

Response of Justice for Women to “Murder, Manslaughter and Infanticide: proposals for reform of the law” CP19/08.

1. Justice for Women welcomes the opportunity to respond to the Government's paper (CP) and draft clauses.
2. Since being established in 1991 Justice for Women has supported (at first instance and appellate level) many cases of abused women who have been charged with murder as a result of killing their violent partners. Such cases have included Emma Humphreys¹, Sara Thornton,² Jane Andrews³ amongst many others. We intervened in the House of Lords case of Smith (Morgan)⁴ and have long campaigned for a change in the law of murder in so far as the defences of provocation and diminished responsibility are concerned. We have always argued that the present laws are disproportionately weighted towards the interests of men who kill their female partners.
3. By way of introduction, we overwhelmingly endorse the proposed changes detailed in the CP and the draft clauses. In particular, we welcome the two limbs of the proposed new defence⁵ in Annex A clause 1(5) [fear of serious violence] and clause 1(6) [exceptional happening and causing D to have a justifiable sense of being seriously wronged]. If the proposals are enacted, then, in our opinion this will amount to a major step forward in terms of establishing fairness between men and women in so far as this aspect of the criminal law is concerned.
4. Concerning the reform of the partial defences to include those who kill in response to a fear of serious violence.

We think this is a very important change, even if in practice some of those who killed in response to violent abuse have been able to

¹ [1995] 4 ALL ER.

² [1992] 1 ALL ER 306.

³ [2004] Crim L R 376.

⁴ [2001] 1 AC.

⁵ which it is intended will replace the present partial defence of provocation.

squeeze their defences into the existing laws on Provocation or Diminished responsibility. However, we are aware of a number of cases where women have not been able to avail themselves of either defence. Furthermore, we consider that this reform will show that the law is able to recognise the reality of those who kill in fear of serious violence.

5. We also welcome the raising of the threshold so that words and conduct should be a partial defence to murder only in exceptional circumstances. Too often we have seen, in this highly gendered society, that defendants have argued successfully that they killed due to nagging or alleged or actual infidelity. It is good for the law to declare that in effect no one owns anybody – that an act of sexual infidelity is not an excuse to kill.
6. These changes together are a significant step for the law to recognise the reality of domestic violence and signal that it is not to be tolerated. Justice for Women accordingly supports these changes.

Fear of serious violence

7. We wish to make the following observation in response to the CP paragraph 26. First, in regard to the reference to the Law Commission's perception of there being a loophole in the present law whereby a defendant fearing serious violence overreacts and kills, the Review Team considers that there is not, "much of a loophole in practice". It is argued that this is partly attributable to the breadth of the defence of self-defence.⁶ This is not consistent with our experience, which is that in reality, self-defence does not accommodate those who fear serious violence on the basis of previous traumatic experiences. In other words there is a tendency on the part of juries to conclude that the violence used by D was more than was reasonable in the circumstances as she

⁶ CP Paragraph 26.

honestly believed them to be ⁷ because insufficient weight is given to her past experiences of violence. Our experience is that jurors will not automatically appreciate how a history of abuse and trauma can magnify in the mind of the victim the fear of further violence. Furthermore, if there is any evidence of other emotions on the part of the defendant⁸, then the reality is that juries often do not like to acquit. Secondly, at present there is the obvious difficulty of relying on the defence of provocation when the defendant is running self defence because the intention to kill is inconsistent with the absence of an intention to kill in a true defence of self defence.⁹ It follows that we think that there is a loophole in the present law and that clause 1(5) will remedy this.

8. We are of the view that the Bill should make it clear that “serious violence” includes sexual violence. In our observations of the cases which we have either supported or in which we have been directly involved it has been apparent that the courts, experts and counsel do not always perceive sexual violence (including rape- which can be coercive- and other forms of sexual abuse) as violence.

Clause 1(6) (Gross provocation)

9. We welcome the fact that sexual infidelity cannot of itself amount to an “exceptional happening” for the purpose of this partial defence¹⁰.
10. There may be occasions where a woman has suffered what is sometimes referred to as ‘cumulative provocation’ (consisting of a number of different types of abuse, some of which *on their own* may be said to be exceptional They may however have taken place a significant time before the killing). It appears that the policy behind the Bill is to

⁷ Palmer [1971] AC 814.

