



June 2004

Refuge response to Consultation Paper on Sentencing of Manslaughter by Reason of Provocation

Refuge is pleased that the Sentencing Advisory Panel is giving consideration to the issue of sentencing of manslaughter by reason of provocation and that particular attention is paid to domestic violence within the consultation document.

Refuge has already made representations to the Law Commission in its response to Partial Defences to Murder and more recently to the Law Commission's provisional conclusions. In brief Refuge advocates for abolition of the mandatory life sentence (recognising the value of allowing judges discretion in sentencing), the partial defence of provocation and for reform of the defence of self-defence. Refuge is also supportive of a possible new partial defence of self-defence which allows for the use of excessive and or pre-emptive force.

The rationale for this position has already been expounded in previous consultation documents but in brief, Refuge considers that the partial defence of provocation as it stands

1. has the potential to provide violent men who kill their female partners with a legal 'excuse' for their behaviour. Specifically, the 'reasonable man who *when provoked* (by for example, infidelity, alleged or actual or by taunts about his sexual performance), *temporarily loses control* and kills in *spontaneous, sudden rage*' is able to run this defence because his actions occurred following 'provocation' in the heat of the moment, without planning, forethought or one may suggest, the intent to kill.
2. does not work for abused women who kill, in either theory or in practice
 - a) Theoretically, the concept of provocation does not properly reflect the context in which abused women find themselves and in which they are sometimes driven to kill. The principle motive that drives some abused women to take lethal action is invariably fear. One could argue that 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. Most abused women who kill do so out of fear (not in anger because they have been pushed to the limit) and an honest belief this is the only way to preserve their own lives and those of their children. The fact that 72% of women are killed by a known male, 46% by a partner or ex-partner¹, 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.
 - b) Practically, provocation is less applicable as a defence for abused women who kill. Unlike the male defendant, the female is less likely to possess sufficient strength to fatally

¹ Home Office (2003)

injure her partner if she were to *suddenly* and *temporarily lose self control*. She may however, suffer a loss of control which is neither sudden, nor temporary but rather results from a culmination of abusive acts. Her loss of control may be slow and reach its climax only after many years, when she eventually feels compelled through fear and the experience of operating under extreme stress, to take pre-emptive action in her own defence.

Furthermore, some women are generally only able to kill an abusive male partner in 'the heat of the moment' if she has access to a weapon. If this is a kitchen knife, for example, grabbed in a moment of terror, then she would be able to confidently run this defence. If she uses a gun, obtained for the purposes of 'protection' or even of killing her partner, this would suggest an element of planning and or the use of excessive force which may prevent the availability of this defence and result in either a trial for murder or a more lengthy sentence if convicted of manslaughter.

c) Many women who kill abusive partners do so not just in self-defence but also whilst operating in under extreme stress. Considering a parallel partial defence of diminished responsibility (re-conceptualised and expanded) to take account of the extreme duress that abused women often suffer over many years may also be appropriate. It is important however, not to pathologise abused women as 'diminished' in mental capacity, rather to understand the impacts of abuse upon her state of mind as normal and adaptive responses to abnormal and intolerable situations of psychological and physical violence. A broader understanding of the concept, so that it also includes the socio-political context in which the abuse occurs is also recommended.

Q1 Do the existing sentencing ranges (of 3 years or less, where the degree of provocation is at its highest, up to 12yrs) adequately reflect the seriousness of and the resulting loss of life in offences of manslaughter by reason of provocation?

As mentioned above, viewing abused women who kill through the legal lens of provocation is to misunderstand the impacts of abuse and the reasons why some are driven to kill. It is the view of Refuge that abused women who kill violent partners should be able to run a defence of self defence.

In general, it is difficult to agree that killing in anger can be justified in a civilised society and that loss of control (anger) is available as a legal defence when other emotions such as compassion (assisting the suicide of a terminally ill loved one) is not. Provocation of the type alleged by many violent men who kill their partners, involving actual or alleged infidelity, should receive a much higher sentence than that given to women who kill, in self-defence, after years of abuse.

