

Rights of Women Response to Law Commission Consultation Paper No. 177 'A New Homicide Act for England and Wales?'

As a feminist organisation, Rights of Women¹ welcomes the opportunity to be part of this consultation on reviewing the law of homicide. This response should be read in conjunction with our previous response to the related Law Commission Consultation Paper No. 173 'Partial Defences to Murder'.² As the Law Commission notes this is a complex area of law that is in need of reform, both in terms of the offences and defences. Rather than responding to specific questions we have set out our position to those issues which are of particular concern to us.

Equality Proofing

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

Violence against Women

We are concerned that violence against women is addressed appropriately and effectively. Violence against women is a violation of internationally guaranteed human rights, rights which the UK has signed up to, for example the UN Convention on the Elimination of All Forms of Discrimination Against Women and the Beijing Platform for Action, and which are included in UK law under the Human Rights Act 1998. It is important that the Law Commission understands violence against women and its impact during the consultation process as the issues under discussion have a profound impact on the way violence against women is addressed both in the courts and in wider society. A statutory definition of violence against women could be used, for example, to provide clarification of what can constitute a threat of serious violence under the Commission's proposed restructuring of the provocation defence (see below).

In this regard we are concerned at the Law Commission's negative analysis of the Victoria Law Reform Commission (pp. 173-175) and its understanding of domestic violence generally. The Commission noted the importance of gendered relations in cases of "mercy killing" and the dynamics of power, control and dominance. These same factors are features of violent relationships, and we urge the Commission to apply this same recognition and level of insight to domestic violence and its impact on reforming homicide laws. In doing so we believe that the Duluth Model, and in particular the Power and Control Wheel and the Equality Wheel, should be used to inform understandings of women who kill their abusive partners.³

We are concerned that the Law Commission is not convinced by the arguments that family violence has particular consequences and impacts which require specific statutory provisions setting out how this context can apply to individual cases to provide mitigation. In the context of the Victoria reforms, the inclusion of a statutory provision on family violence does not provide blanket mitigation. Rather it seeks to provide guidance on how family violence *may* affect culpability for homicide. We find it particularly worrying that the Commission believes it is appropriate to draw an analogy between domestic violence and a situation of neighbours engaged in a long-term quarrel and the development of cumulative provocation. We are also concerned at the Commission's assertion that its '...proposals put all defendants who are victims of long-term abuse on an equal footing with victims of domestic violence. We believe this is the right approach' (page 174). Rights of Women reject this formal view of equality

¹ 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. 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. We run two national confidential legal advice lines for women (provided women lawyers), one general advice line specialising in family law issues, including domestic violence and another on criminal law and procedures in relation to sexual violence. For more information see our website www.rightsofwomen.org.uk

² Available at www.rightsofwomen.org.uk

³ Available at www.duluth-model.org

which suggests that treating people equally means treating them the same. Seeking to remedy the historical and prevent future injustices for women as defendants and victims in homicide cases requires acknowledging that treating people equally can also mean treating them differently. We believe that this is not outside the remit of the Commission, and in fact is necessary in order to add clarity to the Commission's proposed reforms which refer to serious violence, such as the reformulation of the provocation defence. We strongly urge the Commission to recommend the enactment of a definition of violence against women, which includes domestic violence. In this regard we strongly urge the adoption of the definition of violence against women contained within the United Nations Declaration on the Elimination of Violence against Women, under which "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life' (Article 1) (see Further Annex I, below). In the event that the Law Commission prefers to recommend a general definition of domestic violence, as has been done in New Zealand and Australian jurisdictions, we suggest a formulation along the lines of section 3 of the New Zealand Domestic Violence Act 1995 (See Annex II, below)

Proposed Framework

We welcome the Law Commission's proposed structure of homicide offences into first degree murder, second degree murder and manslaughter. We accept that the law in its current forms is highly problematic and in need of reform. The Commission's proposed restructuring provides a coherent framework which is both easy to understand and attempts to base criminal law on culpability. We are however aware that there is a particular problem with labelling women who kill as murderers. We welcome the Law Commission's recognition that 'labelling' is a significant issue; the stigma attached to abused women who kill can be very significant. This issue will not be addressed by the ladder principle of homicide in the proposed framework, as being convicted of second or first degree murder is still a murder conviction. This is an issue which we remain concerned about.