⁸ Such as are often prevalent or said to be prevalent in intimate relationships.

⁹ Williams (Gladstone). (1984) 78 Cr App R 276.

cover cases which amount to cumulative provocation but this does not appear to have been made explicit in the Bill. We think that the Bill should make it clear that cumulative provocation is covered.

11. It is not clear from the way in which Clause 1(6) is drafted that the things said or done must have been said or done by V to D. This is in contradistinction to the wording of clause 1(5). We are unclear as to whether or not this is intentional.¹¹ In any event we think it is important that the provision is not limited in the same way as that in 1(5). We have had involvement in first instance cases where this would have been relevant. (Wendy Worral and Anne Ward).

Loss of self-control

12. Provocation has often proved problematic for abused women who kill because of the fact that under the present law, the loss of self-control is integral to the defence. The fear of serious violence together with the comparative physical strength of men has meant that women who kill in circumstances of abuse do so in a way which is often perceived to be controlled. Accordingly, they tend to be denied access to the defence.¹²
13. Whereas the original Law Commission proposals dispensed with the requirement for a loss of self-control,¹³ the review team has attempted to find some sort of 'half-way house' by maintaining the necessity for a

¹⁰ Clause 1(9) (a).

¹¹ Although the wording of clause 1(7) "was attributable to" seems to be deliberately wide.

¹² For further explanation see Murder, Manslaughter and Infanticide Law Com No 305 5.18 and 5.24 (referring to Thornton [1992] 1 All ER 306 and Ahluwalia) [1992] 4 All ER 889 "The premeditation will typically reflect no more than D's reasonable fear that an immediate and direct confrontation with the abusive partner will lead to violence being inflicted on her."

¹³ Murder, Manslaughter and Infanticide Law Com No 305 5.20 where it is stated.

we have sought to express the so-called subjective condition negatively. Avoiding reliance on a positive requirement of loss of self-control. D's reaction must not have been 'engineered' by him or her through inciting the very provocation that led to it.

loss of self-control¹⁴ but dispensing with the common law¹⁵ requirement for it to be “sudden.”

14. The difficulty with this proposal is that it is likely to perpetuate the present unfairness in so far as women are concerned. This is because all it does is remove the necessity for a temporal nexus between the qualifying trigger¹⁶ and the defendant’s act. First, notwithstanding such a change, there will still be Ahluwalia¹⁷ type cases where, although the actions of the defendant need not necessarily be described as ‘sudden’ there will be an issue as to whether or not she suffered a ‘loss of self-control’. The proposal will not make sufficient difference to the present situation. We think that cases such as Baillie¹⁸ (which demonstrate the way in which the courts are sometimes already willing to dispense with the suddenness requirement) provide some evidence for this proposition.
15. One difficulty with the retention of the requirement of a loss of self-control is that conceptually it is inconsistent with a fear of serious violence that can be seen as an extension of self-defence.
16. Neither does it fit with our experience of the paradigmatic case of the abused woman who kills. In such a case the loss of self-control is not necessarily manifested physically. A person out of control as a result of ‘cumulative provocation’ may well act in a physically controlled way. The loss of self control is a loss of psychological and/or emotional control. See Susan Shickle¹⁹ and Josephine Smith²⁰.

¹⁴ CP Clause 1 (1) (a) Annex A.

¹⁵ Duffy [1949] 1 All ER 923.

¹⁶ Clause 1(1) (b), (4).

¹⁷ [1992] 4 ALL ER 889.

¹⁸ [1995] 2 Cr App R 31 where the facts disclose a gap between the provocation and the defendant’s response.

¹⁹ [2005] EWCA Crim 1881 Although provocation was not in issue in this case the degree of planning said to be involved in the killing enabled the prosecution psychiatrist to state that it was inconsistent with the appellant suffering from or acting as a result of a personality disorder.

²⁰ [2002] EWCA Crim 2671.

17. If the concept of a requirement for the loss of self-control is to be retained in the Bill, then we suggest that it is essential that it is clearly defined to reflect the above.