Other cases which should result in a lesser sentence, include those who kill in response to the killing/abuse of one's own child. Such acts may be viewed as extreme provocation and result in psychological impacts so intense as to justify running a parallel defence of diminished responsibility /acting under extreme stress.

"In the *Smith* case, a woman who killed her ex-partner after he told her that he had had sex with her 5- year-old daughter and that the child "tasted better" than she did, was allowed to plead guilty to manslaughter and sentenced to three and a half years of penitentiary. The trial judge said that

he could not imagine a more serious provocation. It thus must be emphasized here that the insult in this case comprehended an admission and boast of child sexual assault, which clearly sets it apart from the trivial insult cases advanced by men²".

Q2 In what circumstances might a non-custodial sentence be justified for manslaughter by reason of provocation?

A non-custodial sentence might be justified in circumstances where the killing is really in self-defence but the defendant is unable to confidently run this defence because they have acted in a pre-emptive fashion and or killed the victim whilst asleep or insensible through drink or drugs; this is often the case for most abused women who kill. It may also be justified in circumstances where defendants have suffered extreme provocation and stress (as in the case of Smith cited above) and who are otherwise not a danger to wider members of society.

Q3 Do you agree that an assessment of the level of provocation is the critical factor in sentencing where a conviction for manslaughter is based on a finding of provocation?

It is obviously important to assess the level of provocation in such cases, but a shared understanding about what constitutes provocation is crucial. Such assessment, particularly in domestic violence cases, must be rooted in a gendered understanding of the issue. Refuge is in agreement with the court of appeal who in R v Hussey upheld a sentence of 8yrs imprisonment stating "we must have regard to the public interest in not allowing revenge to hold sway no matter that the unfaithfulness has been protracted and most blatantly carried out". Refuge would strongly urge the Panel to disregard infidelity (or disparaging comments/ taunts about sexual performance) as sufficient provocation to justify killing in any circumstances, regardless of the 'impact' the victim's behaviour or words has allegedly had upon the defendant.

Refuge is pleased to note that attention has been paid to assessing the context of the relationship between the defendant and the victim, including the nature and history of that relationship and the balance of power within it. It is also clearly important to assess for the impacts of any abuse suffered by the defendant at the hands of the victim, which may have resulted in psychological difficulties, financial deprivation, social isolation³ and so on; the findings of this assessment may reveal that the defendant was operating under extreme stress and indicate the need to run a parallel partial defence of diminished responsibility.

Q4 Are there any other factors in addition to the type and degree of provocation, its duration, the actual effect on the offender and the context of the relationship of the offender to the victim that should be taken into account in assessing the level of provocation?

In respect of domestic violence there should be a clear and accurate understanding of the gendered nature and origins of violence against women, including the most common circumstances in which they are killed and in which they themselves are sometimes driven to kill. Sexism is embedded

² Stop Excusing Violence Against Women. NAWL's Brief on the Defence of Provocation (April 2000) National Association of Women and the Law

³ domestic abuse of women is known to take many forms and includes psychological, sexual, financial, social as well as physical abuse.

within our culture and so it follows that traces are likely to exist within judicial processes and legislation. Awareness and challenge of such discrimination must form part of reform at a systems level as well as the level of the individual case.

One should also consider the impact on others in the family, especially children who may be witnessing on going violence against their mother or who may themselves be at risk. The majority of domestic violence occurs in the presence of children who are either in the same or the next room⁴. It is likely that murder which occurs in this context would be similarly witnessed by children and this can only be very as a seriously aggravating factor.

Q5 is there evidence that the assessment of the level of provocation operates unfairly between female and male offenders?

Yes and this has been discussed in the introductory paragraphs of this response.

Q6 Are there any circumstances in which infidelity can amount to a high level of provocation? No.

Q7 Are there any circumstances in which offensive words amount to anything other than a low level of provocation?

Where offensive words and degrading comments are part of a pattern of emotional and psychological abuse perpetrated over a long period, the impact can be severe. For some abused women, a feeling that the 'psychological self' is under threat can prompt them to kill in defence of that 'self' – again, a parallel defence of partial diminished responsibility may be appropriate in such circumstances.

Q8 When measuring the loss of self control, to what extent should the lapse of time between the provocation and the killing affect the seriousness of an offence of manslaughter by provocation?

