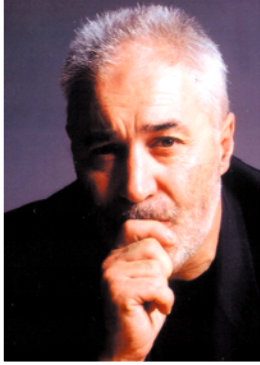


INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

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9 April 2012

Submission to NSW Legislative Council Select Committee Inquiry
to examine the partial defence of provocation.

From Philip Cleary

Getting Away with Murder

I've written extensively about the law of provocation since the murder of my sister in 1987 and the granting of a provocation defence to her killer. It is my considered view, based on the case involving the murder of my sister (R v Keogh 1989) and the numerous cases I've researched, that in practice the law has compromised the established rights of women. In a series of cases in the 1980s and 1990s judges extended the defence in ways that culminated in the Victorian Attorney General declaring that women had been reduced to chattels. The abolition of provocation in Victoria in 2005 was identified (LRC Report, Attorney-General's press releases etc.) as predicated on the law's deep-seated prejudices towards women.

In too many cases, judges have either granted a provocation defence to a 'wife killer' or an appeal court has upheld an appeal by a convicted man (R v Yasso 2004) when such a defence has been denied at trial. That a judge could deny a 'wife killer' a defence of provocation in R v Parsons (1997) – Angela Parsons was stabbed to death outside the Family Court – and an appeal court could rule that 'To hold that provocation arose in this case would be to encourage savagery at the expense of civilised behaviour' begs the question as to why so many men, including the man who killed my sister, were routinely granted such a defence.

Inexplicable manslaughter verdicts are not simply a product of the supposed complexity of the provocation law and confusion regarding the ‘ordinary man’ test. Perplexing appeal court rulings, questionable directions on the admission of evidence and the very act of allowing a provocation defence have played a profound role in entrenching anti-female imperatives and, therefore, anti-female outcomes. The provocation law is and was conceptually flawed not because a ‘provocation killing’ is unreasonable but because of the kinds of arguments it sustained when the victim was a woman. Its problems were at a deeper level than the concept of provocation; in the court’s systemic discrimination towards women.

It was for this reason that I did not believe the abolition of provocation would bring an end to the anti-female manslaughter verdicts in ‘wife killing’ cases. It was my contention that the only solution was to tighten the law to prohibit forms of argument and evidence at odds with a woman’s lawful rights.

Consistent with my contention that the law must be reformed to ensure it does not compromise a woman’s human’s rights, in their paper *Provocation in Sentencing: A Culpability-Based Framework* Felicity Stewart and Arie Freiberg said:

The central issues to determining whether, and to what extent an offender’s culpability should be reduced by provocation should be:

1. The degree of provocation, that is whether, in all of the circumstances of the case, the provocation caused the offender to have a justifiable sense of being wronged, considering:

(a) The nature and context of the provocation, including whether it consisted of the victim exercising his or her equality rights.

(b) The duration of the provocation.

2. The degree to which the offender’s response was disproportionate to the provocation: the greater the disproportionality the lower the reduction in the offender’s culpability. For the most serious examples of offences against the person, only serious provocation should warrant a reduction in the offender’s culpability.’

The question of course is that if we believe there should be no reduction in sentencing where the victim is doing no more than expressing his or her ‘equality rights’ shouldn’t that human rights principle guide the court at trial? Why not incorporate such principles into the law and therefore deal with the question in the first instance by way of a law that precludes any defence at odds with a person’s equality rights? This is the major contention of this paper.

In 2004 the Victorian Law Reform Commission found that:

Between 1997 and 2001 in Victoria, 182 people were committed for trial for homicide. Around one-third of Victorian homicides involved people killing their sexual partner, former partner or sexual rival. Of this third, most involved men killing women. Women are more likely to be killed by their partners, or former partners, than by anyone else.

In the end, the Commission unanimously decided provocation was ‘unsalvageable’ and on 18 November 2004 the Chair of the VLRC Marcia Neave declared that despite her previously support for the provocation law – as per the VLRC’s 1991 report – the arguments for abolishing provocation were overwhelming. That, as will be addressed in this paper, did not put an end to verdicts based on the very prejudices that afflicted the provocation defence.

