“Excluding sexual infidelity as a ground of loss of control in the Coroners and Justice Act 2009 was a poor policy decision. It failed to recognise the massive potential for serious emotional impact that a betrayal of sexual trust may have in real life on the average person, which should make it a classical case for serious provocation.” Discuss.

Excluding sexual infidelity was poor policy decision because it is gendered, confusing and illogical. This essay will analyse: the current law, the *R v Clinton* decision, the impact of the decision and the purpose and problems of the reform.

**Current Law**

*R v Mawridge* introduced the provocation defence to murder as a concession to human frailty. The partial defence of loss of control is outlined in the Coroner and Justice Act 2009, s.54. There are three criteria the defendant must satisfy: first, loss of self-control; second, caused by a ‘qualifying trigger’; and third that a person of normal age and sex with a normal degree of tolerance and self-restraint would have reacted in the same way. Therefore, the defence contains three components: a factual component and two overlapping objective evaluative components. Parliament broke the former objective test into two parts in an attempt to narrow the defence and create a bifurcated objective test. The starting point for the new defence addresses the question: did this defendant in fact lose self-control? If someone feels personally wronged and subjectively viewed the circumstances as being of extremely grave character it is irrelevant under the new defence.

S.55 states that sufficient qualifying triggers include: fear of serious violence and/or a thing said or done which constitutes a circumstance of extremely grave character or caused the defendant to have a justifiable sense of being wronged. There are two exceptions: incitement by the defendant and sexual infidelity as a trigger; the latter is expressly precluded by s.55(6)(c) because it was felt that juries were being overly sympathetic to men who killed their partners upon discovering their adultery. The Ministry of Justice emphasised that the victims sexual infidelity can never justify reducing a murder charge to manslaughter, even if it is present ‘in combination with a range of other trivial and commonplace factors’. It is clear why the Government has taken this position; it does not want to say the conduct was rightful but wrongful.

**R v Clinton**

The provision has proved problematic and was considered in *R v Clinton*. Clinton’s wife admitted to him that she had been having an affair and described various sexual encounters; Clinton threatened to commit suicide, his wife replied that he had not got the ‘balls’ to do it. Clinton then killed his wife by beating her over the head with a baton and strangling her. The trial judge did not allow him to rely on evidence relating to sexual infidelity. However, the Court of Appeal held that where sexual infidelity forms an essential part of the context the prohibition does not apply. Therefore, sexual infidelity was not subject to a blanket exclusion and was considered in context under the third prong, even though excluded under the second prong. The controversial decision has significantly

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2 (1706) 1 East PC 276; 84 ER 1107.
4 *Clinton* (n1).
reduced the scope of this exception. Baker and Zhao argue that ‘the Court of Appeal got the law completely wrong’ because the ‘hazardous precedent’ clearly ‘overlooked the fundamental policy issues that led Parliament to enact a narrower defence of loss of control’.  

If the court is satisfied that the defendant did in fact lose control and was subjected to objective provocation, it then considers the second objective question, where he/she will have to prove that any normal person would have lost control given the degree of objective provocation. Morgan argues ‘that the law should not govern the feeling of emotion itself… but the reaction of the defendant to it,’ reinforcing the importance of objectivity and the need to refrain from adopting a psychological basis which is too subjective. The Law Commission proposed abolishing the subjective requirement. However, the Government retained it and suggested the sexual infidelity exclusion, which was not advanced by the Law Commission; this conflict between law and policy reflects the initial cracks in the decision before it was even formalised.

If a qualifying trigger has not been proved as the source of loss of control, then there is no need to consider the second objective question; this was overlooked by Lord Judge CJ in Clinton. Three things triggered Clinton’s attack: his wife’s sexual infidelity; his wife’s taunts about his suicide threat; and his fear of having to look after his children on his own. There is no doubt that the main trigger was his wife’s sexual infidelity; evidence showed that after he killed his wife he sent explicit photographs to her lover exhibiting that sexual infidelity was on his mind even after the killing. Baker and Zhao believe ‘compartmentalisation is exactly what the new law requires’ highlighting that ‘sexual infidelity may add a dimension to provocation but it cannot be considered, any qualifying triggers should stand on their own’.  

Contrastingly, Clough argues that it ‘cannot be compartmentalised without creating injustice’ because a trigger cannot be established ‘without looking at all the circumstances’. It could be argued that the Government was merely trying to prevent sexual infidelity as the sole basis for the trigger. Ward emphasises the Governments view that sexual infidelity is never ‘sufficient on its own’. Therefore, considering its effects does not conflict with the provision. However, this is paradoxical. Effects of an act cannot be separated from the act itself; both contributed to the creation of the situation, influencing the defendant’s behaviour. All triggers should be considered; however, deconstructing the cause into its different parts could avoid misapplying the exclusion. Although, this is often impossible due to the multi-faceted nature of relationship breakdowns.

The flexible contextual approach combined with the court’s reasoning presents an ‘apologist attitude’ which indicates an uneasiness about excluding the defence.  

