



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

RESPONSE TO MURDER, MANSLAUGHTER AND INFANTICIDE: PROPOSALS ON THE REFORM OF THE LAW

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ advising on legislative and other measures which ought to be taken to protect human rights,² advising on whether a Bill is compatible with human rights³ and promoting understanding and awareness of the importance of human rights in Northern Ireland.⁴ In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by human rights bodies.
2. The Commission welcomes the opportunity to comment on the reform of the law envisaged in this document. In addition to making this submission, the Commission would like to engage further by making representations to those charged with drafting or implementing new legislation in this area. The Commission would welcome correspondence on this consultation response and, in particular, whether any of the points raised have resulted in policy changes to the legislation. If they have not resulted in such a policy

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid*, s.69(3).

³ *Ibid*, s.69(4).

⁴ *Ibid*, s.69(6).

change, we would welcome explanation about why they have not been taken up.

3. Although there are a number of provisions in the consultation document, this comment will restrict itself solely to the reform of the law on murder and manslaughter with regard to the partial defence of provocation (draft clauses on pp 33-35, Annex A of Consultation Paper). This consists of three elements:
 - a) Abolition of the existing partial defence of provocation
 - b) The existing partial defence of provocation would be replaced by killing in response to fear of serious violence, and
 - c) Additionally (in exceptional circumstances only), there will be a partial defence of "killing in response to words or conduct which causes the defendant to have a justifiable sense of being seriously wronged".

Rights engaged by the proposed reform of the law

4. Both victims and perpetrators of violence are protected by the scope of rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and the Human Rights Act 1998. Article 2 states that the right to life shall be protected by law. The scope of this right requires states to take effective criminal law sanctions to safeguard life and the state has a positive obligation to ensure that the law protects the lives of citizens from unjust deprivation by other individuals.
 - a) The right to a fair trial (Article 6, ECHR) is also engaged whether the defendant is alleged to have perpetrated long-term abuse or murder.
 - b) "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
 - c) The right to a fair hearing includes the presumption of innocence of the defendant until proven guilty.
5. Taken together, these rights mean that state laws and procedures should not condone killing in any circumstances or the pre-emptive use of lethal force. They provide for

states to take measures to ensure that the right to a fair trial, with the presumption of innocence, is ensured to every defendant charged with the use of such lethal force.

6. These rights require a careful balancing of considerations as they are engaged for both victims and perpetrators of crime. For example, women (and men) who experience repeated and systematic abuse have a right to life under Article 2 of the ECHR. Men (and women) who perpetrate abuse also have a right to life under the scope of Article 2, and a right to a fair trial under Article 6. Women (and men) who kill in response to alleged abuse have the right to life and the right to a fair trial.
7. The law surrounding the defence of provocation also engages a further treaty obligation in Article 15 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),⁵ to accord to women equality with men before the law.
8. Although this reform touches on very wide-ranging and detailed legal provisions, for example, the doctrine of reasonableness, and evidentiary requirements, the brief comments below will be restricted to whether and how the reforms enhance the right to life, the right to a fair trial and the right to equality before the law.

Application to Northern Ireland

9. The issues in the consultation paper are equally relevant to Northern Ireland as the law on murder is the same in Northern Ireland as in England and Wales. While the Homicide Act 1957 does not extend to Northern Ireland, there are equivalent provisions for provocation and diminished responsibility in the Criminal Justice Act 1966.
10. The proposal for change in the partial defence of provocation is intended to provide an improvement for the current position of vulnerable women. Women do not usually kill in response to domestic violence; but it is nonetheless relevant to consider the broader context of which this legal reform will be one part: more effective prevention of domestic violence and protection for victims of domestic violence.

⁵ The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) adopted in 1979 by the UN General Assembly.

11. The most recent figures available from the Police Service of Northern Ireland (PSNI) indicate that there were 23,076 reported incidents of domestic violence between 1 April 2007 and 31 March 2008. This represents a small reduction on the totals of the previous year (23,456). Two-thirds of these incidents are classified as violent crimes. Available evidence also suggests that these crimes are under-reported and do not represent the true scale of the incidence of domestic abuse. There is no gender breakdown of these incidents, but available research shows that in most cases the perpetrator of domestic violence is a man, and the victim is a woman. An effective response to protect the victims and prosecute the perpetrators of domestic violence is a prior condition for the effectiveness of support to vulnerable women.

