

Select Committee on the Partial Defence of Provocation

Question on notice

Mr Adam Searle MLC to the Deputy Director General of Family and Community Services:

1. Your agency is the applicant in care protection matters. Do you have any experience of that being a factor, or if you do not personally perhaps you could take it on notice, because we would be very interested? (Where 'that' referred to the possibility that where child welfare proceedings are taken essentially on the grounds of domestic violence it may explain why some women do not report – they are frightened for themselves but they are frightened about losing their children?)

Date Asked: 28 August 2012

Date Due to Parliament: 24 September 2012

RESPONSE

Community Services lawyers who bring care applications on behalf of the Director General of the Department of Family and Community Services (FACS) are aware that women frequently under-report violence in the home. Copies of the Police reports on the family obtained by the lawyer often reveal a discrepancy between the violence reported by the mother compared to what is shown in the reports. Other mandatory reporters from sources like schools, hospitals and other family members also reflect this discrepancy.

As the Director General of FACS is the applicant in proceedings, mothers do not usually advise Community Services why they under-report violence. Groups representing respondent mothers like Legal Aid, community legal centres and women's legal advocacy groups may be better able to give reasons for women under-reporting. NSW Police may also keep records of why women do not take out apprehended violence orders.

There are a number of studies that show that women do under-report violence for fear of having their children taken away. Dr Lesley Laing, Faculty of Education and Social Work, University of Sydney, states in her report *No way to live, women's experiences of negotiating the family law system in the context of domestic violence* June 2010, that women do fear losing their children, but they fear that if they fail to prove the domestic violence, their children could be in greater danger of abuse.

Community Services is aware that there are many factors contributing to mothers not reporting domestic violence. These include fears the father will threaten to harm the children if the mother reports the violence, the mother not wanting her partner to get into trouble, and also the risk that this will affect her relationship with him.

Question on notice

Mr David Shoebridge MLC to the Deputy Director General of Family and Community Services:

Could you ask them (the Domestic Violence Death Review Team) if they have some preliminary material that they could provide to the committee, because clearly that kind of material, even on a preliminary basis, might be of assistance to our deliberations?

Date Asked: 28 August 2012

Date Due to Parliament: 24 September 2012

RESPONSE

The Domestic Violence Death Review Team has advised the Department of Family and Community Services that the Select Committee on the Partial Defence of Provocation has also asked it directly for this information and that it will be providing any data that may be useful direct to the Committee.

Supplementary question on notice

1. Some stakeholders, including Women's Legal Services NSW and Mr Phil Cleary, have argued that a human rights focus should inform the review of the partial defence of provocation.

a. Do you agree with this suggestion?

Date Asked: 28 August 2012

Date Due to Parliament: 24 September 2012

RESPONSE:

The Department of Family and Community Services supports the suggestion that a review of the partial defence of provocation should be guided by principles of human rights. Any review must be consistent with the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of Children, since Australia is a signatory to both these conventions. They require that all Australian laws address equally the rights of women and children as compared to any other group in the community.

b. Are there any other principles or themes that you think the Committee should have regard to when formulating our view on the issue of provocation?

RESPONSE

One of the principles to be borne in mind when considering reform to the criminal justice system is to ensure that the law is not so complex as to render it unintelligible to a jury. The partial defence of provocation involves particularly complex concepts and can be very difficult for juries to understand and apply. Such complexity may result in a misapplication of the law and have a significant impact on the family of the victim as well as the defendant.

It is suggested that the Select Committee consider ways to ensure that, if provocation is retained, it is simplified so that the complexity of the law does not result in a miscarriage of justice.

Maura Boland

Deputy Director General
Family & Community Services