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LAW & HUMAN DIGNITY

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REFORMIST TINKERING, THE QUEENSLAND LAW OF MURDER AND OTHER DISASTERS

SANTO DE PASQUALE* AND ADRIAN HOWE#

Two Victorians, long-term advocates of abolishing the provocation defence, discuss the ramifications of reformist tinkering with the law of murder that stops short of abolition. They register their despair at legislatures that hold fast to the so-called 'heat of passion' defence with reference to law reform and cases in Queensland and New South Wales. What, they ask, will it take for these two jurisdictions to enter the twenty-first century and follow all the other Australian states in abolishing a defence well past its use-by date?

Santo

Hi Adrian.

I know your work over the last decade or so has been almost exclusively on English intimate partner femicide cases, but I thought you might be interested in a recent Queensland case. Coming as we both do from Victoria where the provocation defence was abolished in 2004 – the second Australian jurisdiction to do so – it is devastating to have these conversations again, all these years later, about how courts should handle wife-killing cases. Sadly, I think it's essential that we repeat what we have been saying for the last 30 years - namely, that the provocation defence needs to be abolished.

Adrian

I'm guessing I already know why, but tell me anyway.

Santo

* Principal Lawyer, Commonwealth Director of Public Prosecutions. Disclaimer: The views expressed in this article are my own and do not represent the views of the Commonwealth Director of Public Prosecutions.

Principal Fellow School of Historical and Philosophical Studies, University of Melbourne.

Because it is an outrage that two decades after the abolition of provocation in most Australian jurisdictions, commencing in Tasmania in 2003 through to South Australia in 2020, Queensland, like New South Wales, is still refusing to follow suit, both preferring instead to make minor legislative changes. I recall you terming this 'reformist tinkering'.

Adrian

Yes, I did back in 2004 when I was assessing the English Law Commission's recommendations for reforming partial defences to murder.¹ Thankfully they were not implemented, the government opting to take the vastly preferable path of abolishing the provocation defence. It did so on the explicit ground that the defence was 'letting men get away' with murdering their women partners and former partners. No longer. Now that provocation is not available as a defence, most femicidal men are pleading guilty to, or are being found guilty of, murder.²

But I am getting ahead of your story. Tell me about your Queensland case. It's been a while since I checked in on Australian provocation cases.³

Santo

The offender in *Peniamina* – I will limit my references to case names as I know you would much rather drum wife-killers out of the human race than 'glorify' them – and his wife, Sandra, were married with young children. After returning from a holiday overseas, he suspected her of having had an affair.⁴

On 29 March 2016, the two had an argument. Sandra demanded that he return her phone, which he claimed had messages from another man. Two days later, he killed Sandra.

¹ Adrian Howe 'Provocation in Crisis – Law's Passion at the Crossroads? New Directions for Feminist Strategists' (2004) 21(1) *Australian Feminist Law Journal* 55.

² For a discussion of the English reforms of partial defences to murder which were implemented in 2009 over protests by the upper echelons of the judiciary see Adrian Howe, "'Red Mist' Homicide – Sexual Infidelity and the English Law of Murder (Glossing *Titus Andronicus*)' (2013) 33(3) *Legal Studies* 407.

³ I discuss Australian cases in: Adrian Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence' in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (Oxford University Press, 1994); Adrian Howe, 'Provoking Polemic: Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition' (2002) 10(1) *Feminist Legal Studies* 39 and in Adrian Howe, 'Parker v R – Judgment' in Heather Douglas, Rosemary Hunter, Francesca Bartlett and Trish Luker (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014), 234.

⁴ *Peniamina v R* (2020) 385 ALR 367, 378 [36] (Keane and Edelman JJ).

Adrian

I can hardly bear to hear it, but can you give me a brief run-down of what happened?

Santo

Of course, we only have his account. He claimed it all started when he found Sandra's second mobile phone, where he discovered more text messages and that the last conversation was with the same man.⁵

In a subsequent argument with her, he hit her. She proceeded to the kitchen where she grabbed a knife. He tried to take the knife from her but in doing so cut his hand. This made him 'more angry and more angry'. He then grabbed the knife from Sandra who tried once again to get away from him. At this point he resolved to kill her and commenced stabbing her.⁶

When Sandra fell to the floor, he continued stabbing her. One of the knife wounds to Sandra's face measured twelve centimetres and caused her nasal septum to be exposed. She lost a tooth.⁷ Somehow Sandra was able to get up off the floor and run to the driveway. But he found her and continued stabbing her in the head. In fact, he stabbed her over twenty times, kicking her as well. He then removed a concrete bollard from a garden bed and hit Sandra twice on the back of her head with it, fracturing her skull and killing her.⁸

At the crime scene, he claimed in a call to his mother and to attending police that Sandra had cheated on him 'too many times'.⁹

Adrian

How many times have we heard that same old exculpatory script?

Santo

⁵ Ibid 379, [40]-[41].

⁶ Ibid [43]-[44]. See also *R v Peniamina* (2019) 2 QR 658, 686 [97] (Applegarth J).

⁷ *Peniamina v R* (2020) 385 ALR 367, 379 [45] ((Keane and Edelman JJ)); *R v Peniamina* (2019) 2 QR 658, 658 (112) (Applegarth J).

⁸ *Peniamina v R* (2020) 385 ALR 367, 379 [43]-[44] ((Keane and Edelman JJ). In the sentencing remarks following the offender's second trial, the sentencing judge, Davis J stated that the offender 'inflicted 29 sharp-force injuries': *R v Peniamina (No 2)* [2021] QSC 282, [11].

⁹ *R v Peniamina* (2019) 2 QR 658, 690 [114] (Applegarth J).

Too many.

Adrian

And how many times is 'too many times'?

Othello said his wife Desdemona 'hath the act of shame a thousand times committed' with her lover Cassio.¹⁰ He miscalculated by a factor of 1000, Desdemona being entirely 'innocent'. Nor have femicidal men let the facts get in the way of a compelling provocation by 'infidelity' narrative.