The assertion that one is less culpable if control was lost suddenly, immediately following provocation actively works against abused women who kill in fear and in favour of men who kill in anger. Abused women often suffer a steady stream of provocative insults over a protracted period and some have described this as 'the slow burn of provocation', the stress of which, may in some circumstances result in a loss of control, sufficient to allow homicidal behaviour. Abused women rarely possess the physical strength to fatally injure a partner in heat of the moment, so often take pre-emptive action (planning) and or use of excessive force, such as a weapon. Any reform of the partial defence of provocation and or guidelines for sentencing should take account of and aim to rectify such gender disparities.

Furthermore, it is important to acknowledge that 'loss of control' is not a feature of domestic violence. Domestic violence is rather an exercise in control, systematically played out over time in order to maintain power over the victim. It is known to escalate both in frequency and severity;

⁴ British Crime Survey (1992) found children were present or in the next room during 90% of domestic violence incidents.

women who are killed in this context, often die as a result of “one hit too hard” during the experience of a *regular* and *controlled* beating.

Q9 Do you agree that when measuring the loss of self control, post killing behaviour such as disposal or concealment of evidence or dismemberment would normally aggravate an offence of manslaughter by provocation?

Assessment of the defendant, including his/her state of mind before, after and at the time of the killing may inform judgements as to whether concealment or dismemberment aggravate the offence. For example, there may be circumstances in which the defendant, following an episode of abuse, such as prolonged violent sexual assault, forced imprisonment or beatings has become so dissociated and numb (in order to survive) that they act in an uncharacteristic manner and may conceal evidence or even dismember the body. Parallel defences of diminished responsibility and or ‘acting under extreme stress’ may be appropriate in such circumstances.

Q10

a) Do you agree with the provisional view of the panel that the use of a weapon should not of itself move a case into a higher sentencing bracket?

Yes

b) Do you agree that the issue is whether or not the weapon was to hand (tending to mitigate the offence) or carried to the scene (tending to aggravate the offence)?

No – as already stated above, there are significant gender differences which must be taken into account, particularly in relation to abused women who kill. It is therefore, unhelpful to create a general response to all homicide involving the use of a weapon. Awareness of gender specific factors in relation to domestic homicide should be taken into account when creating sentencing guidelines.

Q11 would your answer to question 10 be influenced by the gender of the offender?

Yes

Q12 should the minimum terms for murder provided in the Criminal Justice Act 2003 influence the sentencing ranges and starting points for manslaughter following provocation?

Q13 do you agree:

- (i) **that there should be three sentencing ranges for manslaughter by reason of provocation**
- (ii) **that the principal feature identifying the range is the level of provocation**
- (iii) **that, once the range has been identified, the starting point within the range should be identified by reference to the time span over which the provocation occurred:**
 - (ii) agree
 - (iii) agree

Q14 are the sentencing ranges and starting points appropriate to the three categories of manslaughter by reason of provocation?

Where there is a very high degree of provocation, such as prolonged, extreme abuse and threats to kill or where a child has been abused/killed, there should be options for acquittal.

Q15 do you have any comments on the aggravating and mitigating factors identified or any additional suggestions?

Aggravating features

Refuge agrees the following constitutes an aggravating feature

- Where the killing occurred in the presence of a child/children

But would suggest adding

- Where the killing occurred as result of jealousy, infidelity or in response to sexually disparaging remarks

Refuge suggests that within a domestic violence context, and in the spirit of self defence, a woman may act with '*an intention to kill rather than to cause serious harm*' because she honestly believes that she must do so in order to preserve her own life and or that of her children, as such this should not be viewed as an aggravating factor.

Mitigating factors

Refuge agrees the following constitutes a mitigating factor

- Where the offender was acting to protect another

But disagrees that *spontaneity and lack of pre-mediation* is similarly mitigating, recognising that prolonged 'provocation' may result in abused women 'losing control' at *any* time rather than immediately and spontaneously following an abusive incident. The need for pre-emptive action has also been discussed fully above.

Refuge would suggest adding

- killing which occurs as a consequence of prolonged domestic violence is viewed as a mitigating factor.

[ENDS]