



Women's Resource Centre

Response to the Law Commission on the Partial Defences to Murder Consultation (No. 173)

16 January 2004

Background

1. The Women's Resource Centre (WRC) is a second-tier umbrella body providing infrastructure support, information and capacity building to voluntary and community organisations working to improve the status women.
2. WRC is the only pan-London organisation providing infrastructure services specifically for the women's voluntary and community sector.
3. WRC has three teams, Development, Information and Policy, providing services to member groups and others.
4. The Development Team provides support for organisations through training, workshops and one-to-one advice sessions on development issues such as fundraising, business planning, monitoring and evaluation, good governance and leadership. The Development Team also runs a 'train the trainer' project to develop training capacity amongst workers within the women's voluntary and community sector.
5. The Information Team ensures that members receive the latest information affecting both the women's and general voluntary sectors through a number of publications and website. The Information Team also refers women and other organisations on to member groups. The Resource Library and various services are available free of charge to all member groups. The Information Team is also responsible for WRC's volunteer programme.
6. The Policy Team disseminates information to members, holds consultations and makes responses on policy issues of importance to women and women's organisations. The Policy Team also administers the WRC Policy Forum – a forum of WRC members who guide the work of the Policy Team and identify strategic issues for pro-active lobbying. Throughout 2004, the Policy Team will be providing policy capacity building (through training, information, resources and individual support) to members and other voluntary and community organisations.
7. The mission of WRC is: *Generating, Promoting and Sustaining Voluntary Action that Improves the Status of Women.*
8. WRC is a membership based organisation and we currently have 151 members. The majority of WRC's member groups operate in Greater London, often working with some of the most marginalised communities in the capital. Of WRC's members, 137 (90%) are groups and 14 are individuals. Sixty-eight percent of members are general organisations. Black and Minority Ethnic (BME) women's groups represent 28 percent of members.

9. WRC members work within and across many fields including anti-racism, arts, sport, employment, health, violence against women, education, justice and human rights. One quarter of all WRC's members work directly with issues of violence against women.

10. Fifty-four percent of members have specific service users i.e. their organisation either has services or projects that target specific populations. BME women represent 68% of specific service users. Other specific service users include lesbians and bi-sexual women, disabled women and older and younger women.

Summary

11. The current model (i.e. Battered Woman Syndrome) used to define battering and its effects is inadequate and ineffective. There is a desperate need to develop a model based on women's realities.

12. WRC supports both licensed and non-licensed professionals (such as refuge/shelter advocates) providing expert evidence.

13. None of the defences, in their current forms, have proven effective for battered defendants as evident in the outcomes of battered defendants' cases and particularly when compared to male-female homicides. We support the reform of defences.

14. WRC believes that battered women's responses can be viewed as justifiable and reasonable when a rigorous analysis is applied. We strongly agree with paragraph 10.13 of the consultation document.

Introduction

15. Firstly, we would like to acknowledge the work undertaken by the Law Commission on this complex and often controversial issue. We believe that the Law Commission has successfully managed to capture many of the key issues regarding justice and battered women defendants.

16. Our response is related specifically to issues raised in Part X of the consultation document - abused women who kill their violent partners - and in particular, we will be focussing on Battered Woman's Syndrome (BWS).

17. Domestic violence continues to adversely affect the health and wealth of the United Kingdom (UK). Research indicates that one in four women in the UK will experience domestic violence in her lifetime. For battered women, the violence permeates every facet of their lives including mental and sexual health, employment opportunities and relationships with others. Children risk witnessing their mothers abuse and may repeat victimisation or perpetrator behaviours in their own adult relationships.

18. Harassment and threats can continue for many years after the relationship has been dissolved and women may be most vulnerable to ongoing harassment, serious assault and death after separation from a partner, as demonstrated below by statistics gathered by Women's Aid:

A study of 200 women's experiences of domestic violence commissioned by Women's Aid, *Routes to Safety*, found that 60% of the women had left because they feared that they or their children would be killed by the perpetrator.

The same study found that 76% of separated women suffered post-separation violence. Of these women:

- 76% were subjected to continued verbal and emotional abuse;
- 41% were subjected to serious threats towards themselves or their children;
- 23% were subjected to physical violence;
- 6% were subjected to sexual violence; and
- 36% stated that this violence was ongoing.

In addition to this, more than half of those with post-separation child contact arrangements with an abusive ex-partner continued to have serious, ongoing problems with this contact.

