

RIGHTS OF WOMEN RESPONSE TO THE LAW COMMISSION CONSULTATION PAPER 173, *PARTIAL DEFENCES TO MURDER*

Rights of Women welcomes the publication of the Law Commission consultation paper *Partial Defences to Murder* (number 173). The Law Commission has produced a paper which addresses many of the key issues relevant to abused women who kill in this context.

Rights of Women is an Industrial and Provident Society, which was founded in 1975 to promote the interests of women in relation to the law. We run a free, national confidential telephone legal advice help line for women. We specialise in advising in family law, especially domestic violence and Children Act matters. Rights of Women works to attain justice and equality by informing, educating and empowering women on their legal rights. We are a membership organisation and our activities include producing publications, organising conferences and training courses, and undertaking policy and research work.

Our primary interests in responding to this paper concern the defences available to abused women who kill, and the problem of inadequate convictions and sentences frequently given to perpetrators of domestic homicide against women.

Overarching arguments

Human Rights and Domestic Violence

We believe that it is vital to the success of any law reform in this area that it complies fully with the Human Rights Act 1998. It will need to reflect the sanctity of human life, as expressed by Article 2 of the European Convention on Human Rights. The matters discussed here clearly engage Article 6 (fair trial) and Article 8 (right to private and family life) as they apply to both victims and perpetrators. We would also argue that in some contexts, domestic violence constitutes torture, and that Article 3 also therefore applies. We would urge the Commission to ensure that their recommendations comply with these standards.

The issues under discussion have a profound impact on the way violence against women is addressed both in courts and in wider society in England and Wales. It will therefore be important that a clear definition of domestic violence is used when designing and implementing reforms. There is currently no definition of domestic violence included in the Domestic Violence, Crime and Victims Bill currently before Parliament, and we believe that this needs to be amended urgently to ensure that the legislation will be effective.

Even if the Bill is not amended, a much stronger and more inclusive definition of domestic violence should be used to frame these specific reforms. We

would endorse that used by the United Nations Special Rapporteur on Violence Against Women, who cites that in the United Nations Declaration on the Elimination of Violence Against Women which in article 2 defines violence as encompassing but not being limited to ‘physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation’. The Special Rapporteur has further adopted an expansive definition of violence in the family to include ‘violence perpetrated in the domestic sphere which targets women because of their role within that sphere or as violence which is intended to impact, directly and negatively, on women within the domestic sphere. Such violence may be carried out by both private and public actors and agents. This conceptual framework departs from traditional definitions of domestic violence, which address violence perpetrated by intimates against intimates, or equates domestic violence with woman-battering.’¹

Equality Proofing

It is vital that every element of draft legislation produced as a result of this paper be equality proofed – that it be tested to ensure it does not discriminate on the basis of gender, race, disability, sexuality, age, religion or traveller status.

Implementation

Effective implementation will be crucial to the success of any reforms. A key component of this should be comprehensive gender and domestic violence training for all officers within the criminal justice system (this would include for example judges, prosecuting lawyers, police officers, probation officers etc). This training should involve abused women and their representatives, and we recommend that it be based on the Duluth Model Power and Control Wheel.² It will be essential that such officers have an understanding of the issues of power and control within violent relationships, and to learn about the different ways domestic violence is perpetrated and experienced. This should include analyses of disproportionately low sentences received by some men who kill their female partners.

Such training should also cover cultural matters impacting on women in situations of domestic violence, and ensuring clear understanding that ‘honour’ killings and forced marriages are clear cases of domestic violence.

There should also be independent monitoring of the implementation of any reforms on individual cases, with particular attention given to the treatment of abused women who kill and to uniformity of sentencing in domestic homicide.

¹ E/CN.4/1996/53, para. 28.

² See Pence, E., and Paymar, M., 1993, *Education groups for Men who Batter – the Duluth Model*. Springer Publishing Company:New York.

The Court of Appeal should produce a practice direction on both sentencing and evidence in cases where domestic violence is a factor. A problem which has faced practitioners defending an abused woman who has killed is the difficulty of bringing evidence of her experience of domestic violence at the deceased's hands, other than by using it as evidence of Battered Women's Syndrome (BWS). It can be difficult for the defence to adduce evidence of matters that are considered issues of common knowledge. We argue that, whether or not the defence is arguing that the defendant has BWS, assumptions about the judge's or jury's level of knowledge about domestic violence generally and of honest responses to it by women in particular should not be made. Expert evidence about domestic violence should therefore be admissible. We would envisage such experts including health care professionals (GPs, hospital staff), academics, women's organisations, and others.

Finally, it will be of paramount importance that the cases of abused women who have killed are urgently reviewed by the Criminal Cases Review Commission (CCRC) should the law be reformed. Cases where women are on remand or are still in prison should be the CCRC's top priority, before focusing on women whose convictions are spent.

