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Adjudication in Homicide Cases involving Lesbian, Gay, Bisexual and Transgendered (LGBT) Persons in the Commonwealth Caribbean

Se-shauna Wheatle

A Report to
the Faculty of Law UWI
Rights Advocacy Project

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Foreword

As full and partial defences to murder respectively, justifiable homicide and provocation appear to represent the flexible approach to adjudication that is the hallmark of a just and humane legal system. While much of criminal law is concerned with how people ought to behave, these defences represent one space in which criminal law grapples with how people actually do behave. Thus, at their core justifiable homicide and provocation are doctrines that were intended to account for human frailty.

But, intended utility notwithstanding, a close examination of how justifiable homicide and provocation doctrines have been applied by courts in the Commonwealth Caribbean suggest the defences are in serious need of reform. Though facially neutral, these defences have a disparate impact on members of vulnerable communities, most notably lesbian, gay, bisexual and transgendered (“LGBT”) persons, women, battered women and the poor. Se-shauna Wheatle rightly highlights that in the Commonwealth Caribbean justifiable homicide is now used solely to defend the killing of gay men and pleading provocation is often futile for those persons who do not conform to gender stereotypes. For far too many people, the existence of these defences has meant the denial of guaranteed constitutional protections of equality, life and due process.

As insightful as it is necessary, Ms. Wheatle’s study is an important contribution to an on-going conversation that we must continue to have in the Commonwealth Caribbean – a conversation about the tensions that exist between our constitutional and criminal laws as well as the deleterious effects of clinging to anachronistic doctrines.

The Faculty of Law Rights Advocacy Project is very grateful to Se-shauna Wheatle for undertaking this study. The Project also wishes to thank Natalia Casado who served as the research assistant for the project. The Law Branch Library of the University of the West Indies, Mona Campus Library provided invaluable assistance during the project, as did the Supreme Court Library, Trinidad and Tobago. We also wish to express our thanks for the help of the many civil society organisations across the Caribbean that shared information on those homicide cases known to them involving LGBT persons. Finally, the Project also wishes to express its gratitude to the British High Commission for Barbados and the Eastern Caribbean which generously funded this study and its dissemination.

Janeille Zorina Matthews

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About the Author

Se-shauna Wheatle is currently a Lecturer in Law at Exeter College at the University of Oxford and was formerly Lecturer in Law at Trinity College, Oxford. She achieved her Bachelor of Laws (LLB) at the University of the West Indies before attending the University of Oxford as a Rhodes Scholar to read for the Bachelor of Civil Law (BCL). She completed a Master of Philosophy in Law (M.Phil.) on the constitutionality of the criminalization of same sex relations in Jamaica. She is now pursuing doctoral research in the fields of comparative human rights law and comparative constitutional law.

Se-shauna has written several papers and articles on equality, gender and sexuality in Commonwealth Caribbean constitutional law. Her published articles include 'The Rights to Equality and Non-Discrimination and the Jamaican Charter of Fundamental Rights and Freedoms', which was published in the *West Indian Law Journal*, and a co-authored article on 'Post-Independence Constitutional Reform In The Commonwealth Caribbean And A New Charter Of Fundamental Rights And Freedoms For Jamaica', published in the 2012 edition of *Public Law*.

Currently a Regional Correspondent for the Oxford University Human Rights Hub, Se-shauna was previously the convenor of the Public Law Discussion Group of Oxford's Law Faculty, and has also sat on Oxford University's Race Equality Steering Group.

The Faculty of Law UWI Rights Advocacy Project (U-RAP)

U-RAP is an outreach and public service activity of the University of the West Indies. It was established in 2010 as a project of the Faculty of Law, University of the West Indies. It now comprises of a team of teachers in human rights and public law at the Faculties of Law at Cave Hill, Mona and St. Augustine supported by student volunteers and research assistants. U-RAP relies on the provision of pro-bono legal services by human rights lawyers across the Caribbean and works closely with civil society organizations.

The main objective of the UWI Faculty of Law Rights Advocacy Project is to promote human rights, equality and social justice in the Caribbean by undertaking and participating in human rights litigation in collaboration with human rights lawyers and relevant civil society organizations. Another key dimension of its work is undertaking and supporting legal and social science research on the nature of human rights violations and attitudes to controversial human rights issues.

The initial focus of U-RAP's work is on the human rights of sexual minorities since these reach Caribbean courts infrequently because of endemic stigma and discrimination. U-RAP's work seeks to underscore foundational principles expressed in virtually every single Caribbean constitution: the importance of respect for human dignity, that freedom is founded on the rule of law and we must have 'an unshakeable faith in human rights'.

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EXECUTIVE SUMMARY

This report is the product of a project by the University of the West Indies Faculty of Law Rights Advocacy Project (U-RAP). It presents an analysis of homicide cases involving LGBT persons from the Commonwealth Caribbean and of the treatment of such cases by Commonwealth Caribbean courts.

The terms of reference for the project were:

- a) to provide a summary background of the state of the law relating to homicides in the Commonwealth Caribbean;
- b) to document emerging approaches to homicides involving LGBT persons in the Commonwealth;
- c) to provide a detailed analysis of the practices and legal principles being applied in homicide cases involving LGBT persons in the Commonwealth Caribbean, and how the operation of stereotypes and biases in relation to gender and sexuality impact the administration of justice and the duty of the state to exercise due diligence to hold accountable those who kill LGBT persons; and
- d) to make recommendations to the relevant stakeholders.

The desk review and analysis of the homicide cases take place within the context of the rights and obligations arising under the constitutions of the Commonwealth Caribbean states and the rule of law. Particularly relevant among these rights are the rights to equality, the right to life and due process rights. These three rights are outlined in each Constitution in the region along with a concomitant obligation on the institutions of state to respect and protect these rights for individuals in the respective jurisdictions. The criminal laws of the region and the operation of the criminal justice system must therefore be examined in the context of these requirements.

Most of the cases examined in the course of this project are cases in which a 'homosexual advance defence' has been raised by the defendant in a homicide case. A 'homosexual advance defence' is an argument by the defendant that the deceased made a sexual advance to the defendant, who is of the same sex as the deceased. A homosexual advance defence can be used in a variety of defences to murder. In the cases examined in this project, the homosexual advance defence has been employed in order to raise the defences of justifiable homicide and provocation. An examination of the cases reveals significant themes that are addressed in this report. These themes include issues of respect for the principles of reasonableness and proportionality in defences to murder, the characterization of members of the LGBT community and the extent to which the current definitions and applications of the defences to murder take account of societal attitudes surrounding sexuality. The research reveals significant tensions between the constitutional rights and obligations and the law as applied to homicide cases involving LGBT persons. These tensions arise chiefly because the relevant criminal law shows insufficient regard for the life of a deceased LGBT person; the law fails to respect the criminal law principles of reasonableness and proportionality; and the law reflects a perception of the LGBT person as criminal.

This report addresses these issues and makes findings and conclusions that may be considered by judges and other stakeholders. Our main conclusions are centred on reform of the criminal law. Hence, we highlight the need for ***abolition of the defence of justifiable homicide and for reform of the defence of provocation to exclude the availability of the defence of provocation*** where the homicide occurred

in response to a non-violent sexual advance. These changes would introduce greater proportionality into the defences as applied in cases where the deceased is an LGBT person.

We note that there are judicial codes or guidelines for judicial conduct in some states in the region, all of which highlight a judicial responsibility to observe standards of equality and fairness in the performance of judicial duties. We find that while a number of the codes and guidelines specify that sexual orientation is a ground on which judges must protect equality, this is not a universal requirement in the codes. We therefore conclude that there ought to be judicial codes or guidelines for each jurisdiction and that ***these guidelines for judicial conduct should all list sexual orientation as one of the prohibited grounds of discrimination.***

In addition to the conclusion that there is need for reform of the criminal law in this area, we also find that ***the constitutional law in the region should be developed to expressly protect the rights of LGBT members of our society.*** The constitutional reform would, of course, be within the purview of the legislature, but we expect that judges should, and would be included in consultations on the implementation and reform of the Constitutions in the region.

We also suggest areas in which there is need for continuing research in the region, with the objective of further improving our states' responses to violence against LGBT persons. Chief among these areas for further research are the issues of the treatment of LGBT persons and violence against such persons by the apparatus of the criminal justice system and empirical research on sentencing patterns in homicide cases involving LGBT persons.

The Report proceeds as follows. Before turning to the substantive sections of the report, we first outline the methodology used to conduct the study. Subsequently, Chapter 1 of the Report discusses the constitutional rights and obligations that apply to the criminal law and homicide cases examined in the study. Chapter 2 summarizes the criminal law on homicide and defences to homicide which are applicable to the cases that we have reviewed. The defences outlined are justifiable homicide and provocation. A critique of the defence of justifiable homicide is undertaken in Chapter 3, where we address the consistency of the defence with the landscape of the modern criminal law developed in the Commonwealth Caribbean. Chapter 4 then addresses the conceptions of sexuality that are manifested in the defences of justifiable homicide and provocation. We then conclude that the way in which these defences are applied in homicide cases reviewed is inconsistent with the constitutional guarantees outlined in Chapter 1.

METHODOLOGY

This report is the product of a desk review and analysis of judicial decisions in homicide cases involving LGBT persons in the English-speaking Caribbean. It encompasses homicide cases in which the deceased was a member of the LGBT community as well as cases in which the defendant or one of the defendants is identified as LGBT and, finally, cases in which the homicide followed an allegation or ‘accusation’ by the deceased that the defendant was an LGBT person.

A. Primary Material

The majority of the primary sources used in this study are appellate judgments from Commonwealth Caribbean jurisdictions. The appellate judgments examined in the course of this project will be reported appellate judgments on homicide cases involving LGBT persons from Commonwealth Caribbean courts from any time period. The temporal limits of the appellate judgments used are wide. This is important to enable us to take account of the development of the law over a succession of decades and to include as many relevant appellate judgments as possible. This wide temporal net will provide more judicial reasoning for our examination and thereby enrich the analytical discussion in this report.

Most of the appellate judgments relied upon are published in law reports and have been located through a search for terms relevant to the objectives and terms of reference of the research project. Transcripts of appellate hearings are also used, but there are challenges associated with the collection of this data. The challenges are largely due to the fact that transcripts of cases in the jurisdictions under consideration are not centralized or digitized. The issue of accessibility of data is therefore a methodological challenge that is factored into defining the parameters of this project. With these issues in mind, there are two circumstances in which transcripts will be used as part of the data that informs this report. The first is where the reported appellate judgment of a case leaves important factual issues unclear and it is necessary to consult the transcript for clarification. Second, transcripts are used where non-governmental organizations or attorneys involved in homicide cases involving LGBT persons have access to such transcripts and have made them available to the project team. The transcripts used in this project have been issued by the relevant court of law in which the case was argued and the transcripts remain on file with the members of the project team.

Limitations on the Research Design

It will be apparent that the methodological decisions on the primary sources are partly guided by pragmatic considerations. In this context, in conducting research in Caribbean jurisdictions with limited resources available for case reporting and collation of transcripts, accessibility to data is a limitation on research design. Martin Bulmer has articulated an approach to research design in developing countries that takes into account research limitations in such jurisdictions.¹ He has dubbed this approach ‘acceptability’ and it recognises the necessity of attempting to find a nexus between the demands of rigorous critical analysis on the one hand and the availability of information and accessibility to that information on the other. Accordingly, our methodological approach reconciles the analytical objectives of the project and issues related to accessibility of data, in order to achieve an optimal methodological design. This approach is evident in our sampling of transcripts to be included in the desk review of relevant cases.

Content Analysis

The homicide cases have undergone a critical desk review consistent with the project's terms of reference. There are two general approaches used in the analysis of the homicide cases: thematic analysis along with critical doctrinal analysis. The thematic analysis will identify themes that emerge from key points in the reasoning of the judges in the cases.² This will reveal some of the important ideas and conceptions that influence the decisions regarding the guilt of the defendant/appellant, the extent to which there is a justification or excuse for the homicide and the appropriate sentence for offences. This method of content analysis will assist in achieving the objectives of this project by identifying patterns in the perceptions of same-sex orientation by the institutions of the state and the law's interaction with and treatment of LGBT persons that impact the administration of justice in homicide cases involving LGBT persons in the Caribbean. The themes unearthed in the examination of the case law become the central features of analysis in this report. These themes include perceptions of gay men as dangers to society and to the state and the relevance of the legal principles of reasonableness and proportionality in defining and applying defences to murder.