Women are at greatest risk of homicide at the point of separation or after leaving a violent partner. Forty two percent [n=102] of all female homicide victims (compared with 4% of male homicide victims) were killed by current or former partners in England and Wales in the year 2000/01 - an average of two women per week.¹

19. What is clearly borne out by these statistics is that women may be at higher risk of being killed despite leaving the violent relationship. A women's fear for her life is reasonable and realistic, rather than unfounded paranoia.

20. There are several (legislative) instruments which recognise the rights of women and children in the UK to live free of domestic violence. The UK has ratified the Convention on the Elimination of Discrimination against Women (CEDAW), and is party to the Beijing Platform for Action, both of which provide further impetus for the need to address the issues surrounding battered defendants in an effective and timely manner. For example, paragraphs 103a and c of the (United Nations) Beijing +5 Outcome Document state that Government's should:

- (103a) As a matter of priority, review and revise, where appropriate, legislation, with a view to introducing effective legislation including on violence against women, and take other necessary measures to ensure all women and girls are protected against all forms of physical, psychological, and sexual violence, and are *provided recourse to justice*; and
- (103c) Establish legislation and/or *strengthen appropriate mechanisms to handle criminal matters relating to all forms of domestic violence*, including marital rape and sexual abuse of women and girls, and ensure that such cases are brought to justice swiftly.²

21. We would hope that any changes to legislation, especially those which would impact significantly on women, would take into account both international instruments, as well as being congruent with and in the spirit and intention of domestic policy and legislation relating to domestic violence.

¹ See www.womensaid.org.uk.

² The Final Outcome Document of the Twenty-third Special Session of the General Assembly entitled "Women 2000: Gender Equality, Development and Peace for the Twenty-first Century" was adopted by the Plenary on 10/06/00 at the United Nations, New York City. Italic emphasis my own.

Battered Woman Syndrome (BWS)

22. Walker's theories of learned helplessness and the cycle of violence have been useful in explaining why some women in violent relationships remain with their abusive partners to a lay-person or juror who might consider it a more logical response to leave the relationship. Indeed, this is a common response from the public - to focus on a woman's inability to leave rather than a man's inability to be non-violent. Women who remain in abusive relationships (women very rarely leave a relationship after the first incident of abuse) are seen as masochistic and 'undeserving' victims.

23. Walker's explanation shows that because of a sense of learned helplessness and the cyclic nature of the violence, a woman does not have the same perception of her ability to leave the relationship. We would not refute that this is the case for some women. While Walker's theories have been helpful for the defence of some women who kill their violent partners, it has also proved, over time, to be limiting.

24. In relation to the cycle of violence theory, the 'honeymoon' stage of the cycle of violence may decrease over time until it may disappear completely, leaving only the stages of 'tension building' and 'violence'.

25. We would also support that a relationship exists between the experiences of battered women and the diagnosed condition of Post Traumatic Stress Disorder (PTSD). Experiencing domestic violence is extremely traumatic for the victims/survivors. This is often exacerbated by physical injury, exhaustion and fear of repercussion.

26. While BWS and Walker's theories have generated greater awareness of battering, they have also come to represent a model of rigid characteristics of *the* battered woman's experience. This model conflicts with current knowledge of domestic violence which has established that *there is no single profile of a battered woman*.

27. The use of a 'syndrome' to explain and defend women's criminal behaviour has resulted in the development of a rigid model of characteristics and behaviours of battered women. This model has come to be so strictly adhered to that *women whose behaviour falls outside the syndrome model have not been considered 'truly battered'*. Learned helplessness implies passivity on the part of the battered woman when in reality many women do employ survival tactics (such as fighting back and pre-empting an attack) and exhibit behaviour which is anything but passive.

28. Rather than the theory of learned helplessness, which describes women as only passive victims, Jocelyne Scutt's theory may be more helpful. Scutt, an Australian lawyer and author, argues that women can and do escape from violent relationships but *learn that there is no help*. Laws which would protect women and prosecute abusers are often ineffective because of their application. The ready access that men have to power, property, prestige and wealth continues to effect the application of domestic violence laws and women's rights under these laws.³ Women are not necessarily safer from violence when they leave the relationship or seek assistance.

³ Chappel, Irene. 1999. Battered Women's Syndrome: A Report on its Current Position in New Zealand Law. Unpublished Report. National Collective of Independent Women's Refuges. Wellington.