Concerns that the law is intended to address

12. Provocation is a partial defence to murder, which, if pleaded successfully, reduces a conviction from murder to manslaughter. The law on provocation is set out in the Criminal Justice Act (Northern Ireland) 1966 (and in the Homicide Act 1957 for England and Wales), but it has also developed through case law. Advocates of this legal reform suggest that it arises out of longstanding concerns that the law is too generous for those who kill in anger and too harsh for those who kill out of fear of serious violence. The consultation document argues that, although "...the courts are producing broadly the right outcomes, they have to do so at times by pushing the current law to its limits".⁶
13. The right to equality before the law is positively engaged by the Government's stated intention to address a reputed gender bias in law on provocation and the outcomes that, it is argued, favour men through the emphasis on the trigger of jealousy or adultery, of anger rather than fear, and the emphasis on the sudden loss of control rather than a loss that may happen more gradually in situations of repeated and long-term abuse.
14. There are two main difficulties in the application of the current legislation. First, there is a requirement for a *sudden* loss of self control; by contrast a violent response to repeated domestic abuse may be the result of a build-up over time, resulting in the loss of control. Second, and linked to this, there is the difficulty of applying an emotional

⁶ Ministry of Justice, Murder, Manslaughter and Infanticide: Proposals for the Reform of the Law, Impact Assessment, July 2008, p 12.

response founded primarily on anger to situations where the predominant emotion is fear. The Government contends that these difficulties lead to unjust outcomes:

There are homicides at present where offenders are able to reduce their convictions to manslaughter in circumstances where a more just outcome would be murder. This is unfair on victims' families in such cases and wrong in principle.⁷

15. If this is the case, then the reforms envisaged would rightly address the duty of government to protect the right to life.
16. This reform releases court processes from a dependence on medical pathologies such as 'battered women's syndrome' to explain women's actions. The concept of a single pattern that can be described as 'battered women's syndrome' has a widespread currency. However, it fails to acknowledge that the experience, pattern and impact of abuse are also often different, depending on the individual and the context. An over reliance on particular patterns of either abuse (a 'cycle' of abuse characterised for example by lulls and periods of violence) or the response (the 'learned helplessness' posited by the 'battered women's syndrome') can also restrict the scope of protection afforded by the law to women who have been abused. If their experiences do not fit these preconceived patterns, they may not be considered sufficiently victimised, for example, to be protected by the law.

Assessment of the changes proposed against international standards

17. The Commission believes that the protection of the right to life of women, men and children will be realised more fully if there are concerted efforts in law enforcement to provide safety and support to victims of abuse. Evidence shows that preventive and protective strategies and policies save the lives of both men and women:

Coordinated and determined law enforcement approaches to domestic violence has prevented domestic homicides. The deaths of men and women are prevented if domestic violence is taken seriously... Creating appropriate defences for women

⁷ *Ibid*, p 6.

who kill in desperation is a damage limitation rather than a prevention strategy.⁸

The Commission agrees with this position.

18. This position was recently echoed by the United Nations' Committee on the Elimination of All Forms of Discrimination against Women (CEDAW). In July 2008, the Committee expressed its concern about the continuing prevalence of violence against women and girls, including domestic and sexual violence, and the low prosecution rates of sexual violence. In its Concluding Observations, the Committee recommended:

The expansion of training activities and programmes for parliamentarians, the judiciary, and public officials, particularly law enforcement personnel and health service providers, so that they are sensitive to all forms of violence against women and can provide support to victims.⁹

19. In the context of such comprehensive efforts by the State to introduce additional safety, protection, and prosecution measures in order to reduce domestic violence, the Commission also welcomes the proposed change to the law on provocation that clarifies that jealousy and adultery are not permissible partial defences for homicide. In the Commission's view, this is a welcome advance to the right to life, and the right to equality before the law for men and women.
20. Studies of women who kill (Browne 1987; Jones 1991) in the US have found that women in the main have experienced repeated and life threatening violence, with a greater frequency of coerced sex. Almost all the women had also attempted to leave violent relationships and enlist the support of other agencies in their struggles to end the violence. Further, fear is one of the reasons women do not leave violent men; leaving is one of the most dangerous things a women can do in response to repeated abuse.
21. Of course, according to the international framework of human rights, the perpetrator of domestic violence also has the right to life and right to a fair hearing. The reform to the law on provocation represents a continuing compromise

⁸ Justice for Women: Battered Women's Syndrome: Help or Hindrance [Online] Available: <http://www.justiceforwomen.org.uk/BWS.HTM>.