Availability of the Partial Defences

We agree with the Commission that the outcome of provocation and diminished responsibility defences should be the same, and that if successful these partial defences should reduce the offence to a lesser one on the ladder. However Rights of Women is not convinced that the availability of these defences should be restricted to first degree murder (where there is intent to kill). Under the proposals charging decisions will impact heavily on what defences are available to a person accused of homicide. If the prosecution chooses to under-charge a defendant with second degree murder, they are effectively withdrawing the defendant's ability to demonstrate their reduced culpability. Rights of Women believe that the partial defences should apply to both first and second degree murder, and because the result of running a successful partial defence should be consistent, we recommend that the reduced offence be manslaughter.

Suicide Pacts and "Mercy Killings"

On a general note Rights of Women welcomes the Commission's discussion on gender differences in this section. We are keen to have more information on the gendered aspects of "mercy killings". In particular Rights of Women is concerned that such an analysis should also be sensitive to issues that intersect with gender such as ethnicity. We are aware that controlling gendered relationships exist in both majority and Black and Minority Ethnic (BME) communities. We would like to highlight the concerns that have been made about reported suicides of BME women and the role(s) played by their partner and/or families. We therefore think that "mercy killings" and suicide pacts are areas where further research, which appreciates the nuances of gender, ethnicity, culture, disability etc, should be commissioned to design in-depth proposals for reform.

In the interim, given that clarification is required over "mercy killings" we support the Commission's position that such homicides should, where the elements of the defence are proven, be dealt with under the re-formulated partial defence of diminished responsibility. We also believe that focusing on the defendant's mental functioning prevents the incredibly complicated task of examining the question of consent. We are very wary of basing culpability

solely or partly on the alleged consent of the victim in these cases. We consider that it will be highly problematic to prove the consent of the deceased, and where there is evidence of such, questions have to be asked about coercion and the role of the partner given the Commission's acknowledgement that these homicides can occur in the context of gendered, controlling relationships.

Duress

Rights of Women is very cautious about the introduction of a defence of duress to homicide. We are aware that some concern has been expressed that such a defence could be relied upon by defendants in some cases of "honour killing". Under this line of thought B would be able to claim duress where family member A threatens B with serious violence or death unless B kills family member C. We are not necessarily convinced that the defence of duress as outlined and envisaged by the Law Commission would apply to such situations. However, we believe that in practice the defence of duress will be difficult to implement and given the complex development of existing defences to murder, we are wary about how such a defence would be applied in practice and evolve.

Diminished Responsibility

Rights of Women has historically acknowledged the problems associated with diminished responsibility, however we have advocated for the continuance of this defence. It is important that women are able to access a defence where their mental health issues impacts on their culpability in committing homicide. We acknowledge that this may be of particular relevance to cases where an abused woman kills her abuser and recognise that Battered Women's Syndrome (BWS) has a role to play in some such cases. However, we are concerned that women's experiences of violence is often reduced to BWS as the only means of introducing evidence of this history at trial.⁴ Again, we reiterate that the enactment of a definition of violence against women, or at the least of domestic violence, would provide statutory clarification. In addition, we restate our previous recommendation that where domestic violence is an issue (not only in cases of diminished responsibility), expert evidence should be admissible to provide explanations of and honest responses to domestic violence, with testimony from health care professionals, academics, women's organisations, and others.⁵ We do however acknowledge that funding for expert testimony in partial defences, particularly diminished responsibility, is difficult. Finding a specialist doctor can often be a lengthy process and finding one who will complete a report for legal aid rates is even more difficult. However we are not convinced by the Queensland Model or similar court-appointed or independent panel reports discussed in the Consultation Paper. Whilst both the defence and prosecution can challenge such a report, the status a jury may accord a court-appointed report and the impact this may have on its decision would be cause for concern.