For those who had been part of the campaign against provocation, going back nearly twenty years, many questions remain unresolved. Some of these questions go to the heart of the matter. Why had it taken so long for a law condemned by the Victorian Attorney General and his government in 2004 as anti-woman to crumble? And how could the Commission have found in 1991 that the provocation law did not discriminate against women and was not anti-woman? And what had happened in a decade for people such as Marcia Neave to change their mind and for the Commission to unequivocally condemn the law?

La Trobe University academic Dr Adrian Howe’s assessment of the 1991 VLRC report in a paper titled *Provoking Comment* provides a possible answer:

The law’s betrayal of its notion of neutral legal person and, by extension, its notion of a gender-neutral provocation defence occurs at a still deeper level than that of legal argument.

If we are to devise a sentencing regime capable of countering the kind of assumptions that underpinned the old law, and progress towards, to quote Ms Stewart and Professor Freiberg, ‘the development of a more principled and sophisticated jurisprudence that appropriately reflects changed community standards and expectations’, the question of whether our criminal justice system is undermined by deep anti-female prejudices must be addressed.

On 19 November 2008 the Victorian Director of Public Prosecutions Jeremy Rapke was the subject of some strident criticisms in the *Age* that I believe illustrate why the legal system has been such an abject failure when dealing with violence against women. The Director’s public admissions that he would sometimes ring judges after trials prompted criminal barrister Robert Richter to write: ‘criminal lawyers do not accept that the DPP is interested in making the system fair and efficient ... we deserve better from our chief prosecutor. If this is the best he can do he should resign.’

The Chief Justice Marilyn Warren walked a similar path to Mr Richter when she said, ‘the role of the DPP is to prosecute criminal cases, independently, not to counsel, supervise or criticise judges in private discussions.’ Former Supreme Court judge, Professor George Hampel joined the chorus:

I would have been amazed if a person holding a public office, such as the DPP, or even holding a position such as chairman of the bar, would have approached me privately with comments about my decision or behaviour on the bench. I would certainly not have entertained such an approach ... The line between conduct that raises concern and should be dealt with and misconduct can sometimes be a difficult one. However, public confidence in its judiciary would be enhanced if complaints were formally and independently dealt with.

Such comments, I believe, reflect how vested interest in the application of the law has constrained legal reform. Justice Hampel is right to defend the independence of the judiciary. But what excuse does he offer for the Director of Public Prosecutions refusing my request that he evaluate the ruling on provocation in *R v Keogh*? To this day there is not one public document or statement for my family to consider in so far as the question of whether Vicki Cleary’s human rights were compromised in *R v Keogh*. In the face of a cone of silence on the way judges conceptualised crimes of violence, especially those against women, Jeremy Rapke assumed the role of an activist. He would not have had to take such a controversial position had the judiciary not set such bewildering precedents.

The campaign for reform of the provocation law was not predicated on a desire to establish a draconian sentencing regime but on the premise that the law must never betray its neutrality. I wrote three books – *Cleary Independent* (1998), *Just Another Little Murder* (2002) and *Getting Away with Murder* (2005) – between the time of my sister’s murder and the abolition of the defence of provocation. All played their part in the campaign to expose the failings of the provocation defence and force the parliament to act. Despite widespread condemnation of the law in progressive quarters, there were pockets of resistance.

In 2010 lawyer Robert Richter in response to the question, ‘Do you think sometimes the books that the general public read ... can that sometimes sway the community?’ told ABC Radio’s Ramona Koval:

It can and does. I think Phil Cleary’s book was a major influence in the abolition of the defence of provocation, which I disagreed with because I had defended a woman who relied on that defence quite properly and rightly. So that book had a great impact, I think, especially as it was taken up by certain mass media.

Richter's comment prompted Marcia Neave to say:

Robert, as you know I was chairing the Law Reform Commission at the time and we certainly reached our conclusion that provocation should be abolished before the decision and before the press coverage and so on, and we reached that view on the basis of the work that we did, the community consultations and so on. So I'm not sure that it's fair to say that the abolition of provocation was simply a response to media manipulation.