⁹ CEDAW/C/GBR/CO/6 at para 34.

within the criminal law.¹⁰ The value placed on human life and society's interest in maintaining order incline the courts to severely punish those who kill. It is important to protect the right to life and fair trial of all concerned, to reduce the possibility that a partial defence will serve as a cover for taking the law into one's own hands.

22. With this in mind, it is the Commission's view that the changes to the law still constitute an effective deterrent and a proportionate response to the risk inherent in such a course of action. With some caveats, the Commission welcomes the proposal to replace the existing partial defence of provocation by "killing in response to fear of serious violence".
23. However, the Commission has concerns about the second provision on the reform to the law on provocation. The proposal is that there will be a partial defence of "killing in response to words or conduct which causes the defendant to have a justifiable sense of being seriously wronged" (draft provisions (6)(b)). The Government argues this would have a narrower application than the current partial defence of provocation¹¹ and that this would reinforce the explicit statement on the face of the statute, that sexual infidelity on its own could not constitute grounds for the defendant to have a justifiable sense of being seriously wronged to an extent which would warrant reducing murder to manslaughter.
24. However, it appears to the Commission that the wording is vague and may create unintended consequences. For example, although the provision stipulates that this is "for exceptional circumstances only", it is not clear what criteria a defendant must satisfy before the judge will instruct a jury to consider the circumstances exceptional, or what constitutes the "justifiable sense of having been seriously wronged".
25. Without clear criteria, judicial interpretation might have an adverse impact on bringing to justice defendants who have committed murder in the name of, for example, perceived family honour.¹² For this reason, the Commission is concerned that the second provision will not adequately protect the right to life of the victims of such crimes.

¹⁰ Greene J (1989) *Adelaide Law Review* 12, p 146.

¹¹ Ministry of Justice, Impact Assessment, p 12.

¹² Ministry of Justice, Impact Assessment, p 13.

26. The right to a fair trial for women (or men) who kill should rest not on special rules by gender, but on the same rules applied consistently. The relevance of a particular social context is not unique to women defendants in a murder trial. It is relevant to any claims of self defence or provocation in a trial, to help the jury evaluate why the defendant had a reasonable fear of violence. This will mean that the reformed law on provocation will rely on consistent instructions by judges to juries on the substantive criminal law in question, the admissibility of evidence about the context of the defendant's act, the instructions to the jury on the relevance of the evidence, and the procedural rules defining the quality of evidence.
27. In this context, if juries are directed to determine how a person might with a "normal degree of tolerance and self-restraint" respond in similar circumstances, a fair trial will only be realised with more clarity about whether a normative standard of 'reasonableness' is possible or desirable to set. This creates a number of difficult issues of fairness; if the standard of reasonableness is set by the jury, then it is not a normative standard but personal and subjective, and if the standard of reasonable is restricted to that of a "reasonable woman experiencing abuse", for example, or a "reasonable man experiencing mental illness", this is also problematic for a fair verdict based on consistent instructions and information to a jury. There are dangers, too, of creating models of a "reasonable abused woman" or "reasonable abused woman who kills" because it could invite the courts to prevent the fair trials of women whose experience or response may not fit widely accepted patterns of what women experiencing abuse go through or how they respond. The lessons learned from using the "battered women's syndrome", as outlined above, would apply here.

Conclusions

28. The Commission welcomes the proposed change to abolish the current standard of provocation as a partial defence.
29. It welcomes the proposed change to the law that replaces the existing partial defence in the case of "killing in response to fear of serious violence", provided that the substantive law, evidentiary requirements and procedural requirements can be clarified to realise fair trial rights of both female and male defendants.

30. However, the Commission is concerned about the vague wording of the proposed partial defence of killing in response to words or conduct which causes the defendant to have a "justifiable sense of being seriously wronged". The Commission feels that with inconsistent judicial application, this may have serious and unintended consequences in law.
31. More widely, to save lives, there is a need to address adequately gendered violence in the criminal justice system. The identification of good practice within the process of reporting, evidence gathering, and arrest must be combined with effective prosecution and case handling. All must be underpinned by high quality support services that are responsive to the wide ranging needs of victims and survivors of violence and abuse.

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