Rights of Women welcomes the Law Commission's reformulation of diminished responsibility which now refers to 'underlying conditions', provided that this is understood, as the Law Commission states, to include cases where the origins of the condition itself lie in the adverse circumstances which the defendant has had to cope with. This is a particular issue for women who kill their abusers, and we note that the Law Commission has referenced intimate partner violence in this context. However, we are concerned that issues such as jealousy or punishing a partner/former partner, or family member should not fall within the ambit of the diminished responsibility defence. While we note the Law Commission's acknowledgement that these issues should be ones where the jury is encouraged to take a robust approach to causation, we question how this will be achieved.

Self Preservation

Rights of Women have a long-held concern with the partial defence of provocation which is inherently gendered both in its construction and its application.⁶ Our preferred choice for reform in this area is for an enactment of a defence of self-preservation to replace the

⁴ We have set out our concerns in our response to the Law Commission Consultation Paper 173 Partial Defences to Murder, available at www.rightsofwomen.org.uk

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defence of provocation. A defence of self-preservation would be gender-neutral but would recognise the specific circumstance of violence within the family. Jill Radford outlined our original position on this in 1992⁷ 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.

It is clear that for abused women who kill to have their experiences considered in determining culpability, they will almost certainly have to plead diminished responsibility and/or BWS. Whilst we do not deny that this is appropriate in some cases, this should not be the only option available. We believe that the defence of self-preservation provides a defence for women whose experiences do not necessarily fit within diminished responsibility.

We are also seriously concerned about the various labels that attach to women as a consequence of the offence they are charged with or the defence they argue. We believe that in the context of women who kill, labelling plays an important role, both at a collective conceptual level and at the individual level. Requiring women to show a mental health defect, abnormalises the violence they have experienced. We believe this is an issue of gender discrimination in the operation of the law on homicide. Whilst we acknowledge that on the individual level, this may not be a primary concern as the important issue will be running a successful defence, there may in fact be adverse consequences. For example labelling a woman as incorrectly experiencing a 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.

Provocation: Law Commission's Proposals

In the event that our proposals on self-preservation are not taken up, we would like to comment on the Law Commission's proposals on provocation. The Commission has proposed that the partial defence of provocation should be reformulated (Partial Defences to Murder: Final Report, 2004) and apply to those who, without acting out of a considered desire for revenge:

- (i) killed only in response to gross provocation; and/or
- (ii) killed only in response to a fear of serious violence

in circumstances where someone of the defendant's age and of an ordinary temperament might have reacted in the same or in a similar way.

Rights of Women question why revenge killings have been singled out, particularly given resistance to consideration of specific provisions on domestic violence. We also question the meaning of revenge. For example, will it exclude homicide motivated by jealousy or the desire to revenge a perceived sexual transgression of a partner/former partner or family member, including, for example, in some cases of 'honour killings'?

We are unsure how current case law would apply to the reformulation of provocation, as this proved a source of problems when the law was reformed in the 1957 Homicide Act. In absence of the enactment of a defence of self-preservation, we cautiously welcome the second limb of the reformulated provocation defence, on responding to a fear of serious violence. However, we are again wary of what would be included within a definition of serious violence. It appears from the Law Commission's Consultation Paper that violence is limited to physical harm. As noted above, we do not consider this to be an appropriate definition. A more expansive definition of violence would not, as the Commission suggests, stretch the

⁷ Radford, J., 1992, 'Self Preservation', Rights of Women Bulletin Summer 1992, p. 10

concept of violence. Rather, we believe it would be more appropriate at reflecting the reality of violence and its impact on the culpability of women who kill their abusers as well as providing clarity in cases of domestic homicide where there is a history of violence.

Conclusion

Rights of Women urges the Law Commission to recommend the changes outlined in our response to help ensure justice for abused women who kill, and for women who are the victims of domestic homicide.

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Annex I

UN Declaration on Violence Against Women

Article 2 of the Declaration further states that violence against women encompasses, but is not limited to:

- '(a) 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;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.'

Annex II

Section 3 Domestic Violence Act 1995, New Zealand:

'(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.'