If Richter was talking about the 2005 Ramage book, Marcia Neave is right. However, the earlier book, 'Just another little murder' (2001) and the intermittent media attention to provocation cases did play a role in bringing down the law. But only because the law was so fundamentally flawed it could not survive in its existing form. It's regrettable that lawyers with an expressed commitment to human rights continue to defend such a law and misrepresent the reasons for its abolition.

Provocation collapsed not because of media hysteria but because it was barbaric and discriminated against women. Robert Richter surely knows that. So too does he surely know that provocation has been no friend of women who've killed violent men. There is a mountain of evidence – R v Osland is a classic example – as to the difficulty women traditionally faced when trying to run a provocation defence. Provocation is built around a so-called sudden loss of control, something at odds with a woman's physical capacity to overwhelm and kill a man. Brutalised for years by a violent man, Heather Osland orchestrated her husband's killing in a premeditated manner. For that she was found guilty and sent to gaol for ten years.

My sister Vicki Cleary was 25 years of age when she was stabbed to death on 26 August 1987 while parking her car outside the kindergarten where she worked. Her ex-boyfriend, Peter Keogh, armed with a knife hidden in a homemade scabbard had waited for more than an hour before ambushing her. She'd left him three months earlier. Granted a defence of provocation on account of Vicki allegedly swearing at him when he confronted her, Keogh served less than four years in gaol.

When I wrote to the DPP John Coldrey about the case he advised me that there was 'nothing manifestly inadequate' about the sentence. That assessment was in keeping with the times and is further evidence of how blind-sighted the judicial system was to the treatment of women in our courts. Keogh was a recidivist with a string of violent crimes to his name, one involving the sexual assault of a 9-year-old girl. If that wasn't bad enough, when his priors were presented to the court no proper effort was made to verify the authenticity of defence counsel John Champion's interpretation of those crimes. This matter was explored in an article by Alan Howe in the *Herald Sun* on 29 August 2011, <http://www.heraldsun.com.au/opinion/a-sentence-to-remember/story-e6frfhqf-1226124026876>

Justice Hampel drew on a ruling by Justice Lush in *R v Dincer* (1982) to justify granting a defence of provocation to Keogh. Zerrin Dincer was only 16 years of age when her stepfather Kemalettin Dincer rushed up the stairs of the terrace house where she was staying in South Melbourne, brushed past her mother and plunged a knife into the girl's heart. In a decision that stunned the prosecution, Justice Lush told the jury it had to consider whether Zerrin's behaviour in having a boyfriend and possibly engaging in sexual activity was the kind of conduct that might provoke a devout Muslim – as Dincer allegedly was – to kill. Dincer's faith and the cultural characteristics were deemed to be permanent characteristics of bearing on the 'ordinary man' test. The jury found him not guilty of murder. He served around four years in gaol.

If the decision to grant a provocation on the grounds that Dincer was Muslim – hardly fashionable today – isn't a sufficient indictment of the courts' approach to violence against women, then the decision to grant bail and allow the killer to live with his wife and daughter surely is. Mother and daughter would be giving evidence in the trial. This was not just a story about the court's failure to set decent community standards and to affirm a woman's human rights. It was also a parable about a society's complicity in the violence. Two months before the murder Zerrin and her sister Berrin had sought refuge at the Western General Hospital, telling a medical social worker their father had 'attacked and threatened them' for talking with boys. Within moments of the girls telling their story, Mrs Dincer arrived at the hospital displaying scratches and bruising to her neck. She said her husband had tried to strangle her. No official action was taken to protect Zerrin.

As is so often the case where prior violence has occurred, the story of Dincer's tyranny in the home was never heard in court. By contrast, his lawyer Colin Lovitt was unconstrained in painting a picture of Kemalettin Dincer as a victim of his Muslim religion, a man conflicted by the belief that a girl should be a virgin until married. As macabre as it sounds, during cross-examination Lovitt asked the doctor who performed the autopsy whether Zerrin was a virgin. The doctor said he couldn't remember! There was no public outcry after the Dincer verdict in 1982 and it never became a cause celebre. A provocation defence for the killing of a woman was virtually a *fait accompli*, with an ever-broadening cache of excuses available to men.

