocation – was a textbook example of queer law reform, in that it would address the issue without codifying categories of sexuality in the process.²²¹

Nonetheless their *modus operandi* was very much identity-based. In fact, the LGBTI Legal Service suffered something of a backlash when it deviated from that strategy in nominating people to the Attorney-General's expert panel without regard to their sexuality. Even Fr Kelly – for all his ostensible neutrality – fought on behalf of gay men and their rights to life and equal treatment. The campaign to date has raised a great deal of public attention to the homosexual advance defence but has fallen short of achieving its eradication in Queensland, if indeed that is possible. It is difficult to judge conclusively whether this effort has opened a dialogue that will lead to a small victory in the future in a long string of victories toward equality, or whether it has done more harm than good by entrenching the very sexuality binary at the root of the problem.

There is no conclusive answer, but there is the hint of one in the Attorney-General's paradoxical formula of saying that gay people have equal rights before disavowing that position. The most likely reason why politicians feel the need to bother with the rhetoric of equality when they disagree with its logical conclusion is that the discourses governing homosexuality have shifted in a powerful way. More than that, the new governing discourse – the principle of equality – is

²¹⁹ Dennis Altman, *Homosexual: Oppression and Liberation* (University of Queensland Press, first published 1971, 2012 ed) 246.

²²⁰ Foucault, above n 18; Foucault, above n 19.

²²¹ Alcardo Zanghellini, 'Queer, Antinormativity, Counter-normativity and Abjection' (2009) 18(1) *Griffith Law Review* 1, 2.

unique in that it potentially downplays difference and so the usefulness of boundaries. In this way an identity politic may achieve the same end that queer theory can only dream of achieving: equality and the eventual disappearance of sexual identities.