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5 Baker and Zhao, ‘Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity’ (2012) 76 J Crim L 254, 255.
7 Baker and Zhao (n3) 265.
9 HC Deb, 9 November 2009, col 82.
Impact
The court highlighted that s.55(6)(c) arises in the context of a trial process, not an ‘academic symposium’.\textsuperscript{11} There is no prohibition on the defendant giving evidence including the impact of sexual infidelity. The difficult cases are those where one partner taunts another with their infidelity as part of a range of taunts, not when infidelity is solely relied upon. Norrie questions ‘should it be the case that one somehow excludes the one taunt and admits the others?’;\textsuperscript{12} it could be argued that it is the campaign of taunting that is significant and not the substance of individual taunts. However, if the things said are exclusively about sexual infidelity, they should be excluded as qualifying triggers.

In \textit{Clinton}, the exclusion was held to be ‘limited to the assessment of the qualifying trigger’.\textsuperscript{13} Therefore, sexual infidelity was considered under the third component where there are no constraints. The decision is problematic for two main reasons. Firstly, it is difficult to identify what triggered Clinton’s loss of self-control. The issue is whether the victim's infidelity was a context for the defendant’s loss of control, or the cause of it. Secondly, it is conceptually challenging for the jury to exclude unfaithfulness at some stages of their deliberations and then draw upon that same evidence at other points. The jury is likely to get confused deciding when sexual infidelity is, and is not, relevant. Stark highlights that the state of the law is ‘unfortunate’ because the reforms ‘were meant to simplify and modernise’.\textsuperscript{14} Therefore, although the reasoning behind the bold move of excluding a sole confession of sexual infidelity is understandable, the setback is that such circumstances are rare.

Sexual infidelity creates a highly emotional situation and produces completely unpredictable responses. Ignoring the context in which words are used introduces artificiality into the law. The jury cannot sensibly evaluate the circumstances if they are both disregarding and considering the same evidence; it is counter intuitive. Lord Justice CJ emphasised that although it may not be ‘unduly burdensome’ to compartmentalise and disregard sexual infidelity when it is the only trigger, seeking to do this when it is ‘integral to the facts… is not only much more difficult, but is unrealistic and carries with it the potential for injustice’.\textsuperscript{15} For example, in \textit{R v Stingel},\textsuperscript{16} a jealous stalker stabbed his victim when he found her having sexual intercourse. He would not face any difficulty with the sexual infidelity element but a jealous spouse would be excluded. The damaging policy decision establishes inconsistencies which undermine the provision and erode public confidence in the fairness of the criminal justice system.

Purpose of Reform
The reforms were implemented to minimise gendered application of the law, focusing on men who kill their female partner in response to alleged infidelity. Although, it is questionable whether express preclusion is necessary. Fitzgibbon considers the exclusion unwise for two reasons: firstly, it

\textsuperscript{11} \textit{Clinton} (n1) 15.
\textsuperscript{13} \textit{Clinton} (n1) [31].
\textsuperscript{14} Findlay Stark, ‘Killing the Unfaithful’ (2012) 71 CLJ 260, 262.
\textsuperscript{15} \textit{Clinton} (n1) 17.
\textsuperscript{16} [1990] 171 CLR 312 (High Court of Australia).
is unnecessary because sexual infidelity defences have lost favour with juries in recent years and secondly, one should never say never because there may be cases, involving sexual infidelity, where a properly directed jury might think the partial defence could succeed. Overt exclusion is not needed because juries can adequately determine when it is being used unreasonably. Over-engineering the law prevents the input of juries, which inject an important community value into the evaluation process. Provocation is a concession to human frailty, therefore, it is vital that there is some human assessment. The power of juries should not be overridden by legislation.

Moreover, it could be argued that identifying specific subcategories of conduct which cannot amount to a defence is not good law-making. Miles believes the “micro-management” of the defence may prove to do more harm than good. It is better to lay out general principles and rely on the judicial check mechanism; rather than using an additional specific exception. Compartmentalisation and prioritisation attempts the impossibility of delineating between appropriate and inappropriate responses. As other forms of disloyalty and humiliation of sufficient gravity may constitute a qualifying trigger, it is likely to generate confusion regarding the extent of the prohibition. There are many circumstances which people might feel should not provide an excuse for murder, so why single out one? For example, honour killings were not singled out because the Ministry of Justice believed the ‘high threshold’ of the provision would have the effect of excluding [these] situations. Keating highlights that it is ‘unclear’ why the Government did not have the same faith in its test’s ability to exclude unmeritorious cases of sexual infidelity.

Harman argues that the reforms signify the end of a ‘culture of excuses’ surrounding provocation cases of sexual infidelity arising from domestic violence. However, there are concerns that the changes have gone too far. Some fear the law has swung in favour of women by including fear of violence in the new partial defence. McDonagh maintains that ministers ‘see homicide in pink and blue’; the law should not take a feminist view on murder, it is wrong to regard ‘women’s domestic violence more leniently than men’s’. The unsatisfactory gendered policy decision merely reproduces the gender bias experienced under the previous law.