Anyway, tell me about the trial.

Santo

At his first trial...

Adrian

His first? How many were there?

Santo

Two. And two appeals. One for his conviction for murder in the first trial and a subsequent, successful appeal to the High Court. The whole process, from the fatal attack on Sandra to the second trial ordered by the High Court, took five years.

Adrian

Five years?

Santo

At his second trial the jury found him not guilty of murder. He then pleaded guilty to manslaughter.

¹⁰ William Shakespeare, *Othello, the Moor of Venice* in E A J Honigmann (ed), *Othello* (Arden Third series Cengage Learning, 1997) [5.2.209-210].

Adrian

Five years to work out whether stabbing someone 29 times and slamming a concrete bollard into their head was murder or manslaughter?

Santo

Getting back to his first trial. He invoked the partial defence of provocation in s304 of the *Criminal Code* (Qld). The section states:

When a person who unlawfully kills another under circumstance which, but for the provision of this section, would constitute murder, does the act which causes the death in the heat of passion caused by sudden provocation, and before there is time for person's passion to cool, the person is guilty of manslaughter only.

He claimed he lost self-control solely as a result of the cut occasioned to his hand when attempting to grab the knife from Sandra.¹¹

Adrian

'Heat of passion'. Who talks like that today? Which century are we in?

The 16th century? When the notion of 'heated blood' had become the 'key conceptual tool' for distinguishing cold-blooded murder from less serious spur of the moment killing prompted 'by the heating of the blood'?¹²

The 18th century? When Chief Justice Holt famously discussed whether killing without any provocation was murder even if committed 'of a sudden, and in the heat of passion'? Unlike many late modern commentators, he had no illusions about who was killing whom in so-called 'heated passion':

...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 a man, and adultery is the highest invasion of property.¹³

¹¹ *R v Peniamina* (2019) 2 QR 658, 686 [95] (Applegarth J).

¹² See Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992) 7-12.

¹³ *R v Mawgridge* (1706) Kel 119, 137; (1707) 84 ER 1107. Enraged men have killed their allegedly adulterous wives far more frequently than their lovers over the centuries. But men have killed men, claiming 'heat of passion'. For example, in 1727 John Oneby killed a man in a sword fight occasioned by

‘Heat of passion’ is so Shakespearean: ‘I see, sir, you are eaten up with passion’.¹⁴ So Iago observed to Othello, suggesting he would have a classic ‘heat of passion’ defence had he stood trial for wife-murder. Never mind that most critical readings of *Othello* see the play as problematising the entire conceit of impassioned femicide.¹⁵ And, never mind decades of criticism of the operation of so-called ‘heat of passion’ defences in the context of intimate partner femicide, critiques which culminated in major shake-ups of the law of murder in many anglophone jurisdictions.

Santo

There’s more to s304. The ‘heat of passion’ or provocation defence is excluded under ss304(2) and (3) if the sudden provocation is based on words alone or, to use short-hand, if it is based on the deceased having changed or ended the relationship, other than in ‘circumstances of a most extreme and exceptional character’.¹⁶

Adrian

What a great step forward. Let me get it straight. The provocation defence is ‘excluded’ if a domestic partner leaves a relationship.

Santo

But not if the circumstances are ‘extreme and exceptional’.

Adrian

heated words. Deciding the case, Lord Chief Justice Lord Raymond elaborated on the early eighteenth-century judicial understanding of an excusatory ‘heat of passion’. He rejected the defence argument that killing taking place in ‘a sudden fighting in heat of passion’ was merely manslaughter. If there was ‘sufficient time for this passion to cool, and for reason to get the better of the transport of passion’, it was murder: *R v Oneby* (1727) 2 Ld Raym 1485, 1488-1489; 92 ER 465.

¹⁴ Shakespeare in Honigmann (ed) (n 12) [3.3.394].

¹⁵ For the deployment of *Othello* in a Theatre of Education project contesting excuses for femicide see Adrian Howe, ‘Dramatising Intimate Femicide — Petitions, Plays, Public Engagement (with a Shakespearean Gloss)’ (2014) 26(2) *Canadian Journal of Women and the Law* 276.

¹⁶ Section 304(3) of the *Criminal Code* (Qld) provided that the defence did not apply other than in circumstances of a most extreme and exceptional character if a domestic relationship existed between the two, one of them killed the other and the sudden provocation was based on anything done by the deceased or anything the person believed the deceased had done: to end the relationship; or change the nature of the relationship; or to indicate that the relationship may, should or would end, or that there may, should or would be a change to the nature of the relationship. As a result of the *Criminal Law Amendment Act 2017* (Qld), an offender invoking the provocation defence in the context of, inter alia, a domestic relationship, would need to establish that the circumstances were of an ‘exceptional character’ rather than the circumstances being of a ‘most extreme and exceptional character’.

So, there's an exception to an exclusion to the defence to murder. Heaven help the poor juries.

And by the way, this is exactly what wife-killers effectively say in 'departure' cases – that he found her leaving him 'extreme and exceptional'. After all, she was leaving him, possibly for another man, and that was unbearable.

Anyone who reads the case law will see that so-called 'domestic' homicides are overwhelmingly committed by men and that the vast majority of these cases involve femicidal men slaughtering women who have left them or are trying to leave them. Attempting to exclude exiting a relationship as an excuse for murder by fiddling with the law to restrict provocation will not work.

Santo

It is so easy to get around. Just change the defence narrative – very useful for astute defence lawyers. But we're getting ahead of ourselves.