Consultation Questions

Provocation

1. Do consultees agree:

- (1) that the law of provocation is unsatisfactory; and**
- (2) that its defects are beyond cure by judicial development of the law?**

Right of Women strongly agree that the law of provocation is unsatisfactory and that its defects are beyond cure by judicial development of the law. The history and development of the defence of provocation illustrate that it is inherently gendered, being constructed around men's rather than women's experiences.³ The general context on homicide as it relates to gender differences is relevant here:

Female victims are far more likely to have known their killer: 72% of female victims know the suspect at the time of the offence, with 46% being killed by their partner or ex-partner. This compared with 40% of males who knew the main suspect and only 5% who were killed by their partner (Home Office, 2003)...In the case of partner killings there

³ See for example McColgan, A., 'In Defence of Battered Women who Kill', (1993) Oxford Journal of Legal Studies 509; McColgan, A., 'General Defences' in Nicolson, D., and Bibbings, L., (eds), 2000, *Feminist Perspectives on Criminal Law*, Cavendish Publishing: London; O'Donovan, K., 'Defences for Battered Women who Kill', 1991 Journal of Law and Society 219; Nicolson, D., and Sanghvi, R., 'Battered Women and Provocation: the Implications of *R v Ahluwalia*', [1993] Crim.L.R. 728.

has nearly always been a history of marital discord and violence, particularly male violence. However, this does not mean that the killings represent an incident of 'normal' violence gone wrong. One characteristic of the male killers is that they are often separated from their partner and the killings arise from disputes about exclusivity and child custody. Women, on the other hand, do not usually kill from jealousy or following the termination of a relationship. When they kill, there has usually been a high degree of violence within an ongoing relationship. (Lacey, Wells and Quick, *Reconstructing Criminal Law*, 3rd Edition, Butterworths:London, 2003, pp. 774).

McColgan argues that:

However much the defence is tweaked and refined, the provocation plea is premised upon an angry loss of self-control; an explosion of rage (whether fired over a long or short fuse). It is not designed to serve those who act in panic or fear, such as frequently happens when battered women kill their abusers. Where provocation pleas by battered women have succeeded, they often relied not merely on the physical violence (real or threatened), but also on the deceased's infidelity.⁴

We believe that for these reasons the defence of provocation should be abolished.

2. Do consultees favour:

- (1) abolition of the defence of provocation, whether or not the mandatory sentence is abolished;**
- (2) abolition of the defence of provocation, conditional upon abolition of the mandatory sentence; or**
- (3) retention of the defence of provocation, whether or not the mandatory sentence is abolished?**

What are their principal reasons?

Rights of Women favours the abolition of the defence of provocation, conditional upon the abolition of the mandatory sentence. We strongly recommend the abolition of both. We therefore endorse the Law Commission's opinion expressed at 12.23 of the consultation paper that:

...a recommendation that the defence be abolished would necessarily incorporate a recommendation that the mandatory sentence be abolished, since the argument that provocation should be taken into account (as appropriate) in determining sentence rather than as a special defence necessarily implies that the sentence should not be fixed by law.

⁴ McColgan, A., 2000 as at note 3.

In the light of our arguments in response to question 1 concerning the irretrievably gendered nature of the defence of provocation, and the lack of options for effective reform, we believe that abolition of the defence is the best option. The proposals we endorse in our answer to question 14 regarding reform of the law relating to self-defence would also be most effective when combined with the abolition of the mandatory life sentence.

If provocation were to be retained as a partial legal defence, we argue that there would be a need to reformulate the law to better accommodate abused women who kill and to regularise sentencing. This is particularly needed to end discrepancies in sentencing for women and men who commit domestic homicide. We recognise that this would be very challenging, and have not found a successful example of such a reformulation – this was one of our reasons for favouring the abolition of the defence.

Diminished responsibility

10. Do consultees favour:

- (1) abolition of diminished responsibility, whether or not the mandatory sentence is abolished;**
- (2) abolition of diminished responsibility, conditional upon abolition of the mandatory sentence;**
- (3) retention of diminished responsibility, whether or not the mandatory sentence is abolished?**

What are their principal reasons?

We favour the retention of diminished responsibility, whether or not the mandatory sentence is abolished, (our preferred option is that it should be abolished).

Overall we feel that, despite some problems, the partial defence of diminished responsibility works reasonably well for women with mental health issues. However, we are wary of the increasing use of Battered Women's Syndrome in defending abused women who kill.⁵ We agree with the problems with the Syndrome summarised by the Law Commission at 10.9-10.19. Wells has summarised and cited the criticisms of BWS provided by Sheehy, Stubbs and Tolmie as being particularly valid, and we agree:

1. The issue is constructed as beyond the understanding of the lay juror. This perpetuates a picture of domestic violence as rare rather than common.
2. The woman herself is supplanted by an expert. This reinforces notions of women lacking credibility as witnesses.