Problems
The term ‘sexual infidelity’ is not defined. Reed and Wake have predicted ‘interpretation difficulties’ which reflect ‘drafting of a tautological and imprecise nature’. It is unclear if the provision is concerned with sexual infidelity, or jealousy arising from it. In addition to these conception issues, the wording itself is problematic. Read literally, s.55(6)(c) only forbids having regard to the ‘fact’ that

19 (n3) para 56.
20 Keating, Cunningham, Elliot and Walters, Clarkson and Keating: Criminal Law (Sweet and Maxwell 2014) 741.
23 Reed and Wake, ‘Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes’ in Reed and Bohlander (eds), Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives (Ashgate 2011), 117.
the thing said or done constitutes sexual infidelity; disregarding the words or acts but not the effects. Additionally, the word ‘infidelity’ generates uncertainty as to which relationships acquire a bond of loyalty and at what point this bond is severed. If construed narrowly, it could only include long-term relationships. Equally, the word ‘sexual’ does not define whether physical intimacy needs to have taken place.

Another difficulty is finding something ‘said’ which ‘constitutes’ sexual infidelity. The drafting has been heavily criticised; Horder describes the wording as ‘bizarre’ and considers it a ‘stretch of meaning’ for a thing said to ‘constitute’ sexual infidelity. Professor Ormerod suggests the example of a defendant hearing a wife say to her lover, “I love you”. Although this may provide evidence of sexual infidelity, it does not necessarily ‘constitute’ it. Furthermore, if the words are untrue, how could they ‘constitute’ infidelity? In Clinton, Lord Judge CJ highlighted that ‘things “said” includes sexual infidelity admissions (even if untrue) as well as reports (by others) of sexual infidelity. It would be illogical for a defendant to be able to rely on an untrue statement about the victim’s sexual infidelity as a qualifying trigger, but not a truthful one. Also, Slater highlights the contrasting use of singular and plural within s.55(4) (thing or things) in comparison to the use of only singular in s.55(6)(c) (thing); presenting further potential misunderstandings. Withey fittingly proposes that a less confusing provision would have been: ‘where the thing done constituted sexual infidelity, or a thing said related to sexual infidelity, it is to be disregarded’.

The unclear drafting means discrepancies are inevitable. Is kissing another person infidelity or just full intercourse? Would a one-night-stand count? Pillsbury concludes that ‘we need to look at the whole context of the relationship and especially the state of the relationship prior to the infidelity.’ Clearly there can be sexual infidelity outside marriage, but how fixed must a relationship be? In Clinton, Mr Edis suggests the concept of ‘infidelity’ involves a breach of mutual understanding which is to be inferred within the relationship, as well as more obvious expressions of fidelity (eg. marriage). However, this does not address the specific requirement that the infidelity to be disregarded must be ‘sexual’.

Express exclusion is unnecessary because juries are capable of deciding when it should be considered. Lord Thomas believes it reflects a ‘failure to trust the common sense of the jury’. However, Elvin goes further, suggesting ‘a failure to trust the judge to remove the issue from the jury’. Being absolutist means that lesser betrayals, such as a kiss, must be treated the same by the jury as discovered adultery. The policy decision is inadequate because a blanket prohibition could

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25 Professor Ormerod, Smith and Hogan’s Criminal Law (13th edn, OUP 2011) 521.
26 Clinton (n1) [26].
30 Clinton (n1).
31 HL Deb, 26 October 2009, vol 713, col 1060.
32 Elvin, ‘Killing in Response to Circumstances of an Extremely Grave Character’ in Reed and Bohlander (eds), Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives (Ashgate 2011), 148.
prevent the jury hearing, albeit infrequent, meritorious cases. The rigid rule does not cater for the emotional pressure sexual infidelity invokes; it is impossible to legislate away people’s instinctive upset in those circumstances.

In conclusion, excluding sexual infidelity was a poor policy decision because the provision is gendered, confusing and illogical. Therefore, it fails to achieve the Government’s aims. Although gender bias in this area is not new, the exclusion merely reverses the previous issue of gendered application. Clinton affirms concerns that the reforms will do little to overcome this. Furthermore, the contextual approach in Clinton means the exclusion is largely ineffective at minimising the problems it was created to prevent. The term ‘sexual infidelity’ creates conceptual and interpretational issues due to uncertainty over meaning and application. Sexual infidelity is rarely completely separate from other events, consequently a more nuanced approach is required as a blanket prohibition excludes cases that arguably deserve concession (eg. excessive taunting and humiliation). Viscount Simon acknowledged that ‘the application of common law principles... must to some extent be controlled by the evolution of society’. Adultery is so frequent in modern life, express exclusion is illogical because juries are capable of excluding it when necessary. The emotional impact is important but events cannot be isolated from their context; the provision wrongly compartmentalises sexual infidelity creating artificiality and injustice. The exclusion cannot and does not eradicate the fact that sexual infidelity and loss of control are inexplicably linked; if this link did not exist, the policy decision to expressly exclude it would be unnecessary. Those who take the law into their own hands need to be punished but a balance needs to be found between emotions and appropriate retribution.

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