This is coupled with critical doctrinal legal analysis to examine the homicide cases in the context of the legal framework governing criminal law as well as constitutional and human rights law in the Caribbean.³ The doctrinal analysis focuses on traditional legal critique of case law and statute law, which may be used to determine the extent to which the law is logical and coherent. This approach includes first, the examination of the legal coherence of the defences applied to homicide cases involving LGBT persons. The critique of the coherence of the cases is most useful in the discussion of the defence of justifiable homicide. Secondly, we make arguments regarding the acceptability of the current law, particularly in light of the themes uncovered in examining the homicide cases, and proposals for reform of the law on defences applicable to homicide cases involving LGBT persons.

B. Comparative Analysis

In analysing the themes that emerge from the homicide cases and developing proposals for improvements to the relevant legal rules, the report includes comparative legal research. Comparative analysis of judicial decisions, statutory law and doctrinal legal literature is an important aspect of the arguments and recommendations made in this report. There are substantial benefits of referring to foreign legal developments. They can help to highlight details of our legal framework; comparison with other jurisdictions can assist us in identifying important features of our own law. On a more specific level, a study of foreign law can reveal to us the common legal and social problems shared between states and help us to identify the solutions that foreign institutions have developed for solving those problems.

⁴ Both the Judicial Committee of the Privy Council (Privy Council) and the Caribbean Court of Justice (CCJ) have embraced comparative jurisprudence as a legitimate and useful technique in constitutional adjudication in the region.⁵ The comparative exercise does not dictate that we adopt a solution that has been favoured by another state, but it flags issues that have been deemed relevant to the search for a solution to a particular problem and similarities and differences between the two states that might affect the extent to which we borrow that state's solution. For comparative purposes, we will chiefly use other constitutional democracies in the Commonwealth of Nations, jurisdictions with whom the Commonwealth Caribbean shares a legal system, a similar legal history, the goals of constitutionalism, and fundamental values and principles such as equality and the rule of law. The jurisdictions that are included are the Commonwealth of Australia, Canada, New Zealand, and to a lesser extent, the United Kingdom. Some legal discourse from the United States of America will also be referred to on a few relevant points where there is an overlap between the legal history of that jurisdiction and the criminal law adopted in the Commonwealth Caribbean.

Chapter 1 - The Constitutional Rights Framework

The essential framework against which the criminal law and the analysis in the homicide cases involving LGBT persons must be measured is the constitutional rights of individuals within the region, including the rights of LGBT persons and the related obligations on the state and state institutions, including the court. Accordingly, Chapter 1 of the Report presents an analysis of the rights to equality, life and due process arising in the Commonwealth Caribbean.

A. The Right to Life

All Commonwealth Caribbean Constitutions contain a provision regarding the right to life. The right to life has been interpreted as imposing an obligation on the state to take reasonable steps to protect life. Some of the right to life sections in the region comprise two elements, which may be described as a positive element and negative element. The positive element states that individuals are entitled to the right to life. The negative element states that individuals shall not be deprived of that right except in specified circumstances. For instance, section 13(3) (a) of the Constitution of Jamaica 1962 provides for ‘the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted’. Similarly, the section 4(a) of the Constitution of Trinidad and Tobago recognizes ‘the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law’.

Section 2(1) of the European Convention on Human Rights 1950 was drafted in that form. It provides that ‘[e]veryone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.’

In interpreting the right to life under s 2(1) of the European Convention on Human Rights the European Court of Human Rights said:

The Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction...This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.⁶

This positive obligation on the state includes responsibilities to safeguard life through the legislative framework as well as the administrative framework. This means that Parliament as well as the courts have a duty to take steps to safeguard life and ‘to provide effective deterrence against threats to the right to life’.⁷

In other Commonwealth Caribbean constitutions, only the negative element appears. For example, article 138(1) of the Constitution of Guyana provides that ‘[n]o person shall be deprived of his life intentionally save in the execution of the sentence of a court in respect of an offence under the law of Guyana of which he has been convicted.’ This right is expressed to be limited to the extent that the deprivation of life is due to ‘the use of force to such extent as is reasonably justifiable’ in certain defined circumstances.⁸ The latter set of provisions was drafted on the model of article 2 of the ECHR but omitted the first sentence [the positive element] of that article. Yet, the omission of that sentence does not mean that the state has no positive obligations arising from the right to life. In fact, in a decision on the constitutionality of the Domestic Violence Act of St Lucia, Barrow J stated in obiter dicta that the state has a constitutional obligation to protect persons from domestic violence, arising from the rights of

individuals to 'life, liberty, security of the person, equality before the law and the protection of the law.'⁹ Moreover, celebrated Caribbean jurist Margaret Demerieux has stated with respect to the right to life sections that do not expressly include the positive element, that 'a right to life must, however formulated, go beyond an obligation on the state not to take life intentionally and to secure to citizens protection against the taking of life by private persons. Consequently, the minimum obligation of the right to life forbids the state from taking life and requires it as well to ensure a legal regime in which murder and seriously life threatening action is illegal.'¹⁰

This point is reinforced by analogy with another right under the ECHR, the right to freedom from inhuman and degrading treatment. Art 3 of the ECHR provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Almost identical sections appear in most Caribbean constitutions.¹¹ There is no sentence with an express positive element as in art 2. Nonetheless, the ECtHR has held that this article places an obligation on the state to take measures 'designed to ensure that individuals within their jurisdictions are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.'¹² This interpretation demonstrates the understanding that though rights provisions may not be drafted in a manner that expressly imposes a positive duty, obligations may yet arise for the state to take action to secure the protection of that right for individuals within the state. Indeed, it is hard, if not impossible, to draw a clear line between the positive and negative duties that arise from this right. In order to protect the right of the individual not to be intentionally deprived of life, the state must establish a legislative and administrative framework that seeks to protect life.

The right to life in the Caribbean constitutions is limited, in most jurisdictions by the legally sanctioned use of force, which is 'reasonably justifiable in the circumstances'.¹³ In Jamaica, the permissible limitation appears narrower, only referring to such limitations as are 'demonstrably justified in a free and democratic society'.¹⁴

Accordingly, the homicide laws and homicide defences must be consistent with the obligation of the state to respect and protect the right to life. Moreover, the Constitutions indicate that states should only permit the use of force in deprivation of life where that force is reasonably or demonstrably justifiable. The element of a reasonable justification for using such force is a principle that must be respected by the criminal law of each jurisdiction.

B. The Right to Due Process under the Law or Protection of the Law

Due process of the law is protected in Commonwealth Caribbean constitutions in provisions that explicitly refer to the right to 'due process of law' and provisions that speak to 'protection of the law'. Both the Constitutions of Jamaica and Trinidad and Tobago include a right to 'due process'. In section 4(a) of the Trinidadian Constitution it is expressed as 'the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law'.¹⁵ Most other constitutions in the region (excluding Guyana) include an introductory statement (preamble) to the chapter of fundamental rights in the respective constitution, which refers to the rights of every person within the state to protection of the law.¹⁶ This formulation is absent from the Constitution of Guyana, but section 145 of the Guyanese Constitution outlines 'provisions to secure the protection of the law', which includes a catalogue of fair trial rights.

Both the Caribbean Court of Justice (CCJ) and the Privy Council have held that due process and protection of the law incorporate protection and respect for standards of justice that extend beyond the express list of fair trial rights referred to in the Constitution.¹⁷ In *Thomas v Baptiste* the Privy Council held that the reference in the Trinidadian Constitution to 'due process' is not a reference to a particular law but 'invokes the concept of the rule of law itself' and 'universally accepted standards of justice'.¹⁸ This assessment was endorsed by the Privy Council in *Lewis*, in which it was held that the reference to 'protection of the law' in the opening section of the Jamaican Bill of Rights (which is similar to the section that now appears in the preamble to the fundamental rights chapter in most other Caribbean constitutions) grants the same protection as the right to due process in the Trinidadian Constitution.

An important element of due process protections is the respect for victims' rights. Protection of victims' rights has received recognition as an imperative of the criminal justice and human rights systems nationally and internationally. The Court of Appeal of Trinidad and Tobago has applied the protection of the law guaranteed in that jurisdiction's Constitution to victims of crime.¹⁹ Abdul Kareem was killed during a struggle and the police failed to conduct a proper investigation into his death, in part by deliberately concealing the identity of the person who killed him. In *Kareem v AG*, the Trinidad and Tobago Court of Appeal found that the failure of the police to identify and arrest the person who killed Kareem constituted a violation of the protection of the law under section 4(b) of the Trinidadian Constitution. This case confirms that due process rights inure to the benefit of the defendant and the victim in cases of violent crime. At the policy level in the Caribbean, the importance of victims' rights have been acknowledged, as the Ministry of Justice of Jamaica is currently developing a victims' charter, following a process of consultation.

At the international level, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power articulated principles to guide member states in the adoption of measures to provide justice for victims of crime and victims of abuse of power. Among the principles in the Declaration are that victims should be treated with respect for their dignity, that they are 'entitled to access to the mechanisms of justice and to prompt redress' and to the establishment of judicial and administrative mechanisms to ensure that victims obtain redress through fair procedures.²⁰ This is accompanied by a Handbook on Justice for Victims, a guide to the use and application of the UN Declaration of Basic Principles.²¹

These international instruments can be useful in interpreting corresponding sections of Caribbean constitutions. It is widely accepted that unincorporated international treaties may be used to interpret ambiguous provisions of domestic law, including the Constitution.²² Where, as is the case in relation to the due process rights, there is ambiguity regarding the scope of their application, the court may legitimately obtain guidance from international law. The Eastern Caribbean Court of Appeal has confirmed that international norms were relevant to an assessment of the victim's interests in the trial of a case and in determining the requirements of the right to fair trial.²³ Indeed, the Ministry of Justice of Jamaica has indicated the significance of the UN Declaration of Basic Principles and stated that 'our national laws ...should also take account of international norms to which we subscribe.'²⁴ The international law guidance on this issue indicates that due process rights are relevant to the protection of the rights of victims of violent crime. The Handbook on Justice for Victims is particularly useful for its guidance to states on ways in which to avoid secondary victimization. Secondary victimization is defined in the Handbook as 'victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim.'²⁵ It proceeds to state that institutionalized secondary victimization may occur in the criminal justice system where there is a denial of human rights to victims from particular groups, 'by refusing to recognize their experience as criminal victimization.'²⁶ Again, the dangers of secondary victimization have been acknowledged at the policy level in Jamaica by a Ministry of Justice paper on the Victims' Charter, which highlights the importance of reducing the risk of secondary victimization, noting that 'institutional secondary victimization results in denial of human rights of persons who fall in vulnerable groups'.²⁷ It is our view that the description of due process and protection of the law as a need to respect universal standards of justice is wide enough to incorporate the need for victims to receive the protection of the law and the obligation of state institutions to take steps to secure fair access to redress for victims as well as to avoid secondary victimization.