18. The Review Team is concerned that if there is no requirement for a loss of self- control on the part of the defendant “that there is a risk of the partial defence being used inappropriately, for example in cold-blooded, gang-related or ‘honour killings’..”.²¹ However in our view the Law Commission proposal of a negative proviso that:

The partial defence should not apply where:

the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or

the defendant acted in considered desire for revenge²²

is a preferable way of ensuring that the defence does not apply to gang-related killings. So called ‘honour killings’ would also be likely to be considered by the courts to have occurred in the context of a considered desire for revenge.²³ In any event, such killings would be unlikely to be in any way attributable to something which could be said to amount to an “exceptional happening” or cause a defendant a “justifiable sense of being seriously wronged.”²⁴

19. At Paragraph 36 of the CP the Review Team has stated, “even in cases which are less obviously unsympathetic [than honour killings or gang revenge killings], there is still a fundamental problem about providing a partial defence in situations where a defendant has killed while basically in full possession of his or her senses, even if he or she

²¹ CP paragraph 36.

²² Murder Manslaughter and Infanticide Law Com No 304 Paragraph 5.11.

²³ *Ibid* paragraph 5.25 “We believe that there is likely to be a strong motive for revenge in such cases. The offender is seeking to make an example of the victim because she (and it normally will be a ‘she’ has defied tradition , custom or parental wishes in her choice of boyfriend spouse or life-style”.

is frightened, other than in a situation which is complete self-defence.” We think that it is important to remember that, as with provocation, the defences apply in circumstances which would otherwise be murder because the defendant has the intention to kill or cause GBH and commits the act of killing. Consequently, the partial defence only mitigates murder to manslaughter and does not provide a justification for the killing. Further, issues of labelling aside, It is open to the courts to impose a life sentence.

20. It therefore follows that, in our view, the case for retaining the requirement of a loss of self-control is not sufficiently made out.

Safeguards to prevent inappropriate reliance on and abuse of the proposed defences.

21. The safeguards in clause 1(8) namely that ,“subsection (1) does not apply if the qualifying trigger to which the loss of self-control is attributable is itself predominantly attributable to conduct engaged in by D which constitutes one or more criminal offences” is too specific and narrow.

22. It differs from the Law Commission proposals²⁵ at (3) and (4) which are:

The partial defence should not apply where:

- (a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence ;or
- (b) the defendant acted in considered desire for revenge.

²⁴ Clause 1 (6).

²⁵ Although we are mindful that this was not a draft bill.

(4) A person should not be treated as having acted in considered desire for revenge if he or she acted in fear or serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.²⁶

23. It seems however that the intention behind the proposals is the same and that that is to ensure that the defence cannot be relied on for the purpose of mitigating gangland type killings. The potential difficulty with the wording of clause 1(8) is that it will create hard cases and prevent some defendants who would otherwise be deserving of the defence from being able to rely on it.

24. For example, what if D who commits offences in the course of working as a prostitute kills her violent and coercive pimp V? D's act [loss of self-control] is attributable to offences that she is regularly committing. Is it right that she should not be able to rely on the defences? We therefore think that it would be preferable for the safeguard to be worded in a way which states that D cannot deliberately incite the trigger for the purpose of being able to rely on the defence. Alternatively, perhaps it is safer not to attempt to specifically preclude any one type of case rather to rely on the common sense of the trial judge to put particular cases into context in the course of his or her summing up.

The reasonable person test

25. In view of the new partial defences (which as we have already explained²⁷ are likely to accommodate the circumstances of women who kill their violent partners) and, subject to our comments at

²⁶ Murder Manslaughter and Infanticide Law Com No 304 paragraph 5.11.

²⁷ See paragraphs 3-4 above

paragraphs 12-16 above, we do not see any reason to oppose clause 1(10) which places Holley²⁸ on a statutory footing.

Annex B- Diminished Responsibility

26. We broadly support the proposals in relation to diminished responsibility. We understand that the policy behind the proposals is to clarify and not to narrow the present law.
27. We would simply point out that the reference to a “recognised medical condition” in the Bill needs to be further defined in terms of by whom it is recognised. This is particularly so in the context of knowledge about mental illness which is continually evolving.
28. The requirement for the explanation to be causative in terms of the killing is also troubling. We think a medical condition can provide an explanation short of it being causative. It is very difficult to attribute cause to a medical condition. We think that it is preferable to say it [the condition] explains the killing which would not have happened but for the condition.
29. We are disappointed at the decision not to include the Law Commission recommendation as to a separate limb to the defence based on developmental immaturity.

²⁸ [2005] UKPC 23.