In the case at hand, the prosecution argued that the events leading to Sandra's death were a continuation of the earlier confrontation when he hit her: he was angry that she wanted to leave and the exclusion in s304(3) applied.¹⁷ That is, it was a departure case, precisely the kind of case that the legislation was designed to ensure could not give rise to a provocation defence. Furthermore, Sandra was 'defending herself and she had every right to be concerned. She no longer wanted this in her life. She needed to get out'. Sandra's actions with the knife, alone, signified the end of their relationship.¹⁸

Adrian

Actually, it was a concrete bollard that ultimately ended their relationship. As we plunge into the minutiae of the reformed Queensland law, it is imperative that we to keep in mind what this man did to his wife.

Santo

Defence counsel maintained that the exclusion did not apply because loss of self-control was based solely on the brandishing of the knife. Although it was acknowledged that the

¹⁷ *R v Peniamina* (2019) 2 QR 658, 677 [57] (McMurdo JA), 691 [119] (Applegarth J).

¹⁸ *Ibid*, 678 [59] (McMurdo JA).

offender had been in a rage before entering the kitchen, it was this that 'tipped him over into a rage'.¹⁹ The defence also argued that the exclusion was negated because the circumstances of the provocation were of an 'exceptional character'.

Adrian

An exceptional character? There is nothing 'exceptional' about a woman wanting to leave a man and employing an object to defend herself against an assault. How much ink has been spilt about jealous and possessive men who kill their partners because of cases like these, because of alleged infidelity?²⁰

Anyway, go on.

Santo

The judge directed the jury that provocation was not available if the provocative act was based on anything that Sandra did, or that the offender believed she had done, to change the nature of their relationship. It was for the defence to satisfy them that the provocation was not based on something Sandra did to change the nature of the relationship.²¹ Nor would the defence apply unless the jury found that the circumstances were of a most extreme and exceptional character.

The judge reminded the jury of the defence position: the relevant provocative conduct was the raising of the knife and the cutting of the hand, these not being acts that Sandra did to change the relationship. Accordingly, if the jury concluded that the provocation was 'based on' this conduct, the verdict would be one of manslaughter.²² Ultimately, he was convicted of murder.²³

Adrian

Amen to that.

¹⁹ Ibid 691 [118] (Applegarth J).

²⁰ See, for example, Victorian Law Reform Commission, *Defences to Homicide* (Final Report, October 2004) 29-30.

²¹ *R v Peniamina* (2019) 2 QR 658, 692 [123] (Applegarth J).

²² Ibid 692 [124].

²³ Ibid 686 [93] (McMurdo JA).

Santo

Yes, but remember he did appeal.

He argued that the exclusion 'did not arise on the evidence' and complained of the jury directions.²⁴ It is worth setting out the reasoning of the judges, briefly. Essentially, it all turned on the meaning of 'based on' in s304(3).

Adrian

Please no.

Santo

The majority dismissed the appeal. Applegarth J considered that it was Parliament's intention that s304(3) would apply in a case such as this, as the deceased's attempt to leave the relationship formed the basis for the killing. Were it otherwise, an accused could avoid the operation of s304(3) by nominating the most immediate act of the deceased devoid of the earlier context.²⁵ Even if an accused might nominate an immediate act of the deceased for the sudden provocation, the evidence might be such that the sudden provocation was based on something else done by the deceased to change the relationship.²⁶

Adrian

This must all be so hard for a jury to follow. I have a law degree but am still struggling to decipher the legalese. But please continue.

Santo

Morrison JA considered that the matters contained in s304(3) could constitute a 'foundation' or 'basis' for an accused's loss of self-control even if a deceased had not done anything specifically to change the nature of the relationship or end it.²⁷ An example in this case was the offender's belief that Sandra was having an affair.²⁸ In any event,

²⁴ Ibid 687 [99] (Applegarth J).

²⁵ Ibid 699-701 [160]-[169] (Applegarth J).

²⁶ Ibid 703 [182].

²⁷ Ibid 667-668 [16]-[19] (Morrison JA).

²⁸ Ibid 668-669 [25].

Morrison JA was of the view that while an accused person might nominate a particular act as *causing* the sudden provocation, regard could nonetheless be had to the changing nature of the relationship.²⁹ Put differently, notwithstanding defence arguments about what caused the sudden provocation, the jury could still have regard to the matters set out in s304(3) to find that the sudden provocation was based on them such that the exclusion would apply.

McMurdo JA, in dissent, disagreed that s304(3) was engaged merely because the deceased's conduct occurred in the context of an end or a change to the relationship. Here, it was the defence case that there was a loss of self-control as a result of Sandra's conduct with the knife. On the defence case, this is what caused the sudden provocation and the jury ought not have been directed to consider the exclusion in s304(3). Sandra's conduct with the knife was not in itself an act to end or change the relationship.³⁰

Adrian

This really does beggar belief. You said there was another appeal?

Santo

Yes, the sole ground of appeal before the High Court was whether the operation of s304(3) was limited to the provocative conduct identified by the appellant as the cause of his loss of self-control.³¹

The majority allowed the appeal, substantially echoing the dissenting judgment in the lower court. They disagreed that the words 'based on' represented a wider connection than the words 'caused by'. Further, they saw no evidentiary foundation for Sandra's conduct with the knife being itself a thing done to change the relationship. Nor was it for the defence to prove that his loss of self-control was not based on anything done by Sandra to change the relationship.³²

²⁹ Ibid 668-669 [20]-[25].

³⁰ Ibid 684 [81]-[83] (McMurdo JA).

³¹ *Peniamina v R* (2020) 385 ALR 367, 393 [107] (Keane and Edelman JJ).

³² Ibid 376 [28] (Bell, Gageler and Gordon JJ).

Adrian

What about the dissent?

Santo

Interestingly, the dissenting judges thought it surprising that the issue of provocation was allowed to go to the jury at all:³³

It is, to say the least, distinctly arguable that no reasonable jury could have been satisfied on the balance of probabilities that an ordinary person who had assaulted his wife could so far lose his self-control by her attempt to defend herself that he could form and act upon an intention to kill her.