29. Psychologising the experience of battered women focuses attention away from the broader social, political and economic context in which battering happens, to a narrow focus on the mental state of the woman. Such a focus ignores the reality that domestic violence is overwhelming gender specific, goal orientated and purposeful (power and control) and supported by wider social, legal and political structures.

30. The term 'syndrome' implies that battered women are, in some way, mentally unstable. An understanding of battered women as helpless implies that they lack mental capacity and will and are incapable of exercising reason and responsibility. Understanding battered women's experience via the syndrome theory deflects the focus away from the abuser and concerns itself with the mental state of the battered woman. The focus should, instead, be directed at the battered woman's reality and attempt to show that her actions were reasonable and justified under the circumstances.

31. The need for medical knowledge to explain battered women's behaviour suggests that battered women are 'crazy' and mentally unstable and therefore requires psychological interpretation. While the behaviour of women who are battered is of course different from women who are not battered, it is not so much the behaviour which requires analysis but the circumstances that give rise to that behaviour. Any other person subjected to continual and systematic abuse may also behave in this manner. The focus on the woman's behaviour takes the emphasis away from the real issue, the continued violence of men against women.

32. BWS evidence paints women as being helpless or psychologically unstable and has dangerous implications for women who are mothers in relation to custody issues. Being battered may give rise to questions about a woman's ability to be a 'proper' mother to her children. These implications should remind us to focus attention on the violent situation and the reasonableness of a woman's response.

33. As well as being essentialist, medicalised and rigid, BWS is also problematic for several other reasons.

34. Firstly, the theories which primarily inform BWS are over 20 years old. Significant developments (such as the Duluth power and control wheel)⁴ have been made since then which are not adequately reflected in the BWS analysis.

35. Secondly, it does not recognise the structural supports for violence against women and the wider social factors which influence women's responses.

36. Thirdly, Walker's theories are not equipped to deal with diversity. Allard, an African American feminist scholar, describes how the BWS model limits defences of battered women of colour who are stereotyped as angry and revengeful - anything but "fragile" - which does not fit with the passive victim theory.⁵

37. Neither does the BWS model account for same sex domestic violence, as the Law Commission has acknowledged. Although a relationship involving battering is ordinarily thought to centre around male violence against women, it is not exclusive to this dynamic. Violence can be and is an issue in same-sex relationships between women. Moving away from a rigid model of

⁴ See www.duluth-model.org.

⁵ Allard, Sharon Angela. 1991. *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*. *UCLA Women's Law Journal*. 191:680-689.

BWS will enable a better understanding of the many backgrounds that make up a woman's experience. We strongly agree with paragraph 10.18 of the consultation document.

Positions in Other Countries

38. It has been useful to read of the positions on defences to murder of other countries.

39. We would like to comment on the New Zealand cases, as described in the consultation document and other outcomes, primarily as examples of how defences and BWS can disadvantage and discredit battered women.

40. The Courts in New Zealand have increasingly accepted that being battered may have an impact on a woman's behaviour and thus, criminal offending. However, the success of cases involving battered women who have introduced BWS has been mixed, largely due to:

- The structure of legal defences (self-defence, provocation);
- Lack of analysis and understanding of domestic violence; and
- The rigidity of BWS theory.

41. The cases involving murder have been less successful than those involving less serious crimes, such as fraud.⁶ This mixture of success indicates that there is still a need for greater understanding, by both the judiciary and lay people, of domestic violence and crimes that women commit as a result.

42. In summary (New Zealand cases):

Charge	Case	Outcome
Fraud	Ruka	Acquitted on appeal
Fraud	Te Moananui	Acquitted
Murder	Oakes	Guilty
Murder	Wang	Guilty
Murder	Manuel	Acquitted
Murder	Gordon	Guilty
Attempted Murder	Zhou	Acquitted
Child Abuse/Death	Witika	Guilty
Child Abuse/Death	Whakaruru	Suspended sentence

43. The consultation document (paragraph 10.33) briefly describes the case of Gay Oakes (probably New Zealand's most famous case involving a battered woman) who, after years of domestic violence, killed her partner by poisoning him and burying the body in the garden.

