

provocationinquiry - Provocation

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Subject: Provocation

The Hon. DAVID CLARKE: That is the ruling out; let us talk about the ruling in. You have heard the expression: the devil is in the detail. Let us get to detail. What other things would you rule in as grounds for provocation?

Mr CLEARY: You have heard them all before. What do you need me to track you through? I got home and I found a man assaulting my—

Mr DAVID SHOEBRIDGE: No. Not the things that you would not want people to raise as provocation, you would want those all excluded—

Mr CLEARY: You are asking me the ones you would rule in?

The Hon. DAVID CLARKE: Yes.

Mr CLEARY: Well I have said you have tracked through those, have you not?

The Hon. DAVID CLARKE: I started with violent criminal conduct.

Mr CLEARY: Yes.

The Hon. DAVID CLARKE: Are there any others that you would add to that list? You can take the question on notice.

Mr CLEARY: I will give you an example. Over the journey people from various settings, those who have defended provocation, defence lawyers defending provocation have a raft of questions or propositions that they put. They use the one that you come home and you find your child being assaulted by someone. Of course people would say they could understand that raising the question of provocation. Could I understand that? Yes I

could. So I can imagine a range of areas, which I would rather take on notice than try to track through all the things I have heard of over the journey

The Hon. DAVID CLARKE: That is all under violent criminal conduct?

Mr CLEARY: Yes.

The Hon. DAVID CLARKE: Can you think of anything else outside violent criminal conduct that comes to mind that you would rule in?

CHAIR: The witness can take that question on notice.

Mr CLEARY:

For provocation to work in any meaningful way we must first identify how it has been used at the expense of women. This has been the fundamental problem, in so far as it has been used to blame women for the violence visited upon them. I have addressed this issue in a previous email in relation to the options papers.

Once we establish that provocation cannot be available as a response to perceived hurt that emanates from a person – man or woman - exercising their lawful rights we can move to the question of whether the actions of the deceased might be considered likely to cause an ordinary 'man' in the circumstances to lose control. This becomes a matter for the judge in the course of legal argument from the defense and the prosecution. An act might not be illegal but might be considered as of the kind to provoke an ordinary man to lose control and kill. This then becomes a question for the judge – he/she decides whether to allow provocation – and for the jury in the case where provocation has been allowed as a form of defense.

It is my view that almost without exception the history of provocation in Australia is one of an expanding license to kill women. Once we address this question, provocation will return to some level of normality where the 'reasonable behaviour test' will not be tainted by misogyny at worst and discrimination towards women at best. Once this matter is addressed the arguments can be heard in a civilised way free of flawed precedent. I do not think helps to say we will only allow provocation in cases where the actions of the deceased are illegal or criminal. Once we have ruled out words alone and infidelity or separation we will have raised the bar to such an extent that there will an onus on the accused at prove in a restricted setting that his/her actions were that of an ordinary person.