



Refuge second response to Partial Defences to Murder review, Law Commission June 2004

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Provocation or Self Defence? The Plight of Abused Women who Kill

Refuge is pleased that in making provisional conclusions to the consultation exercise on partial defences to murder, the Law Commission shows a clear recognition of the fundamental difficulties within the defence of provocation and recommends statutory reform.

However, concerns remain that for abused women who kill a violent partner, the defence of provocation is conceptually inappropriate and reflects an inaccurate understanding of the context in which such women find themselves and in which they are driven to kill.

The principle motive for taking lethal action within a domestic violence context is invariably 'fear'¹. Fear is not 'provoked' it is 'suffered' over years of living with violence and experiencing threats of harm. For abused women, fear becomes a state of being, not a momentary emotion. Women who kill out of fear (and this is the majority) do so, not in anger because they have been pushed to the limit, but because they have an honest belief that they must kill in order to preserve their own lives and those of their children. The fact that 72% of women are murdered by a known male, 46% by a partner or ex-partner², mostly at the point of leaving or after separation and often in the context of disputes about child custody, clearly indicates that such women are acting in reasonable and justified fear. They are acting in self-defence and this is the defence that should be available to them.

We are aware of current conceptual and procedural difficulties in ensuring women who kill violent partners are able to run a full defence of self-defence. The fact that women must use excessive force (including use of a weapon) and or plan the killing, generally precludes the availability of a full-defence of self-defence. It also highlights the gender bias within the defence and its greater application to men who find themselves in the dock following the killing of another man after too much to drink on a Saturday night.

Refuge is therefore disappointed that the commission has not chosen to recommend a separate partial defence of 'excessive force in self-defence', stating that the partial defence of provocation would be recast in a way that includes excessive force. Refuge is also disappointed that any

¹ Refuge acknowledges the comment within the document that fear and anger may have a similar physiological basis but believes it is important to recognise that although the physiological roots of anger and fear may be related, they remain conceptually and psychologically distinct; they can co-occur but this is only possible, not inevitable. Many abused women experience fear together with dissociation/numbing rather than the full force of anger – some kill not in rage but out of a sense of desperation, a sense which is so acute they must dissociate themselves from it. The proposition that there should be a separate defence for those acting out of fear (with a pre-emptive use of force, or excessive force) has already been advocated by some women's groups and is a position supported by Refuge.

² Home Office (2003)

reference to a new partial defence of 'pre-emptive use of force in self-defence' is not discussed within the provisional conclusions.

Refuge firmly believes it is important to be clear about domestic violence - what it is, its causes, its consequences and any remedies, legal or otherwise. It is important that we clearly understand the reasons why abused women are driven to kill abusive partners and that we have a legal response which reflects that understanding. For this reason Refuge recommends a review of the defence of self-defence.

Re-shaping provocation

Given that the partial defence of provocation is to remain, Refuge is generally supportive of many of the suggested amendments. Specifically:

- that provocation will be limited to 'gross provocation', 'fear of serious violence' or a combination of both.
- in considering whether gross provocation occurred the court should take into account all the characteristics of the defendant including 'the relationship between the provoker and the provoked and the defendant's social and cultural environment'.
- that the question which should be asked 'is not whether the conduct would have been grossly provocative to the person 'on the Clapham omnibus' but whether it was grossly provocative to a person in the defendant's situation'
- Refuge is also pleased to note the inclusion of 'fear' within the defence, as this is often at the root of a woman's lethal response to an abusive partner but as previously stated believes this fits more readily within a position of self-defence.

In terms of amendments to 'the objective test' it is difficult to see how the issues raised as problematic in the consultation document have been resolved by the recommendation that 'the defence should only be available if a person of ordinary temperament i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way'. Whilst this 'test' is more detailed and makes reference to contextual/circumstantial factors, determining whether or not an individual has acted in the manner of an 'ordinary person' (rather than a reasonable man) appears to remain a matter of opinion and to continue to reflect a subjective view.

Exclusions

Refuge is fully supportive of all the exclusions.

Merger of provocation and diminished responsibility into a single defence

Refuge is in agreement with the decision not to merge provocation and diminished responsibility into a single defence.

Excessive force in self-defence

Refuge is disappointed that the partial defence of excessive force in self-defence has not been recommended.

Extreme emotional distress

This, together with realistic fear of serious harm or death, is what often motivates women who kill and Refuge would support a new partial defence of this type (self-defence), or would suggest that it is included in an extended form of diminished responsibility.

Refuge supports the retention of a partial defence of diminished responsibility and suggests that the defence is re-conceptualised and expanded to take account of the extreme duress that abused women may suffer over many years, recognising that the likely impacts upon her state of mind are both normal and adaptive responses to abnormal and intolerable situations of psychological and physical violence. Refuge has concerns that if the defence of diminished responsibility is used in a way that focuses only on the woman's psychological make-up whilst ignoring the violence of her partner and the failure of our social, cultural, religious and indeed criminal justice systems to adequately respond to, support and protect her, then it fails to consider crucial factors contributing to the extreme duress under which she has been living. Considering the woman from a medical perspective only, may also place her at risk for stigmatisation and negative judgements following release, with some women having difficulties regaining care of their children.

Whilst we must avoid 'labelling' women who fatally injure their abusive partners, as mentally ill or 'diminished' we must be careful not to ignore the serious and sometimes long lasting psychological/emotional impacts of abuse upon women, or how these impacts may have contributed to their lethal response. Extreme duress, of the kind many abused women suffer, can and often does co-exist with depression, anxiety and posttraumatic stress. But these are normal and adaptive responses and must be distinguished from 'psychiatric conditions and or disorders' generally required to run this defence. It may be appropriate, following re-conceptualisation and expansion of this defence to consider re-naming it to reflect its broader, less exclusively medical, application.

Expert evidence

Refuge feels it is a grave omission not to raise the issue of expert evidence in relation to domestic homicide, especially abused women who kill. This area has received substantial attention and support from the Law Commission of New Zealand³. Recognition of the valuable role played by domestic violence advocates and their suitability as experts within the court system is also acknowledged within other jurisdictions⁴.

Unfortunately, domestic violence is such a common problem in society that almost everyone has a view about it and thinks they are well placed to give a balanced and informed opinion. Yet, we are all aware of the myths about domestic violence that exist and the negative effects these continue to have on women's lives, from the judgemental response of a GP, to the apathy of the police officer, the disinterested detachment of the teacher and the neighbour who looks the other way. The complexity of domestic violence and its myriad impacts is, however, well understood by those working in the field and this specialist knowledge and experience would be an essential element in explaining the defendant's state of mind and or behaviour to the court. This is why Refuge believes that making use of expert testimony from domestic violence specialists is so important.

- Ends -

³ Some Criminal Defences with Particular Reference to Battered Defendants (New Zealand Law Commission May 2001)

⁴ In Australia it is common for abused women's advocates to act as experts within the court system.