C. Right to Equality

All Commonwealth Caribbean jurisdictions contain constitutional provisions that guarantee the right to equality and prohibit discrimination. The constitutional provisions take different forms but they all prohibit discriminatory laws and discrimination by institutions of the state. There are two general sets of equality sections. The first set of provisions guarantee the right to 'equality before the law.' Section 4(b) of the Constitution of Trinidad and Tobago takes this form, providing as follows:

s. 4. It is hereby recognised and declared that in Trinidad & Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:-

b. the right of the individual to equality before the law and the protection of the law;

Section 13(3)(g) of the Constitution of Jamaica and section 149D of the Constitution of the People's Co-operative Republic of Guyana also include a 'right to equality before the law'. Section 4(d) of the Trinidadian Constitution also provides for 'equal treatment' by public authorities while section 13 (3)(h) of the Jamaican Constitution uses the term 'equitable' treatment rather than 'equal' treatment. The Constitution of Guyana goes further by requiring that the State, 'for the purpose of promoting equality, take legislative and other measures designed to protect disadvantaged persons and persons with disabilities.'²⁸

The second set of provisions use the terminology of discrimination rather than equality and bar discriminatory laws as well as discriminatory treatment. For instance, sections 15 (1) and (2) of The Constitution of Saint Christopher and Nevis 1983 provide that 'no law shall make any provision that is discriminatory either or itself or in its effect' and that 'a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.'²⁹ The Constitutions of Dominica and St Lucia take a similar form but are wider in that they prohibit discrimination against 'any person or authority'.³⁰ The Constitutions of Jamaica and Guyana also include provisions barring discrimination on particular grounds.³¹

In states that provide for 'equality before the law', there is a particularly strong case for arguing that discrimination against LGBT persons is unconstitutional. It is our view that these sections are broad enough to prohibit discrimination on the ground of sexual orientation. The 'equality before the law' provisions contain no limitation as to the classes of persons to which the right to equality applies. Accordingly, they do not rely on a need to establish discrimination on the ground of sexual orientation. Consequently, equality before the law is not limited by the grounds of non-discrimination specified in other parts of the Constitution. For example, the equality before the law provision in the Jamaican Constitution should not be limited by the grounds of discrimination specified in section 13(3)(i) of the Jamaican Constitution. This is the interpretation that has been given to the section in the Trinidadian Constitution and the corresponding sections in other jurisdictions should be interpreted similarly. The Court of Appeal of Trinidad and Tobago held in *LJ Williams v Smith* that the right to equality before the law in section 4(b) is not restricted by the bases of discrimination specified in the introductory clause to section 4.³²

With respect to provisions in the Constitutions of St Kitts and Nevis, Belize, Bahamas, Dominica and St. Lucia, that bar discrimination on particular grounds, different considerations apply. As the language of the non-discrimination sections is that 'the expression "discriminatory" means affording different treatment on the grounds specified', on ordinary statutory interpretation principles, it is arguable that the section presents a closed list of grounds. However, this general rule of statutory interpretation should not be applicable in interpreting the constitution. First, it has been established by the Privy Council that the Constitution is "sui generis," calling for principles of interpretation of its own, suitable to its character... without necessary acceptance of all the presumptions that are relevant to legalism of private law'.³³ This means that, in the words of Lord Wilberforce, Bills of Rights 'call

for a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the fundamental rights and freedoms’.³⁴ Second, another celebrated principle of constitutional interpretation is that the constitution must be interpreted as a living instrument. It is settled law that the Constitution is a living instrument and its provisions must accordingly be ‘judicially adapted to changes in attitudes and society’.³⁵ Third, judicial decisions in the Commonwealth African state of Botswana provide support for the interpretation that the non-discrimination sections do not provide a closed list of grounds. In *Makuto v The State*, the Court of Appeal of Botswana held that the prohibited grounds of discrimination in s 15 of the Constitution should be extended to include discrimination on the basis of HIV status.³⁶ The President of the Botswana CA argued that the framers of the Constitution had no intention of limiting the categories of groups protected from discrimination to those specified in s 15, but rather, the groups specified were by way of example of what the Framers thought were the most likely areas of discrimination.³⁷ Guidance ought to be sought from the constitutional decisions of the Botswana CA on this issue because s 25 of the Constitution of Botswana is very similar to the non-discrimination sections referred to above. Therefore, the Botswanan Court’s interpretation of the corresponding section ought to be considered highly persuasive to Caribbean judges in those jurisdictions with a similar non-discrimination provision.

Yet, in Jamaica and Guyana, legislative history suggests that the non-discrimination sections in those two states do not include discrimination on the grounds of sexuality. In both jurisdictions, the non-discrimination sections were the result of recent legislative action, 2003 in the case of Guyana and 2010 in the case of Jamaica. In debates on the grounds of discrimination to be listed as prohibited grounds in the Constitution, the question of discrimination on the grounds of sexuality arose, and in both jurisdictions the terms were constructed to exclude discrimination on the grounds of sexuality. In Jamaica the non-discrimination section bars discrimination on the ground of ‘being male or female’.³⁸ The unusual phraseology of ‘male or female’ was preferred to the more common terms ‘sex’ or ‘gender’. The term ‘gender’ was rejected because it was too flexible and could be understood as any classification ‘roughly corresponding to the two sexes and sexlessness’. The term ‘sex’ was, in turn, rejected on the basis of fear that the word sex might be interpreted to include ‘sexual orientation’.³⁹ In Guyana the original Act to amend the non-discrimination section did include sexual orientation as a prohibited ground but in the face of opposition from religious groups, the President of Guyana refused to give assent to the Act. Consequently, a new Act which excluded sexual orientation was passed and given presidential assent.

In summary then, the only provisions which would seem to exclude sexual orientation as a prohibited ground of discrimination are part of Constitutions that include a right to equality before the law, which is not limited by specified grounds of discrimination. As stated above, the equality before the law sections include equal protection for LGBT persons. Accordingly, there is a strong argument to be made that, generally, members of the LGBT community are entitled to the benefit of the rights to equality and non-discrimination.

The requirement of equality before the law is also fundamental tenet of our common law and the very notion of constitutional democracy. Judges in the Caribbean and other parts of the Commonwealth of Nations have pointed to the powers and duties that they derive from the rule of law in society and have held that it is part of their judicial duty to uphold the rule of law, and, consequentially, to develop the law to reflect the principle of equality and to ensure equal application of the law.⁴⁰

Attendant upon the right to equality are duties on the state and state institutions, including Parliament, the courts and public prosecutors, to respect, protect and fulfil the right to equality.⁴¹ There are two general conceptions of equality that may be applied to judge whether the law is consistent with the constitutional right to equality. The first is the *formal* conception of equality which focuses on the form which the legal rule takes and whether the rule conforms to the notion that likes should be treated alike.⁴² This conception of equality does not take into account power imbalances between different genders or sexual orientations, nor does it focus on the results of the

application of the legal rule. Substantive equality, on the other hand, concentrates on the results or impact of a rule, takes into account the legal and social context in which the rule operates and seeks to alleviate disadvantage.⁴³ The courts have already sanctioned an approach that goes beyond the surface of the law by holding that the constitution prohibits both direct and indirect discrimination. The Belize Court of Appeal in *Wade v Roches* held that the dismissal of the applicant from a school because her unmarried pregnancy evinced a departure from Jesus' teachings on sex and marriage was unconstitutional sex discrimination.⁴⁴ This amounted to recognition of indirect discrimination as unconstitutional since the basis of the dismissal was neutral on the face of the policy but operated with a discriminatory impact on women.⁴⁵

The judicial responsibilities under the rule of law and the Constitution have also been reiterated in several judicial codes and guidelines in the region, including the code of the Caribbean Court of Justice, of the Eastern Caribbean Supreme Court, Barbados, Belize and Jamaica. The Judicial Conduct Guidelines for Jamaica state with respect to equality, that

6.2 Judges should strive to be aware of and to understand diversity in society and differences arising from various sources, including, but not limited to gender, race, colour, national origin, religious conviction, culture, ethnic background, social and economic status, marital status, age, sexual orientation, disability and other like causes.

6.3 Judges should not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards or against any person or group.

These Guidelines are imbued with the principle of equality and specifically instruct judges that in carrying out their duties, they must demonstrate awareness of differences and diversity based on gender and sexual orientation. This requires positive action on the part of judges to not only avoid prejudice and bias in carrying out their duties, but to take care to be aware of differences in society. This is consistent with the protection of substantive equality. The requirements of the Jamaican Guidelines are almost identical to the requirements of the Code of Conduct of the Caribbean Court of Justice and the Barbados Guide to Judicial Conduct. The Code of Judicial Conduct of the Eastern Caribbean Supreme Court enjoins judges to 'hear and decide matters ...expeditiously and fairly', which includes the duty 'to avoid comment or behaviour that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of personal characteristics like race, gender, religion or national origin.'

Consequently, the guarantees of equality in the laws of the Caribbean jurisdictions are applicable to LGBT persons in the region and there is a corresponding obligation on the part of the courts and other actors in the criminal justice system to carry out their duties in a manner that respects those rights. These rights and responsibilities are articulated in varying forms at common law, in the Constitutions and in Judicial Codes and Guidelines.

Chapter 2

The Criminal Law on Homicide and Defences to Murder

Chapter 1 of the Report outlines the framework of the criminal law which is relevant to our research project. Here, we outline the relevant characteristics of the law on homicide in the Commonwealth Caribbean: the crime of murder and relevant defences to murder. The defences to be discussed are justifiable homicide and provocation. In this Chapter, we detail the circumstances in which each respective defence is applicable and the effect of each defence. This discussion will be descriptive, rather than normative, and provides useful context for the critique of the defences in Chapters 3, 4 and 5.

A. Murder

Murder is committed when one person unlawfully kills another person, with intention to kill or cause grievous (that is, really serious) bodily harm.⁴⁶ The law has long recognized that despite the presence of these elements, there may be circumstances that render the homicide justifiable or excusable and has developed defences that operate either as complete or partial defences to the crime of murder. In the appellate judgments reviewed for the purposes of this report the courts almost exclusively addressed the defendant's arguments in response to the charge of murder under the headings of the defences of justifiable homicide and provocation. Consequently, the analysis in Chapter 2 and the remainder of the report focuses on the law relating to those two defences, their application to homicide cases involving LGBT persons and proposals for law reform.

B. Justifiable Homicide

Justifiable homicide is a complete defence to murder; accordingly, if the judge(s) or jury accepts that the facts support the defence of justifiable homicide, the result is acquittal of the defendant. Justifiable homicide may arise in three circumstances: (1) where an executioner executes a criminal in strict conformity with the sentence of death imposed by a court of law; (2) where an officer of justice or another person acting in his aid kills a person who resists arrest, or kills an escaping felon; (3) where the homicide is committed in prevention of 'a forcible and atrocious crime'.⁴⁷ A 'sodomitical attack' has been held to constitute a forcible and atrocious crime in this sense, such that a justifiable homicide can be founded 'on the basis of a killing in repelling a sodomitical attack'.⁴⁸ However, there is 20th century authority that an advance by one man to another, 'in an attempt to commit sodomy' is not a satisfactory ground in modern times for justifiable homicide.⁴⁹

One critical issue regarding the features of justifiable homicide to repel a forcible and atrocious crime concerns the degree of force permitted. It has been held that 'if the intent to commit the forcible and atrocious crime is clearly manifested and there is an honest belief based on reasonable grounds that the commission of the crime can only be prevented by killing the assailant, the degree of force used in repelling the attack is generally irrelevant [see 1 Hale 484].'⁵⁰ However, Smith and Hogan have argued that in cases where someone acts to prevent a forcible and atrocious crime, 'presumably...it was a condition of the defence that the minimum of force should be used'. They also make the point that while an assault and battery is a forcible crime, 'it has never been suggested that it was lawful to kill to prevent it, unless it was of a felonious character.' Importantly for the purposes of considering the application of justifiable homicide as a 'homosexual advance defence', the authors make the further point that 'the mere fact that the attack is also felonious would hardly be a satisfactory ground at the present day for holding a killing to be justified.'⁵¹

C. Provocation

The second defence that is relevant to our discussion is the defence of provocation. Unlike justifiable homicide, provocation is only a *partial* defence to murder. If the facts support the partial defence of provocation, the verdict is one of manslaughter, which usually attracts a variable term of imprisonment. The law on provocation in the Commonwealth Caribbean exists under common law and statute.