44. BWS was raised in support of self-defence and provocation but was unsuccessful. Prosecution counsel argued that Oakes exhibited many behaviours which were inconsistent with the state of learned helplessness (locking him out of the house, laying complaints with the police and obtaining Court orders) as outlined by the expert witness for the defence. The prosecution therefore claimed that she was not suffering from the syndrome and argued that Oakes' active attempts to protect herself from her abuser were inconsistent with learned helplessness. This case

⁶ The acknowledgement of battering has been most successful in cases of fraud against the Department of Social Welfare. The cases of Ruka and Te Moananui have set a precedent in that violence is not a characteristic of a "relationship in the nature of marriage" and therefore Ruka and Te Moananui had not committed fraud by claiming the Domestic Purposes Benefit (for single parents) despite living with partners (parents in de-facto and marriage relationships are not entitled to the DPB).

indicates the way in which the particular and rigid model of BWS, of the battered woman as passive victim, can disadvantage women. If she exhibits behaviour that falls outside the BWS model, as Oakes did, then she is not considered 'truly' battered.

45. The evidence of the expert was actually called by Oakes' defence counsel and yet, ironically, resulted in discrediting rather than supporting Oakes' case. The expert's knowledge of BWS was based on the Walker model of BWS, a model which has limitations. The evidence admitted by the expert was not able to account for Oakes' active attempts to protect herself. This reflects the learned helplessness theory's inability to account for the different ways that women respond to battering.⁷

46. However, the (NZ) case of *R v Tepu*, is an excellent example of how useful the defence of provocation is for defendants who are abusers. Tepu killed his partner after she had promised not to report a severe incident of physical battering to the Police. However, she did report the incident to the Police, of which Tepu was advised. Tepu killed his partner and successfully pleaded provocation to the charge of murder on the grounds that he had been provoked by her breaking of her promise to not inform the Police. The courts upheld that Tepu was an 'ordinary person' (despite evidence of being an on-going abuser) who temporarily lost self-control in response to an action (i.e. his partner informing the Police). Tepu was convicted of manslaughter only.

Expert Evidence

47. Who constitutes an 'expert' (traditionally psychologists and psychiatrists) should also be reviewed. Refuge/shelter advocates are more likely to work intensively with women (on a number of issues) and should be regarded as experts on all aspects of domestic violence. Again, there are also problems in medicalising the effects of battering as noted earlier.

48. The use of medical experts (psychologists and psychiatrists) in Court to give evidence about battered women further reinforces the notion that understanding the dynamics and effects of 'being battered' as being beyond the comprehension of the average person, despite the fact that recent research confirms that domestic violence, particularly partner violence, is prevalent in society.

49. In 1992, California introduced Evidence Code Section 1107 which established the admissibility of evidence of domestic violence. One of the "core concepts" of the Code was defining an expert:

"[C]onstant reference was made to the history of the battered women's movement to document and to understand domestic abuse. Because the issues of battered women had been historically ignored, the theories have been developed outside the traditional professions. In addition, the shelter workers who work with battered women everyday - answering hot line calls, conducting intake interviews, providing shelter, transportation, and comfort - usually do not have degrees of

⁷ R v Oakes [1995] 2 NZLR 673 (CA).

any kind, yet these advocates are clearly the experts on battered women's lives as measured by the amount and quality of their contact with battered women".⁸

50. Shelter workers were also involved in drafting the language of the Code.

51. The priority and measure of competency required of an expert should be the ability to articulate the realities of battering in a manner which provides insight, contextualisation and understanding for the factfinders. Licensing does not necessarily guarantee an ability to effectively articulate diversity of culture, ethnicity and sexual orientation and how these may give rise to different experiences of domestic violence and outcomes.

Educating Judges

52. We believe that educating Judges would be beneficial, particularly if mandatory sentencing were to be abolished.

Options for Reform

53. We strongly agree with paragraphs 10.85 and 10.89. We believe there is an urgent need to review and reform the partial defences.

54. We absolutely agree that the law of provocation (despite some advances made as a result of Ahluwalia's case) is unsatisfactory in its current form.

55. Abolishing the mandatory sentence in favour of discretion is the proverbial 'double edged sword'. While it may enable a Judge to sentence fairly (based on the mitigating factors and also take into account that battered women are not habitual offenders), there are numerous examples in other (women's) cases (particularly where women are the victims) which illustrate the lack of knowledge and understanding of Judges about violence against women in general.

Conclusion

56. WRC looks forward to seeing the outcome of this consultation. We would also welcome specific reviews of BWS and its position in law and expert evidence.

If you require further information about this submission, please do not hesitate to contact me.

⁸ Bowman, Alana. 1992. *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*. *Review of Law and Women's Studies*. 2:219-254. Quote from p229.

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