In essence Justice Hampel ruled that just as Dincer's faith brought with it permanent characteristics that made him more vulnerable to a loss of self-control in certain circumstances, so too was Keogh's alleged alcoholic depression a permanent feature of relevance to the granting of a provocation defence. Where I saw a patriarchal misogynist killer, Justice Hampel saw an afflicted ordinary man. Where Justice Hampel and the law saw provocative words I saw a cry for freedom. How could it possibly be argued that a young woman parking her car for work could have created the circumstances for a provocation defence? Today we could call it stalking, harassment and assault. Sadly, this is provocation at work

Justice Hampel's sentencing remarks ran for a mere two and a half pages and not even Keogh's prolific history of violence was enough to prompt the judge to deliver a lengthy gaol sentence at the top end of the manslaughter range. By comparison James Ramage, in the celebrated 2004 provocation case *R v Ramage* received a minimum eight years. He had no priors. The moral of *R v Keogh* was that the criminal courts were not only at odds with the assertions of the women's movement but were actively reprimanding women who believed they were free to leave a relationship.

R v Keogh was confounding and distressing but it would be wrong for the Inquiry to believe it was an aberration. It was seminal and it was extreme but it was not conceptually at odds with other 'wife killing' cases then and now. The 1988 trial (*R v Crowe*) that dealt with Kevin Crowe's shooting of his estranged partner Christine Boyce in front of her two children produced a courtroom narrative as bad as any seen in an Australian courtroom. That Christine had been making a living as a sex worker was manna from heaven for the tabloids. But the most astounding moment occurred when defence barrister, the late Bob Kent chose the following words as he sought leave to have an album of nude photos of Christine admitted in evidence and therefore viewed by the jury:

We would submit it is a proper and valid argument to say it is relevant to know that the person who is deceased in this case was an attractive woman both in face and body and was in fact the wife of the deceased man. And that in those circumstances a juror might say, an ordinary man in this man's situation may well have acted, lost control and acted in that way [the photos show] she is somebody whom we could understand him having a great passion for.

That such a decision passed without a public outcry is as shameful as the headline 'Love pulls the trigger' in the Murdoch press story that accompanied the trial. Sentencing might be important, both as deterrence and, to quote Arie Freiberg, for 'the symbolic function' it serves, but so too are the accompanying narratives. Is it unreasonable to suggest that the real way to understand Kent's argument for the admission of the photos is as an attempt to cheapen the woman's character and the value of her life? Only a whore would allow herself to be photographed nude in this way. And a whore's life is not as valuable or sacred as that of a chaste or decent woman. That, I believe, was the real reason why Bob Kent wanted the jury to view the photographs. Kevin Crowe was found not guilty of murder and received an effective sentence of around four years gaol. The DPP made no comment and the sentence was not appealed.

Three years later a Victorian County Court judge created a furore when he discounted a rape penalty on the grounds that Heros Hakopian's victim, a sex worker, would not be as traumatised as a 'chaste woman.' There is ample evidence that the prejudices against women run deep in our courtrooms. *R v Dincer*, *R v Crowe* and *R v Keogh* are not aberrations. A decade after the Keogh case had been dissected in the media and in university courses, 31-year-old Eman Hermiz who stood only 152 centimetres and weighed 47 kilograms was stabbed to death by her estranged husband Mazin

Yasso in Melbourne's northern suburbs. Eman had taken out an intervention order but that was no impediment to Yasso confronting her outside a language school in Meadow Heights on 8 May 2001. Her family told me that Eman had rung the police on many occasions saying he was going to kill her.

Although Yasso was found guilty of murder and sentenced to 15 years gaol the case was appealed and two appeal court judges, both male, overturned the conviction and ruled that Yasso should be re-tried. In their view there was sufficient evidence that a jury could reasonably find Hermiz might have provoked him as per the law and could reasonably find him guilty of manslaughter, not murder. Most people would be appalled that anyone could countenance the idea that this frightened woman had provoked this murderous man to kill her.