There are two types of statutory provisions on provocation in the region. The first set of statutory provisions is modelled on section 3 of the Homicide Act 1957 (UK)⁵² and contains the basic requirements of the doctrine. Section 5 of the Offences Against the Person Act 1864 (Jamaica) is a typical provision:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

The corresponding provisions in the St. Lucia, Antigua and Barbuda and Trinidad and Tobago are identical.⁵³ The second category of legislation is more detailed, providing that a person may be convicted of manslaughter, rather than murder, if there is evidence that raises reasonable doubt whether the accused lost self-control by extreme provocation, and specifying categories that may constitute 'extreme provocation'. Such sections appear in legislation in Belize, Bahamas and Grenada.⁵⁴

There are no statutory provisions on the defence of provocation in Dominica so only the common law applies. This has the effect that in Dominica, words alone cannot constitute sufficient provocation.⁵⁵

There are two elements of the defence of provocation. The first is that 'the defendant was provoked into losing his self-control' and second, that the provocation was such that it was capable of causing the 'reasonable man' to do as the defendant did (that is, lose self-control and kill with the intention to kill or to cause grievous bodily harm).⁵⁶ The first element of the test is subjective as it amounts to a determination of whether there is evidence on which the jury can find that there was provocation that resulted in the defendant losing his or her self-control. There was traditionally a requirement that a specific 'triggering incident' provided the provocation, but it is now accepted that a series of events may provide the provocation, even without the existence of one particular trigger.⁵⁷ However, there must be a 'sudden and temporary loss of self-control'.⁵⁸ It has been held that a delayed reaction does not, as a matter of law, negative the defence of provocation.⁵⁹ However, it has also been held that 'it is open to the judge, when deciding whether there is any evidence of provocation to be left to the jury and open to the jury when considering such evidence, to take account of the interval between the provocative conduct and the reaction of the defendant to it. Time for reflection may show that after the provocative conduct made its impact on the mind of the defendant, he or she kept or regained self-control'.⁶⁰

The second element of the test is the objective element. This calls for an evaluation of whether the provocation was such that it could cause a 'reasonable man' to act as the defendant did. There are two features of this element of the test. The first aspect requires an assessment of the gravity of the provocation. The jury must consider how the ordinary person would have perceived the gravity of the provocation. In carrying out this assessment, the jury must conceive of the ordinary person as possessing all the relevant characteristics of the defendant.⁶¹ Such characteristics may include features such as age, sex, physical features and sexuality.⁶²

The second feature of this element of the test asks whether a provocation of that gravity would have caused a reasonable man to lose his self-control and act as the defendant did. The term 'reasonable man' is interpreted by the courts as a reference 'to an ordinary person, that is, a person of ordinary self-control'.⁶³ There is some uncertainty about the extent to which the ordinary person should be imbued with the characteristics of the defendant. The House of Lords of England and Wales held in *Smith (Morgan)* that in determining whether an ordinary person would have acted as the defendant did, the jury should apply the standard of control to be expected of the particular defendant, taking into account all the relevant circumstances of that defendant. In *Attorney General for Jersey v Holley* the Privy Council re-evaluated this issue and concluded that the position taken in *Smith* was 'erroneous'.⁶⁴ For the Privy Council in *Holley*, 'having assessed the gravity of the provocation to the defendant, the standard of self-control by which his [the defendant's] conduct is to be evaluated for the purpose of the defence of provocation is the external standard of a person having and exercising ordinary powers of self-control'.⁶⁵ In the opinion of the Privy Council in *Holley*, this aspect of the test should 'be judged by one standard, not a standard which varies from defendant to defendant. Whether the provocative act or words and the defendant's response met the 'ordinary person' standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable'.⁶⁶ Accordingly, the 'reasonable man has the power of self-control to be expected of an ordinary person of like sex and age' as the defendant but not possessing other characteristics, experiences or idiosyncrasies of the defendant.⁶⁷ The better view is that *Holley* now represents the correct statement of the law in the Commonwealth Caribbean, since *Holley* was decided by nine Law Lords (as opposed to the usual panel of five judges), this extraordinary panel was formed to consider the specific issue of the objectivity of the test to be applied, and specifically considered and declined to follow the decision in *Smith (Morgan)*,⁶⁸ the decision in *Holley* has even been preferred by the Court of Appeal of England and Wales in preference to the House of Lords decision in *Smith*, and *Holley* is a decision of the Privy Council which, as the final appellate tribunal for most of the Commonwealth Caribbean states, is more authoritative in the Caribbean jurisdictions.

In the Commonwealth Caribbean the defence of provocation has been raised in homicide cases involving LGBT persons where (1) the defendant killed his female partner after discovering that she was involved in a sexual relationship with another woman,⁶⁹ (2) the defendant killed the deceased and argued that the killing was a response to a 'homosexual advance' by the deceased,⁷⁰ and (3) the defendant and the deceased were in a same-sex relationship which ended in the defendant's killing of his partner.⁷¹

Chapter 3

The Incongruity of the Defence of Justifiable Homicide with Modern Criminal Law

Three main features of the legal history of the law on justifiable homicide will be examined. The first is the historical basis of justifiable homicide as a defence to murder. Secondly, we analyse the key principles of defences to the crime of murder which emerge from appellate judgments, criminal statutes and respected treatises and commentaries on criminal law, in particular, the principles of proportionality and reasonableness. The extent to which the defence of justifiable homicide incorporate these key principles will be examined.

A significant number of the Caribbean appellate judgments examined for the purposes of this project were decided on the ground of the defence of justifiable homicide. Further, this defence is the most consequential in that it results in acquittal of the defendant and amounts to a determination by the court that there was in fact no murder committed. Consequently, this part of the report will address the use of this defence in ‘homosexual advance’ cases in detail. It will be noted that the defence of justifiable homicide was outlined in Hale’s History of the Pleas of the Crown and Blackstone’s Commentaries, treatises dating back to the seventeenth and eighteenth centuries, respectively. These sources were cited in *Bartley*, the first Commonwealth Caribbean case that we have found that decided a homicide case involving LGBT persons on the basis of the defence of justifiable homicide.⁷² It will be established that there has been significant evolution of legal and socio-political thought since Hale’s treatises and Blackstone’s Commentaries and that the current state of the law as anachronistic.

The rationale for the defence was explained in Blackstone’s Commentaries in the following terms: ‘[f]or the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting.’⁷³ An acquittal for killing a person who is attempting to commit a felony could be justified on the ground that felons are liable to be sent to the gallows, so the victim was, in a sense, ‘living on borrowed time’.⁷⁴ Further, the killing of a person to thwart a felony was done to defend the King’s justice and, therefore, was a manner of execution sanctioned by the Crown. This rationale obviously bears little relation to the reality of the modern framework of the law and the state. Non-capital felonies are now routinely punished by imprisonment, rather than capital punishment, so this raises doubts about the continuing justification for the rule that killing to repel atrocious and felonious attack is justifiable. In particular, in the Caribbean jurisdictions, the crime of buggery is punishable by a term of imprisonment.⁷⁵ This rationale is, therefore, no longer relevant and helps to expose the current state of the law as anachronistic.

A. The Principles of Proportionality and Reasonableness in Criminal Law

The incongruity of the defence of justifiable homicide in prevention of ‘a forcible and atrocious crime’ is striking when it is compared with the current rules regarding self-defence and when it is measured against the general principle of proportionality or reasonableness,⁷⁶ which has developed in criminal law. Specifically, the rule that once there is a clear manifestation of an intent to commit a forcible and atrocious crime, the degree of force used is relevant, is out of place in the modern framework of criminal law defences.

Under Caribbean criminal law, in order for the defence of self-defence to be made out, there must be evidence that the force used by the defendant was reasonable in the circumstances as he or she perceived them. This requirement was enunciated by the Privy Council in the Jamaican case *Beckford v R* in which it was held that ‘the test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another’.⁷⁷ In *Palmer v R*,⁷⁸ Lord Morris explained that:

If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.

The centrality of the principle of reasonableness to the modern scheme of criminal law defences was noted by Professor Andrew Ashworth in *Principles of Criminal Law*. Ashworth states that the 'law on self-defence, as it is applied by the courts, turns on two requirements: the force must have been necessary, and it must have been reasonable.'⁷⁹ Ashworth argues further that,

The requirement that the use of force must be necessary should be limited, as it is in English law, by a further requirement that it must be reasonable in the circumstances. This flows directly from the notion that the doctrine of justifiable force requires a balancing of harms...For offences against the person, it means that deadly force should only be justified for a life-threatening attack and, perhaps, for certain crimes of extreme seriousness.⁸⁰

In considering the defence in the context of the principle of proportionality, it is also necessary to take into account the evolution of thinking since the writing of the ancient authorities on the subject. As was stated by the author of *Russell on Crimes and Misdemeanours*, published in 1958, '[i]n considering the law of this matter as it is set out by the older authorities such as Hale, Foster, Blackstone, and East, it should be remembered that the views of these authors rested upon the legal principles governing homicide as they existed at the period in which they were writing.'⁸¹ The author expected that 'courts would now hold that only such force can be justified as is reasonable under modern conditions'.⁸² This expectation is sensible for so long as the defence of justifiable homicide continues to form part of the law in a jurisdiction. Yet, Caribbean courts applying the defence of justifiable homicide in 'homosexual advance' cases have failed to update the law to take into account modern conditions, have marginalized the considerations of reasonableness and proportionality and have neglected to judge the reasonableness and proportionality of the use of force in such circumstances under modern understandings of the use of force by citizens. The problem is made clear on an examination of the Court of Appeal judgments that rely on justifiable homicide.

The case of *Bartley*, a decision of the Court of Appeal of Jamaica, the first reported Caribbean case that we have found on justifiable homicide in the prevention of a 'forcible and atrocious crime' bears this point out well.⁸³ The appellant and the deceased were prisoners who shared a prison cell. It was accepted that the deceased had attacked the appellant in circumstances that suggested he [the deceased] was trying to have sexual relations with the appellant. The defendant stated in court that while they were in a cell along with another man, the deceased requested that the appellant have sex with him, and when the appellant refused, the deceased dragged off the appellant's pants and began hitting the appellant with his fists. In course of the struggle, the appellant inflicted fatal wounds on the deceased. At trial, the judge left the issues of provocation and self-defence to the jury but declined to put the issue of justifiable homicide to the jury. The jury convicted the appellant of manslaughter (having apparently accepted the partial defence of provocation).

On appeal against his conviction, the appellant argued that the judge should have left the defence of justifiable homicide to jury. The Court of Appeal accepted this argument and allowed the appeal, acquitting the appellant. The Court held that 'an attempt to commit sodomy on the person of another is an attempt to commit a forcible and atrocious crime, and, if accompanied by acts of violence which clearly manifest an intention to commit the offence, can justify the killing of the attacker.'⁸⁴

The court elaborated that 'if the intent to commit the forcible and atrocious crime is clearly manifested and there is an honest belief based on reasonable grounds that the commission of the crime can only be prevented by

killing the assailant, the degree of force used in repelling the attack is generally irrelevant.⁸⁵ Though there is reference to an honest belief on reasonable grounds that the crime can only be prevented by killing, the concepts of reasonableness are negated by two other considerations. First, the court does not question the reasonableness of holding that the use of force resulting in death in response to a non-lethal attack (a 'sodomitical attack') was justifiable. Secondly, the court countered the reference to reasonableness by insisting that, once there was an honest belief based on reasonable grounds that killing was required to repel the attack, then 'the degree of force used...is irrelevant'. Even a charitable reading of this sentence leads to the conclusion that it is contradictory and would be confusing for judges and, especially, juries to apply. Further, this holding set the stage for later judgments which would emphasise the court's statement that the degree of force used is irrelevant.

Hence, in later cases, two threads of reasoning emerge that further erode the element of reasonableness. First, the judges in subsequent cases equate a sexual 'advance' with an 'attack'. This theme is examined in further detail below, but it is worth noting for the purposes of the current discussion that the notion that a homicide may be a justifiable response to a sexual advance completely removes the principle of reasonableness from the defence. Secondly, in subsequent cases, the judges have repeatedly held that, in response to a same-sex advance/attack the degree of force used is irrelevant. Such was the case in *Philbert*. The appellant Philbert and the deceased were in the deceased's room on the night of the killing. The deceased had made several advances to the appellant. The appellant stated that the deceased was trying to unbutton the appellant's pants, whereupon the appellant pushed him off the bed and kicked him repeatedly while he was on the floor. The deceased was discovered dead on the floor of his room two days later. The appellant was convicted of murder and sentenced to 18 years imprisonment.

The appellant appealed to the Eastern Caribbean Court of Appeal on the grounds, *inter alia*, that the trial judge gave inadequate directions on the defences of provocation and justifiable homicide. The Court of Appeal allowed the appeal, finding that the directions on provocation were adequate but that the judge failed to give adequate directions on justifiable homicide. The appellant's conviction for murder was quashed and he was discharged. In the course of delivering the judgment of the Court of Appeal, Edwards J.A. spoke directly to the necessity and reasonableness of use of force. Two passages of the judgment are crucial on this issue. In the first, it was stated held that:

The law is that the a person [sic] faced with a sodomitical attack may even pursue his assailant until he finds himself out of danger, but he must not strike blows except in self-defence. Neither does the relevant law require the degree of force used by the appellant in repelling the attack to be proportionate to the seriousness of the attack and the danger to the person attacked.⁸⁶

It is worth pinpointing that reasonableness and proportionality are excluded as requirements for the defence by the paradoxical idea that the defendant is entitled to 'pursue his assailant until he finds himself out of danger' and by the statement that the law does not require the degree of force to be proportionate to the seriousness of the attack or the danger to the defendant.