But the prosecution neither made that submission nor one that ‘no reasonable jury could have been satisfied on the balance of probabilities that the appellant had killed the deceased when he lost his self-control because she took up the knife rather than because of her perceived infidelity’.³⁴

Adrian

Sanity at last.

Santo

They also disagreed that the phrase ‘based on’ means ‘caused by’.

Adrian

Please, not again.

Santo

OK. Suffice to say they found it telling that the legislature had not used ‘caused by’ and had made a clear policy choice that ‘a loss of self-control founded upon a change, or the prospect of a change,’ in a relationship could no longer be an excuse to intentionally kill a domestic partner.³⁵

³³ Ibid 381 [56] (Keane and Edelman JJ).

³⁴ Ibid.

³⁵ Ibid 390 [97].

Accordingly, they had no difficulty in finding that s304(3) was engaged by the offender's very own admissions of anger at Sandra's alleged infidelity and withdrawal from the relationship and that his loss of self-control was due to his 'smouldering resentment'.³⁶

After a second trial for murder, the offender was convicted of manslaughter and sentenced to 16 years, eligible for parole upon serving 80% of his sentence.³⁷

Adrian

Manslaughter? On what basis?

Santo

It might have been that he did not have the requisite intention to kill or do grievous bodily harm for murder. But the judge considered there was overwhelming evidence of murderous intent and sentenced the offender on the basis that he lost self-control.³⁸

Adrian

Thanks for that summary, Santo. If I could make a few comments.

Santo

Please do. I have a few of my own!

Adrian

Not being familiar with the case, I decided to read it backwards from the post-trial comments of the judge presiding in the second trial.³⁹

Santo

It's relatively uncommon for a judge to write a paper about a case. Why, do you think?

³⁶ Ibid 392 [104].

³⁷ *R v Peniamina (No 2)* [2021] QSC 282 [53].

³⁸ Ibid [3]-[4].

³⁹ Justice Peter Davis, 'Provocation – where to now? The implications of the Peniamina case' (Conference Paper, Queensland Bar Association Annual Conference, 27 March 2022).

Adrian

It's clear why. He felt the need to address the negative media coverage of the case. He helpfully provided a sample of the hostile social media posts. They include:

"Why oh why are we going backwards to entertain this provocation bullshit?"

"Anyone with an ounce of humanity must surely be angry ... over the fact that a bloke who repeatedly stabbed and then beat a woman until she died escaped a murder charge."

"Jealousy as an excuse to bludgeon to death and get away with it in Queensland. So, to get away with murder, just say you were convinced they cheated."

"This 'provocation' law needs to change. 'You made me angry' is not a defence for taking someone's life. Civilised people know this."

"Disgusting. Unforgiveable. When will it end!? ... (P)erpetrators will often irrationally, obsessively, inaccurately accuse their wives or girlfriends of cheating. Hold him accountable."

"Provocation as a defence should be abolished!"

"Why the f... is the defence of 'provocation' still allowed???"

"His sentence was reduced because she defended herself and this enraged him? Is this what it is saying?"

"Australia in the Dark Ages still ...".

"Strengthen the Murder Law. It is now only manslaughter because she attempted to defend herself? Outrageous."⁴⁰

Santo

And what did the judge make of all of that?

⁴⁰ Ibid 12-13.

Adrian

He rejected the abolition option favoured by these commentators, citing the standard refrain that because Queensland has a mandatory life sentence for murder, that this would disadvantage a person in a domestic relationship 'legitimately provoked' into killing a partner because that person would face the same punishment as someone who had intentionally plotted and murdered a third party, perhaps even for money. Such a 'serious injustice', he said, would be 'intolerable'.⁴¹

What *I* find intolerable is that this line of argument is so frequently trotted out every time a femicidal man charged with murder is convicted of manslaughter. I call it 'the move'. However earnest and well-meaning it usually is, the move takes the form of a disavowal of the reality of intimate partner homicide. Diverting attention away from the most common cases of 'provoked' killings, namely intimate partner femicide, the move fixates on the case of the rare woman killer. No matter that, as the Queensland judge acknowledges, so-called 'domestic' homicides are overwhelmingly committed by men, the gender-neutral 'person in a domestic relationship' is code for a woman who kills a male partner in the course of a violent or abusive relationship. No matter that these are not provocation cases but rather, in most cases, departure cases in which a woman leaves or expressed a desire to leave a relationship as the victim in this case allegedly did. The 'movers' cite the statistics but then move straight to a rare or even simply hypothetical case of a battered woman killer who is 'legitimately' provoked.⁴² It would, they say, be unjust to her if provocation was abolished.

⁴¹ Ibid 34. He cites the Queensland Law Reform Commission to this effect: Ibid 32. See generally Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (Report No 64, September 2008). While it is beyond the scope of this article to canvass the merits of retention or abolition of mandatory life for murder, the Commission examined the competing arguments, including those in favour of retaining mandatory life for murder and abolishing the partial defence of provocation: Report No 64, 421.

⁴² The move is by no means confined to non-feminist commentators. It occurs frequently in feminist critiques concerned about ensuring women killers have access to partial defences. For a recent example see the move from the *Clinton case*, appeals by three wife-killers convicted of murder, immediately to that of a woman who killed her husband in Heather Douglas and Alan Reed, 'The Role of Self-Control in Defences to Homicide: A Critical Analysis of Anglo-Australian Developments' (2021) 72 (2) *Northern Ireland Legal Quarterly* 271. I have long argued that the partial defence of provocation is an inappropriate vehicle for protecting women who kill violent male partners in self-defence. See Howe, 'Reforming Provocation (More or Less)' (1999) 12(1) *Australian Feminist Law Journal* 127, 134.