Justice Charles explained his ruling in favour of a re-trial accordingly:

Mr Tehan, who appeared for the applicant, submitted that the following matters of Chaldean culture had been established in evidence and were relevant. Chaldeans live under a code of strict traditions and customs that have continued for many hundreds of years. In Chaldean tradition marital fidelity is of paramount importance. Divorce is not allowed, nor remarriage upon the death of one of the spouses. And no distinction is drawn between married parties who live together and those who live apart. In Chaldean tradition the wife's marital infidelity is a source of strong, social disapproval not only for the wife but for the husband with the potential to result in a lifelong smear upon the husband who is considered responsible for the acts of his wife. There was evidence also that the act of a wife spitting at or upon her husband is an act of almost unthinkable insult of such gravity that there would be an expectation that the wife would be beaten or killed if not by her husband then by her family.

The family of the dead were adamant that Chaldeans, who are Christians, do not hold to the views identified in the ruling. Either way I find the logic breathtaking. The Appeal Court's decision in R v Yasso mirrored the logic of R v Dincer twenty-two years earlier and came at a time when the provocation law was in its death throes in Victoria. It is not a decision taken from the dark ages of jurisprudence. The anti-provocation judge Frank Vincent dissented against a decision which one could argue cast a shadow over the human rights of all women and was clearly at odds with the sentencing principles re 'a victim exercising his or her equality rights' as enunciated in the Freiberg paper. But if two judges believed there were sufficient grounds for a provocation defence, it's reasonable to conclude that they would have delivered a lesser gaol term than Justice Vincent. The possibility that the provocation myth is so entrenched as to cast a shadow over sentencing and therefore surreptitiously over the rights of women is something any review of provocation in New South Wales must surely explore.

R v Yasso didn't attract the public interest of R v Ramage (2004), a case some mistakenly believe was responsible for the abolition of provocation. The facts are that the Law Reform Commission report had been completed in August 2004, some two months before the Ramage case came to court. It did however become synonymous with all that was wrong with the law. The line of questioning of defence counsel, Philip Dunn, aggravated the public's revulsion at the verdict.

Dunn portrayed the murdered 42-year-old Julie Ramage as promiscuous and selfish. So troublesome was the line of questioning that prosecutor Julian Leckie raised it with the judge asking, in the absence of the jury, whether it was appropriate for Dunn to be 'blackening' the dead woman's name. The endless salacious questioning about Julie's 'affairs' was, I genuinely believe, designed to diminish the victim's character in the eyes of the jury. One of those 'affairs' actually occurred after she'd separated from her husband. At one point Dunn asked the doctor who had performed the autopsy whether he found a tampon in situ. We don't need much imagination to understand the import of the question, which was answered in the affirmative.

It was argued in court – Ramage did not give evidence – that Julie's allegedly provocative words in the kitchen of their home in the aftermath of a separation, so deeply hurt Ramage that he lost control. Julie was strangled to death and buried in a bush grave. Granted a provocation defence – which was not challenged by the prosecution because it believed the Appeal Court's decision in R v Yasso foreshadowed a successful appeal – Ramage was found not guilty of murder. He was sentenced to a minimum eight years in gaol. There was general outrage in the community.

The Ramage case was significant for a number of reasons. Notwithstanding the freedom given to the defence lawyer to question the sexual behaviour of the dead woman, Justice Osborn delivered a minimum eight year gaol sentence, double that given in the manslaughter cases involving Dincer, Crowe and Keogh in the 1980s. This was despite there being no change in the sentencing regime during that time. The sentence and the judge's sentencing remarks, which extended to fourteen pages, indicated a changing attitude on the bench.

Judges and courtrooms aren't the only players in the story of wife killing. Too often media reportage reinforces courtroom narratives that blame women for a man's alleged loss of control. This convergence was poignantly illustrated in *Blood on Whose Hands?* a 1994 book published by the Women's Coalition Against Family Violence. This groundbreaking book cited the following newspaper headlines as evidence of the prejudices which murdered women confront:

- 'Love pulls the trigger' – (man shoots woman dead in front of her children) – Murdoch Press 1988,
- 'Despair prompts killing' – (two children bashed, stabbed and burnt to death) – *Sun* 1990,
- 'Dream marriage ends in death – Death on a Sunday morning – (a wife strangled) – *Age* 1990,

- ‘The family that death wouldn’t let go’ – (man kills his wife and children),
- ‘Day of death; dad dies after shooting spree (man kills his wife and daughter) –*Sun* 1989,
- Kill case man’s love plea – (the murder of my sister) –*Sun* 1989.