The subsequent passage is as follows:

The law requires that the appellant should have had, at the material time, an honest belief based on reasonable grounds that the deceased's sodomitical attack could only be prevented by pushing the deceased as he did and kicking him whilst he was on the floor trying to get up. If the appellant, when faced with the deceased's buggery attempt on him, had that requisite honest belief, the degree of force that he used would be irrelevant. *The appellant in such a case does not have to show that it was necessary for him to use force, even deadly force. Necessity for using deadly force against the perpetrator is presumed by the law in such circumstances. It would be the deceased's attempt to bugger him that justifies the appellant's use of force.*⁸⁷

Again, there is incoherence in the court's assessment of the law as the court's statement includes inconsistent requirements. Though the court pays lip service to the idea that the defendant should have 'an honest belief based on reasonable grounds' that it was necessary to act as he did, the court then proceeds to hold that the necessity of using deadly force is 'presumed by the law in such circumstances' and that the use of force is justified by the mere existence of the deceased's 'attempt' to have sexual relations with the defendant. This denial of a role for reasonableness in measuring the use of force has led to the acquittal of defendants in cases such as *Philbert*, who repeatedly inflicted brutal and severe wounds on the deceased, even after evidence suggests that the advance/attack had ceased and the deceased had been disabled. Thus, in *Philbert*, the Court of Appeal accepted as the truth the appellant's assertion that even after the defendant had pushed the deceased off the bed and the deceased was on the floor, the deceased was 'trying to get up' and that even at that stage, the only way to prevent further advances was to repeatedly kick the deceased, killing him. In accepting the appellant's evidence as uncontroverted, the court disregarded the medical evidence which put the appellant's version of events in doubt. The Court also concluded that since the degree of force was irrelevant, the jury should have been directed to 'acquit the appellant without reference to the medical evidence as to the nature and extent of the injuries... and their opinion as to how these injuries were inflicted.'⁸⁸ This case highlights in stark terms the impact of removing the requirement of reasonableness and proportionality from the determination of whether the use of force resulting in death was justifiable.

It is instructive that the other common law jurisdictions considered in this report no longer recognize the defence of justifiable homicide on the ground of prevention of a 'forcible and atrocious crime'. These jurisdictions have reformulated the defence and incorporated clearer requirements of reasonableness and proportionality in the use of force. In the UK, the ancient common law rules on justifiable homicide in the prevention of a crime were replaced decades ago by section 3 of the Criminal Law Act 1967.⁸⁹ Under this statutory rule, the question whether killing in the course of preventing a crime is justified is to be determined by questioning whether the degree of force used was reasonable in the circumstances of the case.⁹⁰ The section therefore rejects the notion that the degree of force used would be irrelevant, a notion adopted by the Caribbean cases on justifiable homicide as a response to a 'homosexual advance'.

The requirement of proportionality or reasonableness is also a requisite element of the deadly use of force in defence of oneself or another in Australia and Canada. Australian laws on the use of force in prevention of crime have 'rules incorporating expressly or by implication some measure of proportion.'⁹¹ In the Australian state of Victoria, for instance, section 462A of the Crimes Act 1958 (Vic) permits the use of force which is not disproportionate for the purpose of preventing indictable offences. In Tasmania, the Criminal Code (Tas) s 41 only permits such force as is reasonably believed to be necessary to prevent crimes involving immediate and serious injury to person or property. With respect to the Commonwealth of Australia, section 10.4 of the Criminal Code (Cth) permits such use of force in the prevention of crime which is a reasonable response to the circumstances as perceived by the person who uses such force. The concepts of reasonableness and proportionality permeate the provisions on justifiable use of force in the Criminal Code of Canada.⁹²

Judges in the Commonwealth Caribbean have generally applied the law on defences to murder in a manner that emphasises the principle of proportionality, as is evident for instance in the law on self-defence. However, the defence of justifiable homicide does not allow for observance of the principle that use of force should only be justified to the extent that it satisfies requirements of reasonableness or proportionality. Due to the traditional and lasting difficulties and incongruities plaguing the defence of justifiable homicide, it will be recommended that this defence be abolished.

B. Distinction between 'Advance' and 'Attack'

A further ground of criticism of the application of justifiable homicide to LGBT killings in the Caribbean is that the judges do not distinguish between 'homosexual advance' and 'homosexual attack'. In fact, the terms are used interchangeably. For instance, in *Philbert v The State*, the Court of Appeal found that the 'appellant was repelling

a buggery attack on him by the deceased⁹³ while also referring to the deceased's 'buggery advances' and 'sexual advances'.⁹⁴ This fails to create a distinction between an assault and an advance, and between a violent act and a non-violent act. The result is to create the impression that any advance by an LGBT person (at least to a non-LGBT person) is *ipso facto* an assault and violent. It would also lead to the conclusion that hostility, violence and homicide are appropriate responses to physical expressions of same-sex sexuality.⁹⁵ The failure to make this distinction may also perpetuate the false impression that gay men are 'aggressive predators'.⁹⁶

C. Findings and Conclusions

The defence of justifiable homicide should be abolished. As shown above, the defence as applied to homicide cases involving LGBT persons is anachronistic in the context of the modern criminal law. The defence fails to sufficiently incorporate principles such as reasonableness and proportionality, which permeate other aspects of the law on murder and defences to murder, and are features of the law on defences to murder in other Commonwealth jurisdictions.

The CCJ has stated that the common law is generally within the purview of the court to adapt to the changing needs of society and changing conceptions of fundamental rights.⁹⁷ Accordingly, the judges may abolish the defence on the basis that it is inconsistent with the current landscape of criminal law and with the rights guaranteed in the Constitutions.

Chapter 4

Perceptions of Sexuality in Adjudication and the Right to Equality

This part of the report will highlight the conceptions of gender and sexuality that are revealed in the reasoning of the appellate judges. Here, we will highlight the perception of expressions of male same-sex sexuality that is reflected in the cases. We will note that in appellate decisions in which a ‘homosexual advance’ defence has been accepted, there is an undercurrent of a belief and fear that same-sex sexuality is threatening and dangerous. This fear has implications for the court’s view of the main individuals in the case, that is, the deceased and the accused, which are reflected in the courts’ reasoning. This therefore reflects a stereotype of LGBT persons in that it adopts a generalized or preconceived view of the characteristics possessed by LGBT members of society.⁹⁸ This stereotyping results in the development and application of the law in ways that undermine the constitutional right to equality.

A. The Homicide Defences and Sexuality

The roots of justifiable homicide and provocation are steeped in attitudes which perceive the ‘reasonable’ or ‘ordinary’ person as male, and privilege the protection of the male body and masculine honour. Further, in applying both defences in cases involving LGBT persons, the judgments reflect a perception of the gay man as dangerous and of same-sex sexuality as inherently abnormal and criminal. Hence, a same-sex advance by a gay man is perceived as an ‘attack’ within the law of justifiable homicide as applied in the Caribbean. The gay man is cast in the role of perpetrator and attacker and the defendant is cast as ‘the [potential] victim of a homosexual act.’⁹⁹

The defence of provocation was originally constructed to address brawls and struggles between men. The defence has therefore been criticized on the basis that it justifies and legitimizes violence, and in particular, violence by men.¹⁰⁰ Analysis of the use of the historical defence in homicide cases reveals that provocation licensed rage in men and violent manifestation of that rage as a matter of defence of honour.¹⁰¹ Part of this defence of honour was the protection of the sexual security and inviolability of the man. This construction of the defence had and still has implications for the sexual activity and the sexual and physical autonomy of persons who do not fit within the category of heterosexual men. For instance, in the formulation of the modern doctrine of provocation, adultery by one’s wife with another man was included in the categories of conduct for which the provocation defence was available.¹⁰² Thus, in *R v Mawgridge*, a seminal case on the doctrine of provocation, Holt CJ explained,

when a man is taken in adultery with another man’s wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of the man, and adultery is the highest invasion of property, 1 Vent. 158...If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man’s posterity and his family, yet to kill him is manslaughter.¹⁰³

This category has been endorsed within the Caribbean in statutes¹⁰⁴ and judicial decisions, with courts finding that the killing of one’s wife could result in a lessening of the offence to one of manslaughter if the defendant acted in response to learning that his wife involved in sexual relations with another man.¹⁰⁵ This form of reasoning was displayed in the Trinidadian Court of Appeal decision in *Cox v The State*. The defendant Cox and the deceased woman were in a relationship when the defendant alleged that he discovered that the deceased was having a sexual relationship with another woman. The defendant was convicted of manslaughter for killing the deceased.¹⁰⁶ The *Cox* case does demonstrate that the courts are growing increasingly aware of the need to display disapproval of homicidal violence in general and violence against women. This was evident in the court’s admonition of the ‘alarming upsurge of violence generally and in domestic violence in particular in this society’. The court took into

account this context in determining the sentence for the accused, while noting that ‘the time has come to set new [sentencing] guidelines and so reflect society’s abhorrence of the gross violence’ in the country. Yet, despite the Court of Appeal’s criticism of the upsurge in violence, the court nonetheless indicated that the sexual jealousy of the defendant on learning of the relationship between his wife and another woman would be ‘critical to any defence to a charge for murder’¹⁰⁷ (and not merely relevant to sentencing).

More specifically, the particular requirements of the defence of provocation have been criticized for manifesting a gender bias.¹⁰⁸ The requirement that the defendant must have experienced a ‘loss of self-control’ privileged men, particularly men in a position of relative power in relation to their victim. This criticism of the defence has been reinforced by reports conducted in countries in the Commonwealth. For instance, the Victoria Law Commission revealed that expert evidence supported the argument that the defence had a differential impact based on gender and power. It reported that:

The association of provocation with typical male responses is said to make it a defence which is more suited to men than to women, even taking into account changes that have occurred over the past 50 years. A sudden violent loss of self-control in response to a particular triggering act is seen to be the archetypal male response to provocative conduct.¹⁰⁹

The ‘loss of self-control requirement’ has also been shown to privilege heterosexuality and to excuse ‘defendants’ lethal expression of outraged manhood against their gay male victims.’¹¹⁰ In the current law of provocation, the notion is still perpetuated that ‘a heterosexual man’s honour is insulted by a homosexual advance and he must retaliate accordingly to counter its effect.’¹¹¹

The ‘reasonable man’ test has also been subjected to strong criticism. The ‘reasonable man’ test has been characterised as an ‘ordinary man’ standard. This ‘ordinary man’ is first, a man (as the name suggests) and secondly, heterosexual.¹¹² The standard is one that divorces individuals from their overall social reality, which may be influenced by gender, sexuality and other factors.¹¹³ This formulation renders it difficult for the courts to take sufficient account of differences based on gender and sexual orientation, as was reflected in the Privy Council decision in *Attorney General for Jersey v Holley*. The Privy Council expressed the view that ‘powers of self-control possessed by *ordinary* people vary according to their age and, more doubtfully, their sex. These features are to be contrasted with abnormalities, that is, features not found in a person having ordinary powers of self-control. The former are relevant when identifying and applying the objective standard of self-control, the latter are not.’ The inclusion of sex appeared tentative and there was no reference to taking account of the sexual orientation of the individual.

Thus the standard of ‘ordinariness’ is one that does not take into account the socio-political realities of same-sex sexuality, women, battered women and the poor.¹¹⁴ Further, the standard is one that imports cultural values and in a culture laden with stereotypes of, and bias against, same-sex sexuality, the deceased gay man would be perceived as anything but ordinary, as part of a sub or counter-culture and the balance of ordinariness would privilege the defendant. Thus, the cases represent an ‘ordinary man’ as one who reacts to overtures from a person of the same sex with repulsion and violence. This was on display in *Marcano v The State*, a Court of Appeal decision from Trinidad and Tobago. The deceased, Christopher Lynch, was killed by the appellant Marcano and Marcano’s friend Nairoon. There was evidence that on the night of the homicide, Marcano and Nairoon were at Lynch’s home, where the three were drinking and watching television. It was alleged that Lynch made a sexual advance towards Nairoon, which Nairoon rejected. An argument developed and Nairoon ran up the stairs of Lynch’s home to arm himself with a ‘Chinese chopper’. Marcano then held Lynch while Nairoon chopped Lynch repeatedly with the weapon. Marcano argued that his actions were in defence of his friend Nairoon. At trial, the jury found Marcano guilty of murder. He appealed against his conviction, partly on the grounds that the trial judge did not leave the issue of provocation to the jury. During the Court of Appeal hearing, Sharma CJ remarked that ‘it is well to remember that

in this particular case... this incident started ... with the rebuff or the repulsion of the overtures made by Lynch [the deceased] to these two young men.' In the course of delivering the Court of Appeal's judgment allowing the conviction and acquitting Marcano, Sharma CJ appealed again to the sentiment of repulsion against the unnatural practices of gay men and a perpetuation of the notion that the response of the 'ordinary man' to invitations to engage in such 'unnatural acts' is to react with deadly violence. In the view of Sharma CJ, '[t]his is a case where... the acts themselves were so unnatural as to create in the minds of any right-thinking person that they would have caused serious reaction as indeed these boys had reacted.'¹¹⁵

The reasoning in the Caribbean homicide cases involving LGBT persons also depict a perception of same-sex sexuality that views it not as an intrinsic state or characteristic, but rather, as an act that can be perpetrated by one person against another. An example of this approach to same-sex sexuality is evident in *Attorney General v Jones*, in which the Court of Appeal found that the sentence of three years' probation imposed by the trial judge (taking into account the five years spent by the appellant in custody awaiting trial) was not overly lenient and was appropriate in all the circumstances. The Court of Appeal stated one reason for its decision as follows:

there is no dispute by the Crown that there was a homosexual advance to him shortly before he shot the deceased and that was not the only such advance. It was pointed out to counsel for the applicant that had he killed him immediately, that would be a case of self-defence, because one is entitled to use whatever force is necessary to prevent one's self being the *victim of a homosexual act*.¹¹⁶

As a consequence of this perception, it follows that a reasonable response from an individual confronted with an invitation to engage in 'a homosexual act' is to react violently and the response from the institutions of the state is to recognize a defence for the violent reaction within the laws of the state.

