Chairpersons Senator Deschambault & Representative Warren
Committee on Criminal Justice and Public Safety
Public Hearing Testimony In Support of L.D. 1632, *An Act Regarding Criminal Procedure with Respect to Allowable Offenses*
By Mary L. Bonauto, Attorney with GLBTQ Legal Advocates & Defenders (GLAD)
May 13, 2019

Dear Senator Deschambault, Representative Warren and Members of the Committee,

My name is Mary Bonauto, and I am an attorney at GLAD and live in Portland. GLAD supports LD 1632 – a bill that limits so-called "gay panic" and "trans panic" defenses. GLAD is a nonprofit legal organization that works in the New England states and nationally to address discrimination against LGBTQ people and people with HIV/AIDS through litigation, policy and education. Among other things, GLAD seeks to eliminate disparities in legal rules and responsibilities, whether explicit or implicit, based on whether an individual is gay, lesbian, bisexual or transgender ("LGBT"). This bill addresses one of those disparities.

First, GLAD believes that all people, including LGBT people, do not cause or deserve to be attacked simply because of who they are. LGBT people engage in the same human behaviors that non-LGBT people commonly do, such as making romantic or sexual advances to another person, or engaging in dating, romantic or sexual relationships. When violence to an LGBT person follows those advances or relationships, it should not be justified as an appropriate reaction or excused as not morally blameworthy any more than it would be if the overtures or relationships involved a non-LGBT person. Anything else sends the unmistakable message that violence against the LGBT community is justified. Accordingly, we support this bill's bright line test to limit certain otherwise available defenses in circumstances where the person who made advances or engaged in a relationship is known or discovered to be an LGBT person.

In 2013, the American Bar Association resolved to encourage all levels of government to "curtail the availability and effectiveness of the 'gay panic' and 'trans panic' defenses."[1] This bill is supports the substance of that recommendation. To those ends, when a person who made advances or engaged in a relationship is known or discovered to be an LGBT person and is then subjected to violence or murder, this bill:

- disallows a claim that a defendant lacked the required culpable state of mind for an act of violence (sec. 1 of bill). It rejects the notion that an advance from or relationship

[1] The Resolution and Report are available at: https://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf

with an LGBT person creates such a strong reaction that an individual is unable to control themselves or to know they are doing something wrong;

- disallows defenses based on justification for the use of force (sec. 2 of bill). It rejects the notion that LGBT people and advances or relationships with LGBT people, are more dangerous or threatening than the same acts when engaged in by non-LGBT people;
  and
- disallows defenses to murder charges based on "extreme anger or extreme fear brought about by adequate provocation." 17-A Me. Rev. Stat. § 3. (Section 3 of the bill amends § 4 of the statute by eliminating the defenses).

Second, this bill prevents miscarriages of justice. Defenses to violent conduct in the stated circumstances wrongly blames the LGBT person for the violent acts following conduct common among human beings. To excuse such violence as *not* morally blameworthy only because of who is involved gives legal effect to heinous stereotypes that same-sex intimacy is unusual and dangerous and that LGBT people are deviants and predators.

For example, in the most high-profile "gay panic" case since the murder of Matthew Shephard, 15-year old Larry King was shot in the head in the computer lab at his middle school by 14-year old Brandon McInerney.[2] King was known as gay, but may also have been transgender. He often wore make up, accessories and high heels, and had openly expressed his interest in other boys. The day after Larry asked Brandon to be his "valentine," Brandon shot Larry in front of his classmates. Larry died two days later.