Santo

Indeed. I note that the introduction of s304 in 2011 had its genesis in a Queensland Law Reform Commission recommendation. While troubled by men's disproportionate use of provocation in departure cases, it did not recommend abolishing provocation partly out of a similar concern held for battered women.⁴³

Adrian

The intention is laudatory, at least in the feminist critiques, but the effect disastrous. As occurs over and over again, retaining partial defences, indicatively provocation for the very rare, battered woman killer, entails making it available for the far larger number of femicidal men. And, what needs to be emphasised is that women who kill male partners rarely, if ever, do so because they were 'provoked' by a man's 'nagging and shagging'. In intimate partner homicide cases, the provocation defence operates in a profoundly sex-specific way. It is the woman who provokes because that is what women do, so the historically mandated cultural and legal script goes.

Santo

That's exactly what happened in Victoria where a new defence of defensive homicide was abolished within a few years of its introduction in 2005. It was found there was 'clear evidence' that the defence was primarily relied upon by men and that they killed in circumstances that were 'very similar to those where provocation previously applied'.⁴⁴

Adrian

There are many other examples of this kind of reformist tinkering with the law of murder, the Queensland case being the most recent instance of a well-intentioned reform going wrong.

⁴³ Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (Report No 64, September 2008) above note 41, 473-4, 480. Section 304(3) was introduced by the *Criminal Code and Other Legislation Amendment Act 2011 No 7* (Qld).

⁴⁴ Department of Justice Victoria, *Defensive Homicide: Proposals for Legislative Reform: Consultation Paper-Criminal Law Review* (2013) viii. See also Danielle Tyson and Bronwyn Naylor (2019) 'Reforming Defences, An Australian Case Study' in Adrian Howe and Daniela Alaattinoğlu (eds) *Contesting Femicide – Feminism and the Power of Law Revisited* (Routledge, 2019).

Santo

I recall the Victorian Law Reform Commission toying with the idea of retaining provocation by excluding its availability in certain circumstances, for example, if the context for the killing was sexual intimacy or spousal homicide. The Commission, drawing upon the academic literature, determined that the provocative conduct would simply be recast by defence lawyers to sidestep the exclusion. Apropos the complexity of the Queensland provision, the Commission shrewdly observed that this approach ‘may also further complicate what is an already extremely complex test’.⁴⁵

Adrian

The situation in New South Wales – the only other Australian jurisdiction to retain the provocation defence – is hardly any better. It’s a toss-up which State has the most reactionary criminal law jurisdiction. I recall a case in New South Wales late last year where the killer was able to successfully invoke the so-called ‘homosexual advance defence’ (HAD) as part of his defence that he was provoked.

Santo

That case – *R v Cust* – bore such an uncanny resemblance to all those HAD cases we wrote about years ago.⁴⁶ In that case, Jesus Bebita was found dead in his unit, having suffered 47 knife inflicted injuries.⁴⁷ The killer, a former work mate who had arranged to stay with him, claimed that after imbibing a few drinks he awoke to find Jesus trying to ‘rape’ him. He admitted stabbing Jesus several times and attempting to conceal the crime by setting a doona alight.⁴⁸ The jury returned a guilty verdict to alternative charge of manslaughter by reason of the partial defence of ‘extreme provocation’ in s23 of the *Crimes Act 1900*

⁴⁵ Victorian Law Reform Commission, *Defences to Homicide* (n 22) 43-47 citing Jenny Morgan, ‘Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them’ (1997) 21(1) *Melbourne University Law Review* 237; Santo De Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26(1) *Melbourne University Law Review* 110, 139.

⁴⁶ See Adrian Howe, ‘More Folk Provoke Their Own Demise (Revisiting the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)’ (1997) 19(3) *Sydney Law Review* 336; De Pasquale (n 47) 139.

⁴⁷ *R v Cust* [2021] NSWSC 1515, [24], [27].

⁴⁸ *Ibid* [12], [14]-[16], [18].

(NSW).⁴⁹ He was sentenced to six years' imprisonment with a non-parole period of four years and six months.⁵⁰

Adrian

I had thought that serious consideration had been given to abolishing provocation in New South Wales?

Santo

While abolition was in the Terms of Reference of the Select Committee's inquiry into the Partial Defence of Provocation, it ultimately recommended retaining the partial defence out of concern for women suffering from long-term domestic abuse who would have difficulty establishing self-defence.⁵¹

Adrian

There's 'the move' again.

Santo

The law was reformed in 2014 to exclude certain conduct from constituting extreme provocation, namely, if the deceased's 'conduct was only a non-violent sexual advance' or the 'accused incited the conduct in order to provoke an excuse to use violence against the deceased.' Another precondition for extreme provocation is that the deceased's conduct is a serious indictable offence.⁵² These threshold requirements appear to have been met in the New South Wales HAD case as the offender's account – that Jesus sexually assaulted him – was accepted.⁵³

⁴⁹ Ibid [1].

⁵⁰ Ibid [89].

⁵¹ See Select Committee on the Partial Defence to Provocation, *Partial Defence of Provocation* (Final Report, April 2013) pt IV, 2 and 87-88. See further, pt X, 5 and, in particular, the discussion at 74-77.

⁵² See *Crimes Act 1900* (NSW) ss 23(2)-(3) as inserted by the *Crimes Amendment (Provocation) Act 2014* (NSW).

⁵³ *R v Cust* [2021] NSWSC 1515, [41]. Specifically, the offender claimed that he awoke to find that his pants were down, and Jesus was rubbing his penis against him: [16].

Adrian

I presume there was good evidence of a violent attack? If so it would surely be a matter of self-defence rather than 'provocation'?

Santo

It does not seem that there was any 'violent' attack to ground self-defence. Anyway, stabbing Jesus multiple times, also while in pursuit of him, might not be seen as a 'reasonable response'.⁵⁴ Theoretically, 'excessive self-defence', which is available as a partial defence to murder in New South Wales, could have applied but the offender would have needed to show that his homicidal conduct (when Jesus was attempting to flee) was 'necessary' to defend himself.⁵⁵

Adrian

Yes, it is clear why provocation serves as the far superior excuse for these men. All in all, it would appear that New South Wales represents yet another failure of reformist tinkering with the law, in this case ensuring that a sexual advance cannot ground a provocation defence.