⁵ We expressed this position in a key article on this issue, Radford, J., 1992, 'Self Preservation', Rights of Women Bulletin Summer 1992, p. 10

3. The threshold for expert testimony forces the issue as a medical/psychiatric one. Her experience has to be rewritten to accord with an accepted scientific discourse.
4. The use of evidence from a psy/chiatrist/chologist reinforces the idea of woman as irrational, rather than emphasis on her conduct being rational, reasonable and comprehensible.
5. BWS lacks logic here since it does not explain why this woman killed her abuser. Also many women do seek help; it is the state agencies which often fail her.
6. The evidence shifts focus from the myriad reasons why a woman would stay in a violent relationship. Often women have tried to leave. Their husbands [or partners] often pursue them, coerce them (and sometimes... kill them).
7. The small number of these cases nonetheless acquire great legal and cultural significance and may reinforce the notion of domestic violence as individual and of women's responses as pathological.⁶

As discussed above under 'implementation' we believe that the Duluth model is more appropriate, in particular the Power and Control Wheel, and the Equality Wheel. Pence and Paymar explain the genesis of the model, which is clearly very different to the cyclical model outlined by Walker in BWS:

In 1984, based on group interviews with women attending educational classes offered by the Duluth battered women's shelter, we began developing a framework for describing the behaviour of men who physically and emotionally abuse their partners. Many of the women criticised theories that described battering as cyclical rather than as a constant force in their relationship; that attributed the violence to men's inability to cope with stress; and that failed to acknowledge fully the intention of batterers to gain control over their partners' actions, thoughts, and feelings. Challenging the assumptions about why women stay with men who beat them, more than 200 battered women in Duluth who participated in 30 educational sessions sponsored by the shelter designed the Power and Control Wheel, which depicts the primary abusive behaviours experienced by women living with men who batter. It illustrates that violence is part of a pattern of behaviours rather than isolated incidents of abuse or cyclical explosions of pent-up anger, frustration, or painful feelings.⁷

We endorse Justice for Women's proposal, contained in their response to this consultation, that representation of abused women who kill be limited to members of a panel with specialist expertise in domestic violence. This would help avoid miscarriages of justice caused by the inadequacy of some defence lawyers.

⁶ 'Defending Battered Women on Trial: the Battered Women's Syndrome and its limitations' (1992) *Crim Law Jnl* 369, cited in Wells, C., 'Battered Woman Syndrome and defences to Homicide: where now?' (1994) 14 *Legal Studies* 266.

⁷ See note 2, p. 2.

We believe that reformed self defence laws which are better designed to accommodate abused women who kill would alleviate the pressure some defence lawyers might feel to argue diminished responsibility for their client, even where this may not be the most appropriate defence. Labelling a woman incorrectly as experiencing mental disorder may have a negative impact on the length and type of her custodial sentence, and can have severe repercussions on her prospects of rehabilitation and obtaining custody of her children.

13. Do consultees favour the replacement of provocation and diminished responsibility by a single merged defence? If so do respondents prefer the Model Penal code version, the Mackay and Mitchell reformulation, or some other formulation?

As outlined in our answer to question 3, we favour the abolition of the provocation defence, so this question does not apply.

A partial defence of use of excessive force in self-defence

14. Do consultees:

- (1) favour the introduction of a partial defence of the use of excessive force in self-defence and/or a partial defence of pre-emptive use of force in self-defence;**
- (2) if so, do they favour option A, B, C or D;**
- (3) would their views be the same if (a) the mandatory sentence were abolished; (b) the defence of provocation was abolished?**

We believe that self-defence should provide the most effective and appropriate defence for abused women who kill.

Partial defence of pre-emptive use of force

We recommend the introduction of a partial defence to murder of pre-emptive use of force in self-defence, 'where the defendant kills another *in the honest belief that it is the only way to prevent grave future violence to him or herself* (10.100). We agree that a woman who kills an abusive partner in such circumstances should not face a mandatory life sentence (10.103). We do not agree that this proposed defence would be unnecessary if provocation and the mandatory life sentence were abolished, (10.107).

We believe that this defence should be available to someone 'who kills another in the honest belief that it is the only effective way to prevent grave future violence to another person, at any rate if that other person is a close relative or (possibly) friend... a woman may be afraid to leave a violent partner more from fear of what he will do to her children than for herself' (10.105). This is particularly relevant given the high proportion of instances of domestic violence that occur as a result of matters relating to child contact

after the woman has left the relationship. We suggest that this defence should apply more widely, to include for example a member of a minority ethnic community who is the victim of repeated violence or threats of violence and who kills a perpetrator of that violence.