Let’s fast-forward a decade:

- Stormy romance turned fatal obsession – (ex-boyfriend bashes girl to death with a steering wheel lock) – *Courier Mail* 2007,
- Henpecked husband strangles nagging wife – (man strangles wife after she growls at him and the dog barks) – Reuters 2008,
- Woman dies on doorstep – (woman stabbed in the back four times by ex-boyfriend) – p. 9, *Herald Sun* 2009.

Such headlines were in clear contrast with the *Herald Sun* headline ‘ACCUSED’ blazoned above a photo of a woman with the by-line: ‘This mum’s little boy may never walk again after she allegedly crashed her car while drunk, with her son unrestrained’. Our society’s capacity to find excuses for male violence and blame women is pervasive and not confined to the courtroom or the media. In her celebrated 2004 book *Joe Cinque’s Consolation*, which dealt with a case in which a woman, Anu Singh, administered a drug overdose that killed her partner Joe Cinque and was found not guilty of murder by the judge, Helen Garner wrote:

You don't think she might have goaded him until he snapped? I once did it myself to a bloke, when I was a student. I treated him so cruelly and hurtfully that he hit me across the face. It was only an open hand but it knocked me to the ground. I never felt badly towards him for it, though. I was ashamed. Because I knew he wasn't that sort of guy. I knew I'd driven him to it. I pushed him past the limit.

Garner offered a picture of women consistent with that painted in every ‘wife killing’ provocation case. Singh was 'the figure of what a woman most fears in herself – the damaged infant, vain, frantic, destructive, out of control'. What Garner did not say was that the defence argument focused on Singh’s capacity to form intent and did not at any time engage in the blackening of Joe Cinque’s name. It was never argued that Joe was to blame for what Anu Singh did.

So little have the courtroom narratives and outcomes changed post-provocation that the Victorian Liberal government has declared its intention to abolish the defensive homicide law. The contention of this paper is that changes to the law are pointless unless we control the courtroom narratives in such a way as to prohibit forms of questioning and admission of evidence at odds with a woman’s rights. This does not mean compromising a defendant’s right to a fair trial but rather restricting ‘his’ capacity to blacken a woman’s name on the basis of assertions that are at odds with her lawful rights.

Such an approach was at the core of submissions to the 2001 LRC which argued that certain alleged ‘facts’, for example, infidelity or separation, should not form the basis of a provocation defence. There has been a raft of academic research papers attempting to prove by way of statistical data that the criminal justice system is prejudicial to women. The challenge now is to establish legal settings that affirm the very rights, the right to separate, for example, which we have enshrined at law. This is not Taliban-held Afghanistan.

In 1982 Dominick Dunn, a celebrity journalist with the American magazine *Vanity Fair*, lost his 22- year-old daughter to a callous act of intimate partner violence that was met with a voluntary manslaughter verdict. In an article in the *Age* Dunn said: ‘I ruined that judge’s career. I set out to do it and I did. I thought “How dare you treat us like this?”’ An intelligent man, Dunn did not need another research paper to prove what he knew viscerally and intellectually about how the court had legitimised the violent behaviour of his daughter’s killer. The treatment of murdered women in ‘wife killing’ cases is so fundamentally barbaric that responses such as Dunn’s are not only entirely appropriate but sublimely logical.

My own campaign has been based on the belief that only by identifying the prejudices at work in the language of the courtroom can we properly understand the failings of ‘wife killing’ cases, whether under the provocation or defensive homicide laws. The following excerpt, taken from *R v Keogh*, illustrates the point. Justice Hampel had been asked to rule on the admissibility of the kindergarten director’s opinion that my sister’s killer was an angry man when he arrived at the kindergarten a few weeks prior to the murder:

It only indicates the intensity of the attitude of his wanting to contact her to speak and so on ... part of a realistic situation ... one person is intense about seeing the other ... there is nothing terribly harmful about that ... I don’t think it is realistic to feel there is some sinister implications going to be drawn from the fact that he is there wanting to see her and getting a bit cross when he thinks this lady is trying to keep him out.

