



Law Commission

**Partial Defences to
Murder**

Final Report

6 August 2004

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are: The Honourable Mr Justice Toulson, *Chairman*
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THE LAW COMMISSION
PARTIAL DEFENCES TO MURDER
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THE LAW COMMISSION

Report on a reference to the Law Commission under section 3(1)(e) of the Law Commissions Act 1965

PARTIAL DEFENCES TO MURDER

To the Right Honourable the Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor

PART 1

INTRODUCTION AND SUMMARY

TERMS OF REFERENCE AND THE CONSULTATION PROCESS

- 1.1 The Law Commission has long considered that the law of murder is in need of review. In this report we do not attempt a wholesale review. Our remit, in accordance with our terms of reference, is more limited.
- 1.2 In June 2003 the Home Secretary requested the Law Commission to consider and report on the following matters:
 - (1) the law and practice of the partial defences to murder provided for by sections 2 (diminished responsibility) and 3 (provocation) of the Homicide Act 1957.¹ In considering this, we are asked to have particular regard to the impact of the partial defences in the context of domestic violence.
 - (2) In the event that either or both of them are in need of reform:
 - (a) whether there should continue to be partial defences to murder in the circumstances provided for by them;
 - (b) if so, whether they should remain separate partial defences or should be subsumed within a single partial defence;
 - (c) if the former, how they may each be reformed;
 - (d) if the latter, how such a single defence may be formulated.
 - (3) Whether there should be a partial defence to murder in circumstances in which the defendant, though entitled to use force in self-defence, killed in circumstances in which the defence of self-defence is not available because the force used was excessive.
 - (4) If so, whether such a partial defence should be separately provided for and in what terms, or should be subsumed within a single partial defence such as is referred to in (2)(b) and (d) above.

¹ In this Part referred to as “the 1957 Act”.

- 1.3 We have not been requested to consider and report on section 4 of the 1957 Act (killing by survivor of a suicide pact), section 1 of the Infanticide Act 1938 or assisted suicide save as to the extent necessary to consider the law and practice of the defence of diminished responsibility. Such cases are rarely encountered.
- 1.4 Although this project is considerably narrower than a review of the whole law of murder, which logically would begin with consideration of the elements of murder before considering defences to murder, it is nevertheless important. It raises issues which have proved to be of great difficulty not only in this country but also in many others with similar legal systems.
- 1.5 We published Consultation Paper No 173 on 31 October 2003.² As part of our review of the law we commissioned studies of the law and law reform proposals in a number of common law jurisdictions.³ Our Consultation Paper gave rise to 146 written responses from a wide range of consultees comprising lay persons, non-governmental organisations (NGOs), professional bodies, academics, members of the legal profession and members of the judiciary.⁴ In addition, members of the criminal law team attended meetings with or arranged by: Rights of Women, Justice for Women, JUSTICE, Victim Support, Support after Murder and Manslaughter (SAMM), the Judicial Studies Board, the Judges at the Central Criminal Court, the Rose Committee, the Wales and Chester Circuit, the Western Circuit, the North Eastern Circuit, the Midland Circuit, the Society of Legal Scholars, the Institute of Advanced Legal Studies and a number of forensic psychiatrists. We are grateful to each of these individual consultees and to each of these bodies for taking the time and trouble to contribute to the consultation. In formulating the recommendations which are contained in this report we have considered all of their responses, as well as the views expressed at meetings. In addition, as part of our consultation process we obtained accounts of the relevant law of the United States of America, France and Germany. We are most grateful to Professor Sanford Kadish,⁵ Professor John Spencer QC and Antje Pedain⁶ respectively, for helping us in this respect.
- 1.6 Provocation has always been at the heart of this project. For a long time, both during the writing of Consultation Paper No 173 and thereafter, we were pessimistic about the possibility of devising a formulation for the reform of provocation, which would significantly improve the law. In addition, we were unconvinced that there was any need for such a partial defence other than as a buffer against the harsh effect of the mandatory life sentence for all cases of murder. Indeed our pessimism on this issue was one of the influences which implicitly informed our approach in that document. As we explained, Law Commission consultation papers usually contain provisional proposals and invite comments on them. Consultation Paper No 173 did not. The Government had

² Partial Defences to Murder (in this Part referred to as Consultation Paper No 173).

³ These studies formed Appendices A to F to Consultation Paper No 173.

⁴ See Annexe H for the full list.

⁵ School of Law, University of California, Berkeley.

⁶ Members of the Faculty of Law, University of Cambridge.

made known its intention to introduce legislation to address the issue of domestic violence possibly as early as Parliamentary session 2003-4. The purpose of the project was both to assist the Government in considering its proposals and to inform public debate. In those circumstances, we were keen to begin our public consultation process as soon as we could. Accordingly, we did not present any provisional proposals in Consultation Paper No 173. Instead, we set out a series of options for consideration and comment and posed a series of questions intended to enable consultees to provide us with a structured response, the better to inform our consideration of this seemingly intractable issue.

- 1.7 In Consultation Paper No 173 we asked whether consultees favoured: (1) abolition of the defence of provocation whether or not the mandatory sentence is abolished; (2) abolition of the defence of provocation conditional upon abolition of the mandatory sentence; or (3) retention of the defence of provocation, whether or not the mandatory sentence is abolished.⁷
- 1.8 The response to the second and third of these questions took us somewhat by surprise. We were impressed both by the number of those who expressed the view that there should continue to be such a partial defence, even in the event of the abolition of the mandatory sentence, and by the arguments which they deployed. Ultimately we have concluded that the law of provocation is capable of reform in ways which would significantly improve it. As a result, reform rather than abolition is our recommendation.
- 1.9 A number of consultees expressed concern about the limited scope of our terms of reference. In Part 2 of this report we consider in some detail the comments, which we received in this regard.⁸
- 1.10 In the course of late January and February 2004 our criminal law team produced a series of draft formulations. These were designed to encapsulate, in short form, a series of principles. The formulae sought to differentiate between the cases in which the culpability of the killer was sufficiently reduced so as not to merit the description of murder and those cases where there was no such reduced culpability. Those formulations were the subject of an intensive round of discussions with a range of academics and members of the judiciary who were most generous with their time and whose views were influential in assisting us to develop and to finalise our recommendations. We are particularly grateful to Professor David Ormerod of Leeds University, our academic consultant on this project, and to Professor John Spencer and other members of the Law Faculty of the University of Cambridge, Professor Andrew Ashworth, Dr Jeremy Horder and other members of the Law Faculty of the University of Oxford, Lord Justice Buxton, HHJ Jeremy Roberts QC, the members of the Rose Committee,

⁷ Consultation Paper No 173, Part XIII question 3.

⁸ See paras 2.12 – 2.16.

Mr Justice Baragwanath⁹ and Professor Marcia Neave¹⁰ for their assistance in connection with this part of the exercise.

- 1.11 Commissioners provisionally agreed their policy and on 30th April 2004 we circulated, and placed on our website, a short statement setting it out together with our supporting reasoning.¹¹ That document focussed on the principles which a reformed law of provocation would reflect. We invited any further comment which consultees and other interested parties might wish to make. We received 30 responses and have taken these further comments into account in finalising our recommendations.

A SUMMARY OF OUR RECOMMENDATIONS

Recommendation for further work by the Law Commission

- 1.12 **For the reasons which we set out in Part 2, our first recommendation is that the Law Commission be asked to conduct a review of the law of murder with a view to:**

- (1) considering the definition of the offence, together with any specific complete or partial defences which may seem appropriate;**
- (2) considering whether the offence of murder should be further categorised on grounds of aggravation and/or mitigation and if so what those categories should comprise;**
- (3) in the light of (1) and (2), considering the application of a mandatory life sentence to the offence of murder or to any specific categories of murder;**
- (4) examining how each of (1), (2) and (3) may differently be addressed where the offender is a child.**

In order to ensure coherence, this detailed scrutiny of murder would involve a limited review of the law of involuntary manslaughter.

Provocation

- 1.13 For the reasons which we set out in Part 3 our recommendation on Provocation is: **that the principles which should govern a reformed partial defence of provocation are:**

1) unlawful homicide that would otherwise be murder should instead be manslaughter if:

(a) the defendant acted in response to

⁹ Judge of the High Court of New Zealand and Formerly Chair of the New Zealand Law Commission.

¹⁰ Chair of the Victoria Law Reform Commission.

¹¹ Partial Defences to Murder, Provisional Conclusions on Consultation Paper No 173.

- i. gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); or**
- ii. fear of serious violence towards the defendant or another; or**
- iii. a combination of (a) and (b); and**

(b) a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.

2) In deciding whether a person of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.

3) 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.**

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

5) The partial defence should not apply to a defendant who kills or takes part in the killing of another person under duress of threats by a third person.¹²

6) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

1.14 We stress that our recommendation is not put forward as a statutory formula. We have sought to identify the principles which we consider should govern any legislative reform. If this approach were accepted, the drafting of legislation would be a matter for Parliamentary Counsel.

¹² Pending a wider review of the law of murder - see Part 3 paras 3.161- 3.162.

Excessive use of force in self-defence

- 1.15 Our recommendation for the reform of the law of provocation is that it should be recast in a way that would include those cases which involve excessive use of force in self-defence where culpability is sufficiently reduced to warrant a partial defence. Accordingly, for the reasons that we elaborate in Part 4 of this report, **we do not recommend a specific separate partial defence to murder based on the excessive use of force in self-defence.**

Diminished responsibility

- 1.16 For the reasons which we set out in Part 5 of this report, we recommend that **for as long as the law of murder remains as it is, and conviction carries a mandatory sentence of life imprisonment;**

(1) **there should be a partial defence of diminished responsibility which would reduce what would otherwise be a conviction of murder to one of manslaughter;**

(2) **there be no change to section 2 of the 1957 Act.¹³**

- 1.17 One of the matters which would be considered were there to be a full review of murder is whether there should continue to be a partial defence of diminished responsibility and if so, how it might be formulated. As we explain in Part 5 we are not persuaded that the acknowledged infelicities of the current formulation presently cause injustice in practice. We are not persuaded that implementing any of the alternative formulations we have considered would sufficiently improve the law to make it worth interfering with the present infelicitous, but workable, formulation. Indeed, merely because they would be novel, implementation might give rise to unhelpful uncertainty. A full review of the whole law of murder would provide the opportunity to consider such matters from scratch. In order to “kick start” such a process were it to come about, we put forward for consideration in the course of such a full review of murder a formulation of diminished responsibility which seems to us to have emerged from the consultation process as a possible option:

A person, who would otherwise be guilty of murder, is not guilty of murder but of manslaughter if, at the time of the act or omission causing death,

(1) **that person’s capacity to:**

(a) **understand events; or**

(b) **judge whether his actions were right or wrong; or**

¹³ Section 2 of the Homicide Act 1957 states: “(1) Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing. ...”

(c) control himself,

was substantially impaired by an abnormality of mental functioning arising from an underlying condition and

(2) the abnormality was a significant cause of the defendant's conduct in carrying out or taking part in the killing.

(3) "Underlying condition" means a pre-existing mental or physiological condition other than of a transitory kind.

1.18 For the reasons we set out in Part 3 of this report,¹⁴ **we do not recommend a single partial defence merging the partial defences of provocation and diminished responsibility.**

THE OTHER ELEMENTS TO THIS REPORT

Empirical research and background material

1.19 We have, throughout this project, recognised that it would be inadequate for us to adopt an approach which was overly technical or legally purist. The law of murder and the circumstances in which the partial defences of provocation and diminished responsibility may arise are not only difficult conceptually but are hugely important and of great public interest. We therefore determined that we would seek to inform ourselves of the way in which the law has developed historically, the way it is being applied in practice and the way in which the public, if given the opportunity to consider the issues, might perceive the various circumstances in connection with which the boundaries between murder and manslaughter might be drawn.

1.20 In conducting this exercise we are greatly indebted to Professors Ronnie Mackay and Barry Mitchell and to the Nuffield Foundation. Professor Mackay and the Foundation have generously made available to us the fruits of his current research into the ways in which the law of provocation and diminished responsibility are working. We publish his two papers on these two topics as Appendices A and B to this report and his work has been invaluable. Professor Mitchell has undertaken a qualitative public attitude survey based on responses to a series of constructed cases which we are publishing as Appendix C. This too has been illuminating and has influenced our work.

1.21 We considered it necessary in order to undertake this project properly that we have the best information possible of how the law operates in practice. To this end we thought it important to request access to files of those who have been convicted of murder and are serving a life sentence or are released on licence. The Lifer Review and Recall Section at the Home Office has given us generous access to those files. This has been particularly helpful in that, from the Judge's Report in each case, we have been able to identify the essential features of these cases. The files to which we have had access comprise a substantial proportion

¹⁴ Paras 3.164 – 3.166.

of all those convicted of murder during a three year period as well as access to the files of most women who are currently serving a life sentence for murder or have been released on licence. We are indebted to Dr Tamsin Stubbing who has collated and analysed the information culled from these sources and we present that information in Appendix D to the report. In addition, in order to ground that analysis we publish as Appendix E to this report a brief, anonymous account of each of the cases of women sentenced to life imprisonment for murder whose Lifer Review and Recall Section files we have seen. For the same purpose we also publish the anonymous case summaries which Professor Mackay has annexed to his reports in Appendices A and B. We endeavour to draw out certain conclusions from this material. We wish to put on record our grateful thanks to Baroness Scotland of Asthal QC, Minister of State at the Home Office, who agreed that we should have this generous access and to the officials in the Home Office and at the Lifer Review and Recall Section who were so helpful to us in accessing this material. We are also grateful to the staff at the Crown Prosecution Service who gave us assistance in connection with this aspect of the work. Professor Sanford Kadish, of the University of California, Berkeley, wrote a paper for us elucidating the operation of U.S.A. Model Penal Code provision on extreme mental or emotional disturbance. His clear exposition of a very complex area of law in multiple jurisdictions was invaluable to our deliberations and we are indebted to him for his help in such a limited time frame. His paper is contained in appendix F to this report.

History of provocation and diminished responsibility

- 1.22 One of our consultees suggested that it would be helpful if our report contained a sociological history of provocation and diminished responsibility. Accordingly, and in order to assist the reader to place the report in context, we have done so. It is contained in Appendix G to this report.

PART 2

THE SCOPE OF OUR CURRENT TERMS OF REFERENCE AND OF POSSIBLE FUTURE WORK

INTRODUCTION

- 2.1 As we explained in Consultation Paper No 173¹ and as appears from our terms of reference² the scope of this project is limited to consideration of two of the existing partial defences to murder, provocation and diminished responsibility, and one possible additional partial defence, excessive use of force in self-defence. Our terms were not limited merely to considering reform of those two existing partial defences but, in addition, included consideration of their abolition.
- 2.2 In this report, we make specific recommendations in respect of each of the matters that were referred to us. We recommend no change to the law of diminished responsibility for the reasons that we explain in Part 5 of this report. We make recommendations for the reform of provocation in three ways:
- (1) We recommend that it be extended so as potentially to be available to certain defendants who kill in response to fear of serious violence to themselves or another in circumstances in which such a partial defence might not be available to them upon a proper application of the present law.
 - (2) We recommend that the defence of provocation be more tightly drawn so as to prevent it being advanced in certain cases where presently it is available.
 - (3) We recommend an explicit power in the court to withdraw the issue of provocation from the jury. Currently the issue has to be left to the jury whenever a very low evidential hurdle is surmounted.
- 2.3 We are not recommending any separate partial defence to murder based on the excessive use of force in self-defence. We believe that our recommendations for reformulating the defence of provocation will cater for those cases involving the use of force in self-defence where it would be appropriate for there to be a partial defence to murder.
- 2.4 We believe that our recommendations would be a significant improvement of the law. The partial defence of provocation would apply more accurately to provide a partial defence to murder for those who should have one and to deny it to those who should not.
- 2.5 We are well aware that the overwhelmingly important function of provocation has always been as a means to avoid a mandatory sentence (whether the death

¹ Paras 1.4 - 1.5.

² *Ibid*, at para 1.2.

penalty or a penalty of life imprisonment) for cases in which the conduct and mental elements for murder are satisfied. It is for this reason that the law of provocation has been placed under increasing pressure to accommodate cases in which it may be considered that the mandatory life sentence is a disproportionate and blunt instrument. The present law reflects a fierce tension between two views. The first holds that:

Murder is a uniquely heinous crime and that a mandatory sentence of life imprisonment is a proper and justifiable expression of public repugnance towards anyone who has intentionally taken the life of another.³

- 2.6 The other view rejects this, particularly as the law of murder is presently formulated:

Murder, as every practitioner of the law knows, though often described as one of the utmost heinousness, is not in fact necessarily so, but consists in a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal cynical and repeated offences like the so called Moors murders to the almost venial, if objectively immoral, 'mercy killing' of a beloved partner.⁴

- 2.7 In this Part we investigate the case for a thorough consideration of the law of murder and the sentencing regime which should apply to it. We first look at the way in which the consultees to Consultation Paper No 173 responded to our limited terms of reference. We then examine, in some detail, evidence of considered public attitudes towards the supposedly "uniquely heinous" offence