We agree with the Commission that there would need to be safeguards to ensure that rival gangs or terrorists are not able to use these defences inappropriately.

We would also be very wary of such a defence being used in relation to the protection of property – we think that for such a defence to be valid there must be a threat to the person. We therefore recommend the adoption of option C and would specifically oppose option D (at 12.88, and 12.93). We would also emphasise that the reduced culpability of a person who kills in such circumstances should be reflected not only in the availability of the partial defence, but in any sentence passed.

Partial defence of excessive use of force

In addition we believe there should be a further partial defence of excessive use of force in defence of oneself or another in circumstances where the use of some force would be lawful (as outlined in Option A, at 12.84). The availability of such a partial defence would be particularly important if the defence of provocation and the mandatory life sentence were not abolished (see 12.85 (5)). We would strongly oppose the extension of such a partial defence to the protection of property or the prevention of crime (Option B, 12.86).

Self preservation

Finally, in the absence of any reform along the lines suggested above to provocation, the mandatory life sentence, or self-defence, we would recommend a defence of self preservation on the grounds of domestic violence. Radford outlined our original position on this in 1992,⁸ and what follows is a slightly amended version of those proposals:

- Self preservation is a partial defence open to a person who
- (i) kills a partner or someone in a familial or familiar intimate relationship; who
 - (ii) has subjected them to abuse and intimidation to the extent that they
 - (iii) honestly believe that they have reached a point at which there is no future, and no protection of safety from the abuse, and are convinced that they will not continue to live while the aggressor is alive.

⁸ See note 5, p. 12.

In addition, we would in this context suggest the use of something similar to the New Zealand definition of domestic violence as contained in section 3 of the Domestic Violence Act 1995 (DVA):

3. Meaning of “domestic violence” -

- (1) In this Act, “domestic violence”, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.
- (2) In this section, “violence” means—
 - (a) Physical abuse:
 - (b) Sexual abuse:
 - (c) Psychological abuse, including, but not limited to,—
 - (i) Intimidation:
 - (ii) Harassment:
 - (iii) Damage to property:
 - (iv) Threats of physical abuse, sexual abuse, or psychological abuse:
 - (v) In relation to a child, abuse of the kind set out in subsection (3) of this section.
- (3) Without limiting subsection (2)(c) of this section, a person psychologically abuses a child if that person—
 - (a) Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or
 - (b) Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;—
 but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.
- (4) Without limiting subsection (2) of this section,—
 - (a) A single act may amount to abuse for the purposes of that subsection:
 - (b) A number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.
- (5) Behaviour may be psychological abuse for the purposes of subsection (2)(c) of this section which does not involve actual or threatened physical or sexual abuse.

We would also recommend the use of a definition of ‘domestic relationship’, to be used in such a defence, like that used in section 4 of the DVA:

4. Meaning of “domestic relationship” -

- (1) For the purposes of this Act, a person is in a domestic relationship with another person if the person—

- (a) Is a partner of the other person; or
 - (b) Is a family member of the other person; or
 - (c) Ordinarily shares a household with the other person; or
 - (d) Has a close personal relationship with the other person.
- (2) For the purposes of subsection (1)(c) of this section, a person is not regarded as sharing a household with another person by reason only of the fact that—
- (a) The person has—
 - (i) A landlord-tenant relationship; or
 - (ii) An employer-employee relationship; or
 - (iii) An employee-employee relationship— with that other person; and
 - (b) They occupy a common dwellinghouse (whether or not other people also occupy that dwellinghouse).
- (3) For the purposes of subsection (1)(d) of this section, a person is not regarded as having a close personal relationship with another person by reason only of the fact that the person has—
- (a) An employer-employee relationship; or
 - (b) An employee-employee relationship— with that other person.
- (4) Without limiting the matters to which a Court may have regard in determining, for the purposes of subsection (1)(d) of this section, whether a person has a close personal relationship with another person, the Court must have regard to—
- (a) The nature and intensity of the relationship, and in particular—
 - (i) The amount of time the persons spend together:
 - (ii) The place or places where that time is ordinarily spent:
 - (iii) The manner in which that time is ordinarily spent;—
 but it is not necessary for there to be a sexual relationship between the persons:
 - (b) The duration of the relationship.

In conclusion, we would urge the Law Commission to recommend the changes outlined in our response to help ensure that the clear injustice to abused women who kill, and to female victims of domestic homicide, perpetuated by the law as it stands begins to be remedied. Such reforms would be a key part of the broader societal change needed to recognise the prevalence and seriousness of violence against women.

Rights of Women, January 2004

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