Courts have made some efforts to remedy the flaws in the defence of provocation and respond to criticism, including those highlighted above. For instance, the cases now allow for a 'slow-burn' element in the defence, which recognizes that there may be delay between provocation and the act resulting in death.¹¹⁷ This development of the law would therefore be useful in cases in which battered women were charged with murder for killing their partners.¹¹⁸ However, the basic requirements of the defence may still produce results that reflect stereotypes of disfavoured groups. In particular, the fact that the reasonable man test remains and that there is still an excusatory defence for lack of self-control resulting in murder, still provides a venue for legitimization of violence against groups that have not benefitted from general cultural acceptance.

B. The 'homosexual advance defence' and the Right to Equality

The use of the 'homosexual advance defence' in the defence of provocation is not a new phenomenon. It was raised in *R v McCarthy* in 1954, where the defence of provocation was unsuccessful because the court held that the accused acted under the influence of intoxication and was therefore not within the proper assessment of the 'reasonable man'.¹¹⁹ However, Lord Chief Justice Goddard, who delivered the judgment of the court in the case, expressed support for the argument that violence on the part of the defendant would have been an excusable response to an advance by the deceased man. In the words of the Lord Chief Justice, 'this provocation would, no doubt, have excused ... a blow, perhaps more than one'.¹²⁰

In other countries in the Commonwealth, there is increasingly recognition by judges, legal analysts and policymakers that the 'homosexual advance defence' should not be an acceptable category within the defence of provocation. Among the judicial branch, the Canadian Supreme Court has perhaps provided the clearest and boldest statement rejecting the 'homosexual advance defence' and the heterosexist notions of male honour as part of the doctrine of provocation. It has been noted that most invocations of 'homosexual advance defence' at the appellate level in Canada are rejected.¹²¹ Moreover, in the recent case *R v Tran*, Court made the argument that,

the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the Canadian Charter of Rights and Freedoms. For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance. Similarly, there can be no place in this objective standard for antiquated beliefs such as 'adultery is the highest invasion of property' (*R v Mawgridge* [1707] 84 ER 1107 at 1115), nor indeed for any form of killing based on such inappropriate conceptualisations of 'honour'.¹²²

In Australia, analysts have undertaken reviews of judicial decisions and statute law on the 'homosexual advance defence' and have arrived at conclusions similar to those in this report. The states of Victoria, Tasmania, and Western Australia and the territories of the Northern Territory, and the Australian Capital Territory (ACT) have reformed the law of provocation.¹²³ Tasmania, Victoria and Western Australia abolished the defence of provocation in 2004, 2005, and 2008,¹²⁴ respectively, while the ACT and the Northern Territory have enacted legislative provisions excluding non-violent sexual advances from the defence of provocation.¹²⁵ In Queensland, the defence was amended to reduce its availability in cases of 'sexual possessiveness or jealousy'¹²⁶ but the Government of Queensland opted not to expressly exclude cases involving non-violent sexual advances.¹²⁷ New Zealand abolished the defence of provocation in 2009, while in the United Kingdom, the provocation defence was replaced with the defence of 'loss of control'.¹²⁸

In the Caribbean, the impetus to address the implications of homicide defences is particularly strong, owing to the constitutional rights and obligations outlined in Chapter 1. As established in Chapter 1, the constitutional rights to equality are applicable to LGBT persons in the Caribbean and there are principles requiring fair and equal treatment by judges in discharging their duties in all cases. The correct approach in measuring the laws relating to homicide defences against the requirements of equality is to adopt the substantive view of equality.¹²⁹ Applying this approach would require that judges and policymakers take into account the history of the gendered development of the defences to homicide, the differential impact of the operation of the defences between different genders and different sexual orientations, the disadvantageous impact that these defences have on members of the LGBT community, and the overall legal and social context that continues to condone and perpetuate prejudice against LGBT persons.

It is clear that the defence of justifiable homicide violates the right to equality. The defence of justifiable homicide to prevent a 'forcible and atrocious crime' is inconsistent with Caribbean constitutions because in its modern instantiation in the Caribbean, it is solely used to defend the killing of gay men. The only Caribbean appellate cases that have been located in which the defence of justifiable homicide was successful were those in which the deceased was a gay man. Accordingly, though the defence is ostensibly neutral on the surface, it has a clear discriminatory impact on gay men. Further, rather than alleviating the impact of the prejudice against LGBT persons in society, the law and its application by the courts, perpetuates this prejudice and effectively targets gay men as worthy of not only opprobrium, but also death.

In addition, the court's characterizations of gay men in the Caribbean justifiable homicide cases have implications for the right to equality. The cases display an acceptance and legitimization of prejudice against LGBT persons and a failure to take account of societal differences in the treatment of, and interaction with, LGBT persons. Thus, we see gay men being represented as inherent threats to masculinity and society, and as criminals. The Court of Appeal in the *Philbert* case referred to a deceased gay man as 'the perpetrator',¹³⁰ hence casting the deceased, who would ordinarily be conceived as 'the victim', in the role of 'the criminal'.

The law on provocation, as applied in homicide cases involving LGBT persons is also inconsistent with the court's duty to respect and protect equality. The provocation defence is applied in a manner that treats gay victims differently from other victims. The problems lie in the use of a non-violent sexual advance as an acceptable basis

for the defence of provocation and the analysis used in the cases which suggest that the success of the defence is due to the fact that the sexual advance was made a member of the same sex. This, therefore, indicates that the defence operates with a discriminatory impact on gay men, which is contrary to the constitutional guarantees of equality.¹³¹ The *Marcano* case presents a useful example. The Chief Justice in the *Marcano* case repeatedly stated that the defendants would have been repulsed by the deceased's 'overtures', that 'there could be nothing more reprehensible' and '[t]hat is the sort of thing that sends people crazy, in a frenzy'.¹³²

Further, the analysis in *Marcano* was indicative of stereotypical perceptions of gay men. In the *Marcano* case in which the defence of provocation was successfully argued in the Court of Appeal, the deceased was repeatedly described as an 'older man' and 'a bigger man', while his killers were characterized as 'boys who were not wise to the world'. [The two defendants were actually aged 17 and 20]. These characterizations appear to project a stereotype of gay men as a corrupting influence on youth. Thus, the characterizations of gay men in these cases reflect perceptions of gay men that suggest that they are not to be treated as other victims of crime; in fact, they are characterized as representing a danger to society. This gives rise to tension between the judgments and the constitutional right to equality and the responsibilities of fair and equal treatment arising under the Judicial Codes and Guidelines.

C. Findings and Conclusions

All Judicial Codes or Guidelines in the Commonwealth Caribbean should expressly include sexual orientation as a prohibited ground of bias or prejudice. In jurisdictions in which there is as yet no judicial code or guidelines, such a code should be drafted along the lines of the Code of the Caribbean Court of Justice.

The law on provocation should be reformed to exclude non-violent sexual (including same-sex) advances as a basis for the defence of provocation. This reform should preferably be accomplished by legislation, or failing that, by a practice direction. This mode of reform would put the matter beyond doubt and make it clear that the use of non-violent sexual advances as a basis of provocation is not for the discretion of the court.

In provocation cases where the accused claims to have been the recipient of a homosexual advance, judges should be required to instruct juries that in applying the standard of the 'ordinary person', they must not ascribe to the ordinary person the characteristic of being homophobic or of fearing gays and lesbians. It should also be made clear to juries that jealousy in response to infidelity is not a basis for a provocation response. This would affect cases in which the accused and deceased are in an opposite-sex relationship as well as those in which they were in a same sex relationship.

The proposals regarding provocation are more modest than proposals outlined in some other reports in the Commonwealth. The Report of the Western Australian Law Commission, for instance, recommended repeal of the defence of provocation. However, the purview and terms of reference of reports which recommended abolition of the defence were wider than those of the current project, encompassing wide-scale consideration of defences to murder. The scope of this project is narrower and since it does not include detailed review of all classes of cases in which provocation is used in the Commonwealth Caribbean, the recommendations do not go beyond the boundaries of addressing LGBT cases, though some proposed reforms may incidentally impact other areas of application of the defence.

Chapter 5

Violence against LGBT Persons and the Rights to Life and Due Process

This section of the report measures the defences of provocation and justifiable homicide, as applied in the cases reviewed, against the requirements of the constitutional rights to life and due process in Commonwealth Caribbean jurisdictions.

A. Right to Life

As shown in Chapter 1 above, the constitutional obligations arising from the right to life include the duty to design a criminal law framework that accords substantial respect for, and protection of, life. Accordingly, the definition and application of defences to murder fall to be measured against the constitutional obligations arising from the right to life. This section of the Report draws on the discussion of the defences to murder in the previous sections to demonstrate that both the defence of justifiable homicide and the defence of provocation as applied to homicide cases involving LGBT persons are inconsistent with the right to life.

The defence of justifiable homicide offends against the right to life in that the defence shows scant regard for the life of those who are gay. The defence fails to meet the requirements of the limitations permitted by the Constitution because, as outlined in Chapter 3 of this Report, it does not incorporate a requirement of reasonableness or proportionality, and therefore, cannot be considered ‘reasonably’ or ‘demonstrably justified’. By maintaining this defence, the state fails to fulfil its duty to protect the life of its citizens through the substantive law and through the actions of state institutions, including the courts. The defence of provocation as applied in these cases also falls short of constitutional requirements insofar as it allows a defendant to succeed on the defence by arguing that he killed in response to a non-violent sexual advance. *Marcano* provides an example of a successful plea of provocation in such circumstances. As discussed above, there was no evidence that the deceased used violence in making a sexual advance towards the two men who killed him. Nonetheless, the accused had the benefit of the provocation defence and was ultimately acquitted by the Court of Appeal after that court held that the trial judge erred in not leaving the issue of provocation to the jury. Again, the law’s response to this killing forms part of the assessment of the state’s respect for and protection of the right to life. The state’s response of allowing a partial defence in such circumstances where the act of killing is in response to a non-violent sexual advance, is arguably inconsistent with the state’s duties to protect the right to life.

In addition to the constitutional implications, there may be a negative criminological impact of the operation of the defences of provocation and justifiable homicide in cases involving the killing of LGBT persons. At a basic level, the defences provide a large loophole for alleged killers of LGBT persons. Further, the availability of the defences may permit the masking of offences and a cloak for murder which was motivated by reasons other than a sexual advance or assault. Noteworthy in this light are cases in which a ‘homosexual advance defence’ was successful but there were acts of theft that accompanied the homicide.¹³³ Theft of the deceased’s property was also a feature of *Philbert* and *Marcana*. The presence of these defences may provide carte blanche to offenders.

Further, authorities should take note of incidents which arose in Dominica subsequent to the well-publicised decision in *Philbert*. In one case it was reported that the accused man was charged with manslaughter but claimed that the deceased man had made ‘sexual advances’ to him, ‘tried to kiss him and touch him in a sexual manner’. The accused claimed that a fight ensued between him and the deceased, the accused found a weapon and struck the deceased with it and then managed to escape and report the incident. The Director of Public Prosecutions of

Dominica informed the court that he had to withdraw the charge of manslaughter as a consequence of the Court of Appeal's acquittal of *Philbert* on the defence of justifiable homicide.¹³⁴ The second incident arose from the trial of David St. Jean in Dominica, who was charged with murder of Clement James. It was reported in May 2012, a month after the reasoning of the Court of Appeal in *Philbert* was released, that St. Jean was arguing in court that the deceased made sexual advances to him, that a fight ensued between himself and the deceased and that he killed the deceased in the process.¹³⁵ The potential effects of the elements and application of the defences on violence against LGBT persons and others in society does not only provide evidence of the state's failure to protect and secure the right to life, but also undermines safety and security in the state as a practical matter.

B. The Right to Due Process under the Law or Protection of the Law

An element of the right to due process that is implicated by the cases reviewed is legal protection of the rights and interests of LGBT victims. Particularly relevant in this discussion is the institutionalized secondary victimization that may result from the criminal justice system's response to violent crimes. This occurs in relation to state responses to homicide cases against LGBT persons in the Caribbean where the institutions administering the criminal justice system fail to take due account of and give proportionate weight to the rights of the victim.¹³⁶ In particular, the rights of the victim are violated if the state fails to appropriately regard the victim as a victim because of gender or sexual orientation.

The application of homicide defences to Caribbean cases relating to homicide against LGBT persons fail victims in these ways. As detailed above, the defences of provocation and justifiable homicide give insufficient regard to the need for proportionality insofar as a non-violent sexual advance can form the basis for both of these defences. They also fall short of the standards required of courts and other state institutions in protecting victims in that the cases generally show insufficient regard for the life and loss of life of the LGBT person, some of these cases suggesting that the state regards the life of an LGBT person as less deserving of dignity and protection. The extent to which the state withdraws due process and protection of the law from LGBT persons is particularly manifested in the cases in which the court characterizes the deceased LGBT persons as the perpetrator and criminal. For instance, in *Philbert*, the deceased was referred to by the court as 'the perpetrator' and the deceased in *Marcano* was described as being a threat, characterized as having an advantage in size and age over his killers, with insufficient attention paid to the fact that there were two men who killed the deceased, one armed with a 'Chinese chopper', while the deceased was unarmed. In these ways, the application of these defences limit and interfere with redress for the killing of an LGBT person. They fail to fulfil the basic requirement of fully acknowledging the deceased as a victim and also limit access to redress on the basis of the identification of the deceased as an LGBT person.

C. Findings and Conclusions

As recommended in Chapter 3, the defence of justifiable homicide should be abolished. This is necessary to accord sufficient respect and protection of the rights to life and due process of LGBT persons and to fulfil the state's obligations to design a criminal justice system that is consistent with respect for the right of every individual not to be deprived of life without due process of the law. A non-violent sexual advance should be excluded as a basis for the defence of provocation. Again, this development would be consistent with the idea that the neither the criminal law nor the constitutional law of the state sanctions disproportionate killing.

Chapter 6

Summary of Findings and Conclusions

The following is a list of the main findings and conclusions that have been developed based on the findings of this research project:

Reform of the Relevant Criminal Law

1. The defence of justifiable homicide should be abolished. This may be achieved either by judicial notice of change in legal and social circumstances since the inception of this defence or by legislative action.
2. The law on provocation should be reformed to exclude the availability of non-violent sexual advances (including same-sex sexual advances) as a basis for a defence of provocation.

Constitutional Reform

3. The constitutions of the Commonwealth Caribbean jurisdictions should be amended to prohibit discrimination on grounds of sexual orientation and/or there should be enactment of bills of rights creating a statutory duty for public authorities to carry out their duties without discrimination on grounds including sexual orientation. Among other beneficial effects, it is expected that the prohibition of discrimination on the ground of sexual orientation, in conjunction with judicial codes of conduct barring discrimination on such grounds, would improve the reasoning in homicide cases involving LGBT persons. Specifically, these reforms may improve the instructions to the jury and appellate judgments in cases where provocation is raised as a defence.

It is expected that judges and other actors in the criminal justice system would be part of the conversations and consultation processes on the operation of the Constitution and proposals for reform of the Constitution. The input of judges would be particularly useful with respect to their judicial duty to uphold equality before the law and equal protection of the law. Judges would be in the position to make a compelling case for the need to expand (and make explicit) rights protection for LGBT members of society. In Jamaica and the countries subject to the appellate jurisdiction of the Caribbean Court of Justice (Barbados, Guyana and Belize) the Judicial Conduct Guidelines of Jamaica and the Code of Judicial Conduct of the CCJ, this case is magnified by the principles in those codes that judges should observe equality of treatment in discharging their duties and that they should be aware of diversity in society arising from sexual orientation.

Judicial Functions and Conduct

4. There should be the introduction of codes of judicial conduct for all Commonwealth Caribbean jurisdictions based on the Code of Judicial Conduct of the Caribbean Court of Justice, including the requirement that in the conduct of the functions, judges must avoid prejudice on the basis of sexual orientation.
5. Formal sentencing guidelines should be introduced in all Commonwealth Caribbean jurisdictions. These guidelines should emphasise the principle of proportionality in sentencing and the judicial duty to make fair decisions which are not influenced by bias or prejudice. Such guidelines would be generally beneficial to the criminal justice system and, more specifically, improve sentencing in homicide cases involving LGBT persons, including cases where sentencing follows the acceptance of the partial defence of provocation.

Continuing Research

6. There should be continuing research on the following issues: (i) the criminal justice system's treatment of LGBT persons and violence against such persons; (ii) the impact of the law on murder and defences to murder on members of the LGBT community; (iii) the extent to which the law on murder and defences to murder is inconsistent with constitutional rights and responsibilities and (iv) patterns in sentencing in homicide cases, particularly to detect whether there are trends that indicate disfavour towards particular groups within societies, including LGBT persons.

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- ¹ See Martin Bulmer, 'Sampling' in Martin Bulmer and Donald Warwick (eds), *Social Research in Developing Countries* (UCL PRESS 1993) 94. See further on the impact of problems with access on research design, Norman Blaikie, *Designing Social Research* (Polity Press 2000)
- ² On thematic analysis, see Alan Bryman, *Social Research Methods* (OUP 2012 4th edn) 578-81.
- ³ On modern legal research methodology, see Council of Australian Law Deans, 'Statement On The Nature Of Legal Research' (October 2005) <http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf> (accessed 16 February 2013.) Christopher McCrudden, 'Legal research and the social sciences' (2006) 122 LQR 632.
- ⁴ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 Univ of Richmond Law Review 99, 127; Christopher McCrudden, 'Human Rights and Judicial Use of Comparative Law' in Esin Orucu (ed), *Judicial Comparativism in Human Rights Cases* (U K National Committee of Comparative Law and British Institute of International and Comparative Law) 18-20.
- ⁵ See, eg, *Thomas v Baptiste* [2000] 2 AC 1 (n 96) 22; *Independent Jamaica Council for Human Rights Ltd v Marshall-Burnett* [2005] UKPC 3, [2005] 2 AC 356 [22]; *AG and Others v Joseph and Boyce* [2006] 69 WIR 104 (CCJ) [108].
- ⁶ *Keenan v UK* App. No. 27229/95, judgment of 3/4/2001, ECtHR (Third Section) [89]. See also *Osman v UK* (2000) EHRR 245 (ECtHR).
- ⁷ *Oneriyildiz v Turkey*, App. No. 48939/99, judgment of 30/11/04, ECtHR (Grand Chamber) [89].
- ⁸ Section 138(2) of the Constitution of Guyana reads, in relevant part:
- ...a person shall not be regarded as having been deprived of his life in contravention of this article if he dies as the result of the use of force to such extent as is reasonable justifiable in the circumstances of the case-
- (a) for the defence of any person from violence or for the defence of property;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) for the purpose of suppressing a riot, insurrection or mutiny; or
 - (d) in order lawfully to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.

Section 12 of the Constitution of Barbados 1966, section 4 of the Constitution of Antigua and Barbuda 1981, section 4 of the Constitution of St Christopher and Nevis 1983, section 2 of the Constitution of St Lucia 1979, section 2 of the Constitution of St Vincent and the Grenadines 1979, section 2 of the Constitution of Grenada 1973, section 2 of the Constitution of Dominica 1978 and section 16 of the Constitution of the Bahamas 1973 are in very similar terms.

9 *Francois v AG of St. Lucia* (unreported) [24 May 2001] (HC, St. Lucia).

10 Margaret DeMerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (University of the West Indies, Barbados 1992) 122.

11 See, eg, section 141(1), Constitution of Guyana 1980; section 7(1) of the Constitution of Antigua and Barbuda 1981; section 7, Constitution of Belize 1981; section 5, Constitution of St. Lucia 1979; section 15, Constitution of Barbados 1966; section 5, Constitution of Dominica 1978.

12 *A v UK* (App. no. 25599/94) [1998] ECHR 25599/94 [22].

13 See, eg, s 4(2), Constitution of Antigua and Barbuda, s. 4(2), Constitution of Belize.

14 See s 13(2), Constitution of Jamaica 1962.

15 See also ss 13(3)(r) and 16, Constitution of Jamaica.

16 Section 3 of the Constitution of Saint Christopher and Nevis is representative:
3.- Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, birth, political opinions, colors, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

a) life, liberty, security of the person, equality before the law and the protection of the law

17 *Thomas v Baptiste* (n 5); *Lewis v AG* [2001] 2 AC 50; *Joseph and Boyce* (n 5).

18 *Thomas* (n 5) 22.

19 *Kareem v AG* (Civ App No 71 of 1987) (December 21, 1990).

20 UNGA Resolution, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34 available at <http://www.un.org/documents/ga/res/40/a40r034.htm> [accessed 10 March 2013].

21 UN Office on Drugs and Crime, Handbook on Justice for Victims, 1999, available at: <http://www.unhcr.org/refworld/docid/479eeb1a2.html> [accessed 12 March 2013].

22 *R v Home Secretary, ex parte Brind* [1991] 1 AC 696; *Joseph and Boyce* (n 5) [54] – [55].

23 *Goodridge v The Queen* VC 1998 CA 9 (January 12, 1998).

24 Ministry of Justice of Jamaica, Towards A Victims' Charter, (19 July 2006) [accessed 11 March 2013] 3.

25 Handbook on Justice for Victims (n 19) 9.

26 *ibid.*

27 Towards A Victims' Charter (n 21) 11.

28 Section 149D(2), Constitution of Guyana.

29 Section 16 of the Constitution of Belize and section 20 of the Constitution of Bahamas are drafted in similar terms.

30 Constitution of Dominica 1978 s 13(2); Constitution of St Lucia 1979 s 13(2).

31 Section 149, Constitution of Guyana, Section 13(3)(i), Constitution of Jamaica.

32 (1980) 32 WIR 395 (CA, T&T) 424-27 (Kelsick JA).

33 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC, Bermuda) 329 (Lord Wilberforce).

34 *Fisher* [n 33] 328.

35 *Boyce v R* [2004] UPKC 32, [2005] 1 AC 400 (PC) [29].

36 [2000] 5 LRC 183, 187-89.

37 *ibid* 189, citing *Dow v AG* [1992] LRC (Const) 623 (CA, Botswana).

38 Section 13(3)(i)(i), Constitution of Jamaica.

39 Report of the Joint Select Committee on its Deliberations on the Bill Entitled An Act to Amend the Constitution of Jamaica to Provide for a Charter of Rights and For Connected Matters.

40 *Yassin v Attorney of Guyana* GY 1996 CA 3, 30 August 1996 (Fitzpatrick J.A), citing Bhagwati J. in *Gandhi v Union of India* A.I.R. [1978] SC 597; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 3 All ER 411 (n 57) [9]; Jeffrey Jowell, 'Is Equality a Constitutional Principle' [1994] 47 CLP 1.

41 Henry Shue, *Basic Rights* (Princeton University Press 1980) 51; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2009) 69.

42 Sandra Fredman, *Discrimination Law* (Oxford University Press 2001) 2; Caroline Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' [2006] 14 American University Journal of Gender, Social Policy and the Law' 27, 29.

43 Fredman, *Discrimination Law* [n 42] 2; Forell [n 42] 29.

44 BZ 2005 CA 5 (9 March 2005) [36]-[38].

45 Se-shauna Wheatle, 'The Rights to Equality and Non-Discrimination and the Jamaican Charter of Fundamental Rights and Freedoms' (2012) *West Indian Law Journal* 126, 132.

46 *Moloney* [1985] AC 905; *Hancock & Shankland* [1986] AC 455; *Nedrick* [1986] 1WLR 1025; *Woollin* [1999] AC 82; *Matthew & Alleyne* [2003] 2 Cr App R 30.

47 J C Smith and Brian Hogan, 'Criminal Law' (Butterworths 1965 1st edn) , 230-32; T R Fitzwalter Butler and Marston Garsia, 'Archbold Pleading, Evidence and Practice in Criminal Cases' (Sweet & Maxwell, 1966 36th edn) §2550.

48 *R v Bartley* [1969] 14 WIR 407 (CA, Jamaica) 411.

49 *McCluskey v HM Advocate* 1959 SLT 215 (High Court of Justiciary, Scotland).

50 *Bartley* [n 48].

51 Smith and Hogan [n 47] 232.

52 Section 3 has since been repealed by section 56(2)(a) of the Coroners and Justice Act 2009 (UK).

53 Section 91, Criminal Code 2004 (St. Lucia); section 12, Offences Against the Person Act 1873 (Antigua and Barbuda);

section 4, Offences Against the Person Act 1925 (Trinidad and Tobago).

54

Typical of this set of provisions are sections 119-120, Criminal Code 1981 (Belize):

119. A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter, and not of murder, if there is such evidence as raises a reasonable doubt as to whether-

- (a) he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 120; or
- (b) he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which he was justified in causing he acted from such terror of immediate death or grievous harm as in fact deprived him, for the time being, of the power of self-control; or
- (c) in causing the death he acted in the belief, in good faith and on reasonable grounds, that he was under a legal duty to cause the death or to do the act which he did; or
- (d) in the case of woman who causes the death of her child recently born, she [while not insane] was deprived of the power of self-control by a disease or disorder of mind produced by childbearing.

120. The following matters may amount to extreme provocation to one person to cause the death of another person, namely-

- (a) an unlawful assault or battery committed upon the accused person by the other person, either in an unlawful fight or otherwise, which is of such a kind either in respect of its violence or by reason of words, gestures or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control;
- (c) the assumption by the other person, at the commencement of an unlawful fight, of an attitude manifesting an intention of instantly attacking the accused person with deadly or dangerous means or in a deadly manner;
- (d) an act of adultery committed with or by the wife or husband of the accused person, or the crime of unnatural carnal knowledge committed upon the accused person's wife or child;
- (e) a violent assault or battery, or any sexual offence, committed upon the accused person's wife, husband, child or parent, or upon any other person in the care or charge of the accused person;
- (f) any thing said to the accused person by the other person or by a third person which were grave enough to make a reasonable man to lose his self-control.

There are similar provisions in sections 299-301, Penal Code 1924 (Bahamas) and sections 239-241 (c) Criminal Code 1987 (Grenada).

55

Holmes v DPP [1946] 2 All ER 124, 128; Philbert v The State [April 30, 2012] (Eastern Caribbean CA, Dominica). [21].

56

Attorney General v Holley [2005] 2 AC 580 (PC, Jersey) [5]-[6]; Jeremy Horder, *Provocation and Responsibility* (Oxford University Press 1992) 1.

57

See, eg, *R v Simpson* [1957] Crim LR 815; *Julien v R* [1970] 16 WIR 395 (CA, Trinidad and Tobago) 400; *R v Humphreys* [1995] 4 All ER 1008, 1023-24.

58 *R v Duffy* [1949] 1 All ER 932, 932 ; *Lee Chun-Chuen v R* [(1963] 1 All ER 73, [1963] AC 220; *Julien* (n 53) 400; *R v Thornton* [1992] 1 All ER 306, 313-14.

59 *R v Ahluwalia* [1992] 4 All ER 889, 896.

60 *ibid* 895 (Lord Taylor).

61 *DPP v Camplin* [1978] AC 705, 718 (Lord Diplock) 726 (Lord Simon).

62 *ibid* 726 (Lord Simon); *R v Morhall* [1996] AC 90, 97-99; *Holley* (n 56) [11].

63 *Holley* (n 56) [7] (Lord Nicholls of Birkenhead). See also *DPP v Camplin* (n 61) 717 (Lord Diplock), 726 (Lord Simon of Glaisdale).

64 *Holley* (n 56) [23].

65 *ibid* [18].

66 *ibid* [22] (Lord Nicholls).

67 The relevance of the defendant's sex was considered 'doubtful': [13] (Lord Nicholls). This is discussed in more detail in Chapter 4.

68 Andrew Ashworth, 'Appeal: Precedent - Privy Council decision overruling decision of House of Lords' [2006] Crim LR 629, 630.

69 *Cox v The State* TT 2008 CA 15 (March 13, 2008) (CA, Trinidad and Tobago).

70 See, eg, *Marcano v The State* Cr. App. No. 2 of 2002 (July 26, 2002) (CA, Trinidad and Tobago).

71 *Harewood v The Queen* BB 2009 CA 22 (December 21, 2009) (CA, Barbados).

72 *Bartley* (n 48).

73 Blackstone's Commentaries on the Laws of England, Book 4, Chapter 4, 181.

74 Brian Simpson, Shooting Felons: Law, Practice, Official Culture, and Perceptions of Morality [article] *Journal of Law and Society*, Vol. 32, Issue 2 (June 2005), 241-266 Simpson, A.W. Brian 32 *J.L. & Soc'y* 241 (2005) , 245-46.

75 See, eg, section 76, Offences Against the Person Act 1864 (Jamaica), which prescribes a sentence of imprisonment not exceeding ten years.

76 These terms are used interchangeably throughout this Report, because for the purposes of the discussion, nothing turns on any distinction that may be made between the two terms.

77 [1988] AC 130, 145 (Lord Griffiths) (emphasis added).

78 [1971] AC 814, 832.

79 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 2009) 114.

80 *ibid* 115.

81 William Oldnall Russell and J. W. Cecil Turner, *Russell on Crime* (11th edn, Stevens 1958) 490.

82 *ibid.*

83 *Bartley*(n 48).

84 *Bartley*(n 48) 411.

85 *ibid.*

86 *Philbert*(n 55) [32].

87 *ibid* [33] (emphasis added).

88 *ibid* [35].

89 The section reads as follows:

[1]A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

[2]Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

90 Smith and Hogan, *Criminal Law*, (Butterworths 1969 2nd edn) 229-30.

91 David Lanham and others, *Criminal Laws in Australia* (Federation Press 2006) 85.

92 See, eg, sections 34 and 37 of the Criminal Code (Canada):

Sections 34 and 37 of the Criminal Code, for instance, state that

34 (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

37. (1) Every one is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

Extent of justification

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

93 *Philbert*(n 55) [26], [28].

94 *ibid* [27], [28].

95 Attorney-General's Department (New South Wales) Review of the 'Homosexual Advance Defence', 14, cited in,
Tomsen and George 'The Criminal Justice Response to Gay Killings: Research Findings' (1997-1998) 9 Current
Issues in Criminal Justice 64.

96 Graeme Coss, 'Lethal Violence by Men' (1996) 20 Crim LJ 305, 306.

97 *Joseph and Boyce* (n 5) [41]; *Cassell and Co. v Broome* [1972] AC 1027 (HL) 1 127 (Lord Diplock).

98 Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of
Pennsylvania Press 2010) 9.

99 *Attorney General v Jones* BS 20120 CA 98 (May 31, 2010) (CA, Bahamas).

100 Christina Pei-Lin Chen, 'Provocation's Privileged Desire: the Provocation Doctrine, "Homosexual Panic," and the Non-
Violent Unwanted Sexual Advance Defense' (2000-2001) 10 Cornell J. L. & Pub. Pol'y 195, 220; Anthony Gray,
Provocation and the Homosexual Defence in Australia and the United States: Law out of Step with Community Values
(2010) 3 The Crit 53, 55.

101 Jeremy Horder, *Provocation and Responsibility* (Oxford University Press 1992) 23-42.

102 *R v Mawgridge* (1707) 84 ER 1107, 1115; Forell (n 42) 31; Horder (n 56) 24, 39.

103 *Mawgridge* (n 99).

104 See Criminal Code 1981 (Belize) s 120(c), Penal Code 1924 (Bahamas) s 300(3), Criminal Code 1987 (Grenada) s.
240 (c).

105 See, eg, *Zetina v R* BZ 2009 CA 18 (June 19, 2009) (CA, Belize).

106 *Cox* (n 69) [15].

107 *Cf R v Entwistle* [2010] EWCA Crim 2828 (CA, England and Wales).

108 Forell (n 42).

109 Similar conclusions were expressed by a Law Commission reviewing the defence of provocation in the UK: Law
Commission, *Partial Defences to Murder* (Law Comn. No 290, 2004) para 3.28.

110 Helen Power, 'Provocation and Culture' [2006] Crim LR 871, 877.

111 Peter Papathanasiou and Patricia Esteal, 'The "Ordinary Person" in Provocation Law: Is the "Objective" Standard
Objective?' (1999) 1 (1) Current Issues in Criminal Justice 53, 55.

112 Chen (n 100) 209;

113 Stephanie M. Wildman and Dolores A. Donovan 'Is the Reasonable Man Obsolete?: A Critical Perspective on
Self-Defense and Provocation' (1980-1981) 14 Loy. L. A. L. Rev. 435, 435-37, 465.

114 Papathanasiou and Esteal (n 111) 62.

115 *Marcano* (n 70) [20]-[21].

116 *Jones* (n 99).

117 *See, eg, R v Ahluwalia* [n 59]; *Baptiste v RLC* 1996 CA 4 (February 12, 1996) (CA, Eastern Caribbean Court
of Appeal).

118 Donald Nicholson and Rohit Sanghvi, 'Battered Women and Provocation' [1993] Criminal Law Review 728.
119 [1954] 2 All ER 262.
120 *ibid* 263.

121 Allyson Lunny, 'Provocation and 'homosexual' Advance: Masculinized Subjects as Threat, Masculinized Subjects under
Threat' (2003) 12 Socio-Legal Studies 311.
122 [2011] 3 LRC 437 [34].

123 There are six states in Australia: New South Wales, Queensland, South Australia, Tasmania, Victoria and Western
Australia. The states are empowered to pass laws on matters not placed under the control of the Commonwealth by
the Constitution of the Commonwealth of Australia. The Australian Capital Territory (ACT) and The Northern Territory
(NT) are two of ten Australian territories; the ACT and NT have a limited right of self-government. See 'State and
territory government' < <http://australia.gov.au/about-australia/our-government/state-and-territory-government>>
[Accessed 23 March 2013].

124 Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas), Crimes (Homicide) Act 2005 (Vic),
Criminal Law Amendment (Homicide) Act 2008 (WA) s 12.

125 Section 13(3) Crimes Act 1900 (ACT).

126 Criminal Code and Other Legislation Amendment Act 2011 (Qld), s. 304(1).

127 Lenny Roth and Lynsey Blayden, Provocation and self-defence in intimate partner and sexual advance homicides,
Briefing Paper No 5/2012, NSW Parliamentary Research Service, (NSW Briefing Paper) 20-27.

128 Sections 54-56, Coroners and Justice Act 2009 (UK); *ibid* 38-31.

129 See, eg, the Australian Law Reform Commission and New South Wales Law Reform Commission, which have made
recommendations aimed at 'ensuring that homicide defences promote substantive equality': NSW Briefing Paper
[n 127] 51.

130 *Philbert* [n 55] [33].

131 See Chapter 2; *Wade v Roches* [n 44] [36]{38}.

132 *Marcano* [n 70] 7-8, 10.

133 See Coss 'Lethal Violence' [n 96] 305.

134 Dominica Vibes News 'Three men facing serious charges given clean slate' < <http://dominicavibes.dm/news/three-men-facing-serious-charges-given-clean-slate>> [accessed December 31, 2012]; 'Men Facing Serious Charges
Walk Free' < <http://dominicanewsonline.com/news/homepage/news/crime-court-law/men-facing-serious-charges-walk-free/>>, Dominica News Online [accessed December 31, 2012].

135 'Murder accused gives his side of the story' < <http://dominicanewsonline.com/news/homepage/news/crime-court-law/murder-accused-gives-his-side-of-the-story/>> Dominica News Online [accessed December 31, 2012].

136 See Handbook for Victims [n 21] 9.