The judge allowed a panic defense. As commentators describe the trial:

> The press and defense counsel consistently cast [Larry] as the bully and [Brandon] as the victim—a characterization that a number of jurors came to accept. Many jurors blamed [Larry], and the school officials who "allowed" [Larry] to defy sex and gender norms, for the murder; one juror went so far as to characterize [Larry's] behavior as "deviant" in a letter to the district attorney. Another juror expressed strong sympathy for the defendant, stating that, "[t]he system totally failed Brandon."[3]

Ultimately, the jury could not reach a resolution, resulting in a mistrial. The point here is not to argue with Brandon, who clearly had serious and unaddressed needs that preceded his encounters with Larry and who, as a juvenile, differs developmentally from an adult. Instead, the point is that *the court* should not have permitted Larry to be blamed for his own death for simply being who he was as a gay boy. The court should not have allowed biases and

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[2] This discussion relies on the ABA Report, supra, as well as an intensive two-year study of the court proceedings and participant and witness interviews in the King case. See J.K. Strader, M. Selvin & L. Hay, *Gay Panic, Gay Victims, and the Case for Gay Shield Laws*, 36 Cardozo L. Rev. 1473 (2015) (hereafter, "*Gay Panic*").

[3] *Gay Panic*, *supra* at n. 3, at 1477.

prejudices (whether conscious or unconscious) against gay and transgender people, including those who are simply gender nonconforming, to be given legal effect. This baseline in our legal system must be as true for Larry King as it would be for any situation where a person is blamed for "provoking" an attack simply by being who they are.

Third, the impact of such defenses extends broadly by legally reinforcing anti-gay and anti-transgender prejudices that contribute to harassment and violence against LGBT people.

By putting the deceased Larry King on trial for behaviors other young people engage in as well, the King case sent a message nationwide that violence is a reasonable response to openly gay and transgender people (and even more so for those whose "devian[ce]" is being gender nonconforming). These messages matter to all of us and particularly our young people. Our schools already have serious problems with bullying of gay and transgender students. As documented by 2017 Maine Integrated Youth Health Survey data[4], 33% of LGB students report being the targets of offensive comments or attacks at or in transit to or from school, compared to 8% of all students. In addition, 1 in 2 transgender students have been bullied on school property. LGBT youth receive enough negative messages in our society – both about themselves and about hostility towards them.

Finally, we offer the information about other states. California (2014), Illinois (2017) and Rhode Island (2018) already have laws limiting "gay panic" and "trans panic" defenses, and a significant number of states have already done the same through judicial decisions.[5] To our knowledge, bills eliminating panic defenses were also filed in the current legislatures of Hawaii, New York, Washington, Nevada, Texas, New Mexico and Connecticut (approved in the Senate last week).[6] We would be happy to provided updated information at the work session.

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[4] The data is available at: https://data.mainepublichealth.gov/miyhs/files/Snapshot/2017BullyingInfographic.pdf and https://data.mainepublichealth.gov/miyhs/files/Snapshot/2017TransgenderInfographic.pdf. The first document also shows 22% of girls (and 9% of boys), were the target of offensive sexual comments, and 28% of students of color (and 7% of white students) were the target of comments or attacks based on their race or ethnicity at or in transit to/from school.

Other instances of "gay panic" and "trans panic" defenses are available at: https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/ and at J.B. Woods, B. Sears, C. Mallory, "Model Legislation for Eliminating the Gay and Trans Panic Defenses," The Williams Institute 2016, available at: https://williamsinstitute.law.ucla.edu/wp-content/uploads/2016-Model-GayTransPanic-Ban-Laws-final.pdf

[5] These cases are discussed in the Williams Institute Report, *supra* at n. 4, at pp. 5-14

[6] This state information is drawn from the LGBT Bar, which tracks this issue. See https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/. The Connecticut information comes from local press. https://ctmirror.org/2019/05/09/senate-passes-bill-toughening-penalty-for-disseminating-intimate-images-ban-on-gay-panic-defense/ .

Maine can now take the steps that the California Legislature did in 2014 after the King case and eliminate "panic" defenses. Doing so is consistent with equal protection guarantees so the courts are not authorizing a defense that treats LGBT people differently compared to others for the same conduct. It would true up Maine law in accord with our values of fair administration of the law, treating like circumstances alike, and holding people to account for their actions under the same standards for all. This issue should not arise often in Maine, but whether in negotiated pleas or courtrooms, it would mean that legal responsibilities should not vary simply because the object of violent conduct is gay or transgender.

We appreciate your consideration of this bill and would be happy to offer any assistance to the Committee in its deliberations.

Truly yours,

/s/ MLB

Mary L Bonauto, Portland