My argument is that in effect Justice Hampel’s ruling and the words and logic he used to justify the ruling created a paradigm in which the killer had unfettered rights and the woman onerous and unlimited responsibilities. This paradigm normalised Keogh’s right to ‘be cross’ when his ex-partner refuses to see him and carried the implication that Vicki was being unreasonable in not talking with him. According to modern workplace laws (this was only twenty-five years ago), a man attempting to barge into a former girlfriend’s place of work is engaging in stalking and/or harassment. By any reasonable standards the evidence would have been seen as prejudicial to the accused but admissible because it was a true reflection of Keogh’s aggressive disposition.

It’s my contention that Justice Hampel’s ruling broadened the ‘ordinary man’ test to place my sister in a position where the expression of her lawful right to a life independent of the killer sufficiently impinged on his rights for him to be justified in claiming provocation. In effect the killer had become a victim. Treated in another way Keogh’s previous arrival at the kindergarten would have been evidence of an

aggressive and intemperate character at odds with the characteristics of the ordinary man. It should have added irrefutable weight to the argument that he was not deserving of a provocation defence. Unfortunately it is not the logic that has informed of the law of provocation in one after another case.

As indicated previously, Justice Hampel's rulings in *R v Keogh* were in stark contrast with the position he took when the Appeal Court ruled against Robert Parsons in *R v Parsons*. Parsons was denied a provocation defence and found guilty of murdering his estranged wife outside the Family Court in 1997. When his appeal went to the Appeal Court, Justice Hampel concurred with Justice Brooking when he found that:

No reasonable jury could have failed to be satisfied beyond reasonable doubt that the applicant's reaction to the victim's conduct fell below – indeed, fell a long, long way below – the minimum limits of the range of powers of self-control that must be attributed to the ordinary person.

Since the abolition of provocation in Victoria in 2005, three 'wife killing' cases have left commentators asking whether the gender bias of the courts is so systemic as to require radical reform of the law. It was not lost on observers that *R v Sherna*, *R v Middendorp* and *R v Grimmett* were characterised by narratives akin to those in provocation murder cases with the words and the character of the woman critical to a 'loss of control' by the man. I believe the lesson is that unless the law is comprehensively reformed to preclude discriminatory narratives, including the prohibition of unacceptably hostile and prejudicial 'evidence' at odds with a woman's lawful legal rights, the outcomes will be the same.

The concerns raised by the NSW Singh case featured on the ABC's 7.30 program on 17 July are consistent with those identified in the cases cited in this paper. The killer alleged that his wife had taunted him and was having an affair. There was no evidence of an affair but the prosecutor made no attempt to question the truth or otherwise of the claim. Challenging the validity of the claim was problematic because in doing so the prosecution would have most likely given veracity to the proposition that at law infidelity is the kind of act that might justify a provocation defence. Either way, there was no way of proving that the dead woman wasn't having an affair or that she didn't say she was having an affair.

As long as we allow arguments – no matter what the law is called - founded on the proposition that a woman who leaves or threatens to leave a partner has created the trigger for a provocation murder we will continue to return barbaric manslaughter verdicts for wife killings. It's for this reason that the Victorian LRC received a submission calling on the law to be tightened to rule out infidelity and separation as the basis of a provocation defence. It's for the same reason that I called for the law to be tightened rather than abolished and argued that defensive homicide would be no panacea.

At the time of the provocation law's abolition in 2005 I said:

With provocation gone, is it the end of women being blamed for men's violence? There is nothing in the legislation to say a woman's infidelity,

alleged or otherwise, won't be dissected in a murder trial. Certainly, it will not be excluded when a judge calculates a sentence.

In general terms the challenge for law reformers is to develop a form of jurisprudence that affirms a woman's right to leave a relationship or express her independence, and prohibits the use of defences to homicide at odds with a woman's lawful human rights. If the provocation law is to continue it must be reconstituted in such a way as to address this fundamental human rights question.

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