Santo

Interestingly, the Select Committee had recommended excluding provocation in 'wife-killing' cases,⁵⁶ using the same language in s304(3) and, which we have seen, failed in *Peniamina*.

Ironically, the Select Committee's recommendation was expressly rejected by the New South Wales Government as it considered the proposal ineffectual. It cited the United Kingdom example of *R v Clinton* to demonstrate that excluding conduct such as infidelity or ending a relationship is problematic. There, provocation arose based on the impugned conduct combined with other 'provocative' acts, this constituting the 'whole context' of the killing.⁵⁷

⁵⁴ Ibid [41]. See *Crimes Act 1900* (NSW) s 418 for the pre-requisites for self-defence.

⁵⁵ *Crimes Act 1900* (NSW) s 421.

⁵⁶ Select Committee on the Partial Defence to Provocation, *Partial Defence of Provocation* (n 53) 203.

⁵⁷ *R v Clinton* [2013] QB 1 cited in New South Wales Government, *Government Response* to the report of the Legislative Council Select Committee on the *Partial Defence of Provocation* (2013).

Adrian

The judgment in *Clinton*, appeals by three more wife-killers, was certainly problematic, - a last gasp attempt to bring back 'sexual infidelity' as relevant to the new loss of control defence despite its express legislative exclusion as a trigger for loss of control.

All that it achieved was a new trial in which the offender pleaded guilty to murder and had his sentence cut from 26 to 20 years. It has not assisted other femicidal men in their bids for manslaughter convictions on the basis of loss of control.⁵⁸ Instead, post-reform cases have exposed 'infidelity' cases to be overwhelmingly exit cases, with juries convicting femicidal men of murder in most cases. And astonishingly, some judges are using their sentencing remarks to confirm a woman's right to leave a relationship without paying for it with her life. The evidence of the post-reform case law is that the English law reform abolishing provocation and expressly excluding sexual infidelity as a trigger for loss of control is having its intended effect. Most men are no longer getting away with murdering their wives and women partners.⁵⁹

In short, abolishing provocation as a defence to murder is, for the most part, working as the reformers intended in England and Wales - namely, stopping men getting away with murder.⁶⁰

Santo

Certainly there are cases that provide catalyst for change. South Australia only abolished provocation in 2020 on the back of a law reform report responding to the High Court's decision in another HAD case, *Lindsay v The Queen*.⁶¹ In that case, two men were jointly charged and tried with the murder of Andrew Negre and the offender was so convicted.⁶²

⁵⁸ Lord Chief Justice Lord Judge, who presided in *Clinton*, had been a virulent opponent of the reforms banning sexual infidelity as an excuse for murder. For a critique of *Clinton* see Adrian Howe 'Enduring Fictions of Possession - Sexual Infidelity and Homicidal Rage in Shakespeare and Late Modernity (glossing *Othello*)' (2012) 21 *Griffith Law Review* 772.

⁵⁹ See the analysis of the post-*Clinton* cases in my chapters in Howe and Alaattinoğlu, (n 46).

⁶⁰ My analysis of post-reform cases reveals that the reforms are working as intended inasmuch as few femicidal men are getting away with murder in England and Wales today: *Ibid*.

⁶¹ (2015) 255 CLR 272. See *Statutes Amendment (Abolition of Provocation and Related Matters) Act 2020* (SA) and South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 1* (Final Report, April 2017) viii.

⁶² The other was acquitted but convicted of assisting him: see *R v Lindsay* (2014) 119 SASR 320, 324[5] (Gray J).

Adrian

What happened this time?

Santo

After meeting at a tavern, the two men returned to the offender's family home where others, including the offender's co-accused, were gathered. Negre allegedly approached the offender, straddling his legs and making a thrusting motion with his hips. The offender threatened to hit Negre. Negre replied he was joking.⁶³

Adrian

That was the homosexual advance?

Santo

Not quite — there was more.

Negre stayed the night at the offender's house where he fatally stabbed Negre after he allegedly said to the offender that he would pay to have sex with him.⁶⁴

Adrian

That was the homosexual advance?

Santo

Yes, unbelievably. I mean, to start with, a witness saw the offender wearing gloves. Then there was evidence of the offender asking his co-accused to hold Negre down while he rifled through Negre's pockets. Further, when the same witness told the offender to let Negre go, the offender said that he couldn't as Negre would 'call the cops.'⁶⁵

Bizarrely, it was the trial judge who left provocation to the jury. The actual defence at trial was that the offender did not attack or stab Negre.⁶⁶

Adrian

⁶³ Ibid 324 [8]-[10] (Gray J), 349-350 [100]-[107] (Peek J).

⁶⁴ Ibid 325 [12] (Gray J), 350 [109]-[110] (Peek J).

⁶⁵ Ibid 325 [13] (Gray J).

⁶⁶ Ibid 329 [21]-[22].

How can you be provoked to do something you said you didn't do?

Santo

Precisely! The trial judge directed the jury that the offender would be guilty of manslaughter if they were satisfied that the offender, as a result of the victim's conduct, suffered a sudden and temporary loss of self-control. He drew on defence arguments that the offender may have lost self-control as he was, inter alia, 'Aboriginal', 'not homosexual', and had been met with an 'unwanted sexual advance.'⁶⁷

Adrian

Ah, the 'cultural defence', racialising the offender as more volatile, less self-controlled than benchmark white men.⁶⁸

I find it significant that the jury returned a verdict of murder. Tell me about the appeal.

Santo

The appeal complained, in general, of the jury directions in relation to provocation.⁶⁹

Although the South Australian Court of Criminal Appeal unanimously dismissed the appeal, Peek J made specific reference to the authorities and the 'extensive academic literature' – none of which was cited – in concluding that no reasonable jury in 21st century Australia could 'find that an ordinary man would have lost self-control' so as to 'attack the deceased in the manner' he did.⁷⁰

Undeterred, the offender appealed to the High Court. Unfortunately, that judgment provides yet another example, if one more was needed, of all that is wrong with retaining a homophobic laden provocation defence. Interestingly, one of the grounds of appeal to

⁶⁷ Ibid 331-2 [29]. Defence counsel contended that the evidence of the co-accused gave rise to provocation: Ibid 325 [19]. The facts that formed part of the provocation to prove that the offender had an intention to kill would have also enlivened the defence.

⁶⁸ See the account of how law figures offenders as 'always already white' and how this played out in *Lindsay* in Kent Blore, 'Lindsay v The Queen: Homicide and the Ordinary Person at the Juncture of Race and Sexuality' (2018) 39(1) *Adelaide Law Review* 159, 171-172.

⁶⁹ *R v Lindsay* (2014) 119 SASR 320, 346-7 [88] (Peek J).

⁷⁰ Ibid 380[236].

succeed in the High Court was that the court had wrongly taken into account the 'unidentified academic literature'.⁷¹

Adrian

They weren't referring to us, were they?

Santo

Not just us as it turns out.

The majority judgment, citing our work and the work of others, misstated our critiques of the provocation defence as revealing a distrust of the jury and their 'gendered' and 'heterosexist' verdicts.⁷²

Adrian

Really? I thought we made it clear we were problematising the law and judicial attitudes to provocation, not jury verdicts?

Santo

We were.

Adrian

But it seems we need to do so again. So here it is once again. The problem we have addressed and highlighted in our analyses of provocation cases rests with the law, not with juries. Occasionally juries will return what we regard as a perverse verdict in a case where a woman has been killed by a male partner. Almost always this occurs in cases where provocation is available.⁷³

⁷¹ *R v Lindsay* (2015) 255 CLR 272, 275 [3] (French CJ, Kiefel, Bell and Keane JJ).

⁷² *Ibid* 281-2 [22] (French CJ, Kiefel, Bell and Keane JJ). See further note 65 of the judgment and the references to the following works: Adrian Howe, 'Green v The Queen – The Provocation Defence: Finally Provoking its Own Demise?' (1998) 22 *Melbourne University Law Review* 466; Sarah Oliver, 'Provocation and Non-violent Homosexual Advances' (1999) 63 *Journal of Criminal Law* 586; Rebecca Bradfield, 'Provocation and Non-violent Homosexual Advances: Lessons from Australia' (2001) 65 *Journal of Criminal Law* 76; De Pasquale (n 47); Stephen Gray, 'Provocation and the Homosexual Advance Defence in Australia and the United States: Law Out of Step with Community Values' (2010) 3(1) *The Crit: A Critical Legal Studies Journal* 53; Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave, 2014).

⁷³ My analysis of the post-reform English intimate partner femicide cases reveals that juries rarely returned manslaughter verdicts in intimate partner femicide cases where self-defence was raised. But these were

Santo

Perverse verdicts aside, the jury in the *Lindsay* case saw through the defence: they convicted him of murder. But getting back to the High Court judgment, the court did think that a jury could be satisfied that an ordinary person in contemporary Australia would have responded as the offender did.⁷⁴ In expressing this view, the majority referred to the court's earlier decision in that other lamentable HAD case, *Green v The Queen*.⁷⁵

For the majority, what was most relevant was that an offer of money for sex made:

by a Caucasian man to an Aboriginal man in the Aboriginal man's home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess.⁷⁶

Adrian

Pungency — racialising an Aboriginal offender as more easily provoked, less self-controlled, is a risible othering practice that itself has a pungent smell about it.⁷⁷

Santo

Equally problematic is the insinuation that the defence in this case was not redolent of homophobia due to the accused's attributes or circumstances. We had already observed this phenomenon years ago when discussing *Green*. There the so-called 'sexual abuse factor', an accused's memory of (hetero) sexual abuse, was seen as highly relevant to the provocation.⁷⁸

outliers, the exceptions proving the rule that when provocation is abolished, murder convictions usually follow in these cases. There is no evidence to support speculation that removing provocation would simply lead to the same problems occurring in self-defence. See my chapters in Howe and Alaattinoğlu, [n 46].

⁷⁴ *Lindsay v The Queen* (2015) 255 CLR 272, 286 [35] (French CJ, Kiefel, Bell and Keane JJ).

⁷⁵ (1997) 191 CLR 334.

⁷⁶ *Lindsay v The Queen* (2015) 255 CLR 272, 287 [37] (French CJ, Kiefel, Bell and Keane JJ). Nettle J, in a separate concurring judgment put it more bluntly, observing that a jury might have inferred that because 'the appellant is Aboriginal, he perceived the deceased's conduct towards him to be racially-based and for that reason especially insulting': at 300 [81].

⁷⁷ For a critique of the use of a so-called 'cultural defence' for an Aboriginal offender see Adrian Howe, 'R v *Wunungmurra*: "Culture" as Usual in the Courts' (2009) 30(1) *Australian Feminist Law Journal* 163 referencing Volpp's scathing account of the deployment of cultural defences for minority ethnic men in the United States: Leti Volpp '(Mis)identifying Culture; Asian Women and the "Culture Defence"' (1994) 17 *Harvard Women's Law Journal* 57.

⁷⁸ Howe above note 72, 476; De Pasquale (n 47) 139.

Adrian

Ah *Green*. Who can forget Gummow J's brilliant dissenting judgment calling for a 'credible narrative' to be told before provocation be left to the jury.⁷⁹

Getting back to the case at hand: what did that jury decide?

Santo

He was found guilty of murder at his second trial too.⁸⁰

Adrian

Juries usually do return murder verdicts, especially in jurisdictions that have abolished provocation. One did so even in your Queensland case where they had to wade through complex legislation to determine if knifing a woman 29 times and smashing her head in with a bollard was murder.

The suggestion in the majority judgment in *Lindsay* that our work critiquing the provocation defence reveals a distrust of the jury is nowhere supported by a reading of what we have argued. Indeed, none of the work cited in their misleading footnote 65 sheeted the problem to juries. Nor, for that matter, do the social media commentators in the Queensland case. The issue to be addressed, as we *all* make clear, is the law of provocation itself.

And there is yet another misreading of the critiques of the provocation defence, namely Justice Davis' response to the social media commentators. He claims it was the fact that this killer's attack on his wife 'seemingly went on forever' was what 'probably most caused public concern'.⁸¹ This misreads the comments he cites. They target the law of provocation itself – this 'bullshit' law should be abolished. Strengthen the law of murder. Why is provocation still allowed? There's not a word about the jury.

⁷⁹ *Green v The Queen* (1997) 191 CLR 334, 377 (Gummow J), quoting *Lee Chun-Chuen v The Queen* [1963] AC 220, 231-2 (Lord Devlin).

⁸⁰ Incidentally, he did appeal once more and again with a complaint about the trial judge's directions to the jury in relation to provocation. That appeal was also dismissed: see *R v Lindsay* (2016) SASR 362.

⁸¹ Davis (n 41) 31.

With such wilful misreading of critiques of the defence passing as reasoned argument, it is Groundhog Day when it comes to dealing with provocation's ardent defenders.

I also have a comment about the minority judgment's criticism in *Peniamina* of the prosecution's 'unnecessarily complicated' case. It is the prosecutor's job to anticipate, prepare for and rebut defence arguments that victims provoke their own demise.

Accordingly, given all the trenchant criticism over the last three decades of the very idea that a woman knifed or bludgeoned to death by her husband bears some blame for her own death and given all that we now know about the usual circumstances of their deaths, surely questions need to be asked about a prosecution case that fails to secure a murder verdict.

Furthermore, I read the minority judgment as, in effect, a critique of legislative tinkering of the provocation defence. All that was needed in the case was a submission to the judge that no reasonable person would have lost control in the circumstances alleged, namely, that the victim was trying to defend herself from a vicious attack.

But a vastly preferential option is to catch up with the other States and abolish provocation and not simply as a defence. It is not enough to merely abolish the partial defence, as defence lawyers can argue lack of intent, as has occurred in Victoria.⁸² Even when murder convictions are secured, the victim's 'provocation' can still be relied upon at sentence as a mitigating factor. Victim-blaming lives on there.

The wider issue needs to be addressed: the entire conceit of a 'provoked' killing must be contested, especially in the context of intimate partner femicide. If historically, 'heat of passion' was seen as a laudable concession to 'human frailty', the merest glance at centuries of case law exposes that frailty to be, specifically, men's frailty, when confronted with women who want to leave them. Your Queensland case leaves us stuck in the Dark Ages.

Santo

I wonder if Sandra's unspeakable death at the hands of her partner will be the catalyst for Queensland to become the next State to abolish provocation? Certainly, the unpalatable,

⁸² See generally Tyson and Naylor (n 46).

almost incomprehensible legalese of the appellate court judgments illustrates all that is wrong with meticulously crafted exceptions to the antiquated 'heat of passion' defence. They inevitably fail in all their complexity.

Adrian

Agreed. Of course, this is not to say that complexity inevitably makes for bad law. But it does in murder cases. Simply put, it makes for a situation such as this where knifing a woman multiple times and hitting her over the head with a concrete bollard can be regarded as less than murder. It cannot be emphasised enough that it is the availability of provocation and the reformist tinkering aimed at restricting it that leads to such an appalling outcome, one attracting so much critical attention in the media, possible.

Santo

Yes. Factually, the case is a simple and oft-repeated one: a possessive and jealous man killed his partner. Yet because of some very technical drafting, coupled with a misguided aim of retaining provocation for the betterment of others, a five-year legal squabble ensued, all for the purpose of determining if a husband's rage over a cut to his hand was, as the defence argued, manslaughter. Or that a wife wanting to leave her husband, as the prosecution contended, meant that he ought properly be convicted of murder.

What better example is there than *Peniamina* of the failure of reformist tinkering with the law of homicide to achieve its stated goal of tightening the provocation defence?

Santo & Adrian

Lest we forget what that man did to his wife.

Lest we forget the ferocious knife attack.

Lest we forget the concrete bollard.

We conclude by recalling Judge Coleridge's apt words in the famous 1837 provocation case of *Kirkham*: '(T)hough the law condescends to human frailty, it will not indulge

human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions'.⁸³

We submit that it's past time that Queensland legislators took these words on board. It is incumbent on them to take a close look at what passes for justice in femicides committed in the 'heat of passion' today.⁸⁴ As Victorian abolitionists, we implore Queensland to consign the provocation defence to history. Avert the gaze from the rare battered woman killer. Focus instead on the lethal violence meted out to women on a weekly basis in Australia by femicidal men claiming 'provocation'. Abolish it as a defence to murder forthwith.

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⁸³ *R v Kirkham* (1839) 8 Car & P 115, 119; 173 ER 422. For some women the glass ceiling is 'like a concrete block': Rachel Noble quoted in Tory Shepherd, "May the best spy win': Australia's intelligence chiefs open up on cyber threats - and feminism", *The Guardian* (online, 2 September 2022) <<http://www.theguardian.com/technology/2022/sep/02/may-the-best-spy-win-australias-intelligence-chiefs-open-up-on-cyber-threats-and-feminism.html>>. For Sandra Peniamina a concrete bollard was a death sentence. For an assessment of how successful English courts have been in holding impassioned femicidal men to account over the centuries see Adrian Howe, *Crimes of Passion Since Shakespeare – Red Mist Rage Unmasked* (Routledge, forthcoming).

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