home, bashed Mr Peterson and raped him. That situation was repeated on at least one other occasion.

Medical evidence called from a Doctor Arthur, a psychiatrist at the trial, was that as a result of having examined Mr Peterson (after his arrest) Dr Arthur had formed the view that Mr Peterson even then was suffering from post traumatic stress disorder, as well as alcohol addiction and drug addiction, being prone to using alcohol in an extremely excessive way as well as cannabis, heroin and intravenous amphetamine.

The learned sentencing judge remarked, when passing sentence for manslaughter, that Mr Peterson's post traumatic stress disorder impaired his capacity to control his actions, and to know what he was doing. The judge accepted that no doubt Mr Peterson's capacities were substantially impaired, but that that was in no small part in due to his voluntary intoxication, but also accepted the time that he bashed Mr Ward, Mr Peterson had a flashback to what had happened to him as a child. The judge concluded from the jury's verdict of not guilty of murder, and guilty of manslaughter, that the jury were unable to exclude the beyond reasonable doubt that an ordinary person, who had suffered what Mr Peterson had suffered in his childhood abuse, could not have reacted in a way in which Mr Peterson had reacted.

Having driven off leaving Mr Ward by the side of the road, Mr Peterson and Mr Smith realised that he would be found there and they returned, not to give any assistance to Mr Ward, but because they wanted to make sure that they would not be punished for Mr Peterson's assault on Mr Ward. When they returned they found Mr Ward still alive and making noises, and they put him in the tray of the vehicle and drove for perhaps 20 to 30 minutes over very rough bush tracks until they found a very isolated spot, where Mr Ward was unlikely to be found, and left him there. After that they took many steps to avoid detection, and Mr Ward's death was not discovered for many weeks, because of the very isolated spot which his body had been left. Efficient police work brought the police to Mr Smith's doorstep, and there he was found cleaning his car, attempting to get rid of any further evidence.

The sentencing remarks make it unarguable that this was a case of a relatively non violent homosexual approach to Mr Peterson, who reacted with murderous rage. But the evidence and the jury's verdict support the argument that that was because of Mr Peterson's experiences as a child, and ongoing post traumatic stress disorder. If his "flashback" which affected him so powerfully while intoxicated, and affected by drugs, was genuine, then it is difficult for me see why the law should deny him a defence that simply relies on explaining a response which an ordinary person could also have made (that is, an ordinary person who had experienced Mr Peterson's level of upset at recollecting the traumatic events which had happened earlier in his life).

The circumstances of *R v Peterson and Smith* were discussed by the working group, as were those in *R v Meerdink and Pearce*. Shelley Argent, the national spokesperson for the PFLAG, was unsympathetic to Mr Peterson's position, contending that too many people used post traumatic stress disorder, alcohol, and the use of other drugs, as excuses; and that prior sexual abuse should not be seen as an excuse for homicidal assault, because, she contended one in four females and one in six males, on average, are molested before the age of 18 in this country. As

she expressed it in a written submission to the working group, "surely we can't have that many potential murderers in this country".

Mr Mark Thomas, speaking on behalf of the LGBTI Legal Service Inc., contended that the Criminal Code should be amended to provide some words to demonstrate to society that certain types of behaviour were not acceptable, and should reflect that under no circumstances should a non violent sexual advance ever justify killing another. He accepted that there could be difficulty in defining what constituted a "non violent sexual advance", but that the Parliament should not shy away from changing it because it was difficult to describe the desired result. He also remarked how the ACT and the NT have grappled with the same difficulty, and at the second meeting of the working group, (on 12 January 2012), Shelley Argent produced a submission paper (referred to earlier in this report) prepared on behalf of the LGBTI Legal Service Inc., in which that legal service recommended that the Queensland Parliament amend section 304 of the *Criminal Code 1899* (Queensland) by the addition of a subsection 304(9). The wording of that subsection is clearly borrowed from the relevant legislation in the ACT and NT, in which those two Territories legislated (in 2004 and 2006 respectively) to modify their criminal statutes, to provide as follows regarding provocation:

> "However, conduct of the deceased consisting of a non violent sexual advance (or advances) toward the accused –
>
> (a) is taken not to be sufficient, by itself, to be conduct which constitutes provocation but
>
> (b) may be taken in to account together with other conduct of the deceased in deciding whether there has been an act or omission establishing provocation"

The LGBTI Legal Service Inc. written submission of October 2011, produced by Shelley Argent, contends for a section 304(9) drafted in similar terms, although Mr Thomas did not expressly argue for that position in the working group. At the first meeting (23 December 2011), he said he was in favour of embedding in section 304 some changes, to go towards solving some of the problems of people with PTSD. He said that when responding to a suggestion that section 304(2) as it currently reads, could be amended to include the words "or non violent sexual advance" after the expression "on words alone" presently appearing in section 304(2). He appeared satisfied that that a person suffering from PTSD, who responded violently to a sexual advance, could fairly argue that that person was in an extreme or exceptional circumstance.

The working party had difficulty with the expression "non violent sexual advance", which is an expression capable of describing both a merely verbal proposition made by one person to another, or some deliberate touching of another's body. The research undertaken by the lawyers between the first and second meetings of the group, both from within and without the Department, did not discover any examples of cases in which the phrase has been considered by the Supreme Courts of either the ACT or the NT. Nor was any assistance as to its meaning found in examining the explanatory notes, or the legislation by which the matter was introduced into the law in those two Territories.

By the end of the deliberations it appeared that the "gay panic" defence was not frequently advanced in Queensland, and there have already been amendments made in 2011 which will make it more difficult to advance an unmeritorious defence based on a violent response to a homosexual overture. However, the possibility of such a response happening raises strong feelings for those who urge a change to the law. Those feelings are well described in the submission of the LGBTI Legal Service Inc. of October 2011, which has as its heading the statement made by Mr Pearce, in *R v Meerdink and Pearce* that "He started all this poofter shit, so I snapped". The written submission contains in its body the statement that in a non violent homosexual advance case, the "narrative fed to the jury is that lethal violence arose naturally enough from the loss of control the killer experienced when his heterosexual male honour was at stake". In fact, that description is not accurate about either of the trials *R v Meerdink and Pearce,* or *R v Peterson and Smith*, for the reasons described.

At the conclusion of deliberations, the members of the working group were equally divided for or against an amendment to change the wording of the current section 304; principally because, it seemed to me, of a lack of evidence of abuse of the potential defence, a view that "non violent sexual advance" was an amorphous concept capable of describing a wide range of conduct, and uncertainty as to the affect of the recent amendments. It was suggested that if the use of more than "words alone" were to be put forward as a reason for refusing a defence of provocation, then the impermissible or permissible conduct should be clearly defined. One suggestion was to use a composite phrase, such as "unwanted sexual advance or other minor touching" in a redrafted section 304(9), with the object being to ensure that conduct amounting to an assault was not a basis for refusing a plea of provocation.

Those suggesting no change included the lawyers appearing as, or representing, Legal Aid QLD, the Queensland Law Society, the Bar Association, the Aboriginal and Torres Strait Islander Legal Service and the Queensland Council for Civil Liberties. Those supporting some amendment to section 304 included the lawyers or persons speaking for the Anti-Discrimination Commission, the LGBTI Legal Service Inc., PFLAG, the Director of Public Prosecutions and myself.

I add that regarding the current drafting of section 304(2), the working group (other than the two DJAG Directors) appeared to accept that the words "a most extreme and" in section 304, wherever they appear, add difficulties, of definition and example, to the requirement that provocation by words alone only apply in circumstances of an exceptional character. The DJAG Directors were anxious that you appreciate that the current terminology, in section 304, denying a defence of provocation based on words alone "other than in circumstances of the most extreme and exceptional character" were explicitly recommended in paragraph 21.37 (page 479) of the QLRC report, in turn citing from the Court of Appeal judgment *R v Buttigieg*.

As to that, the QLRC report also makes the point that the rule in *R v Buttigieg* appears to have been more honoured in the breach than in the observance, referring to the Court of Appeal judgments in *Sebo*, *Auberson*, *Schubring.* The analysis of those three decisions of the Court of Appeal by the QLRC does not record any of the judges of the Court of Appeal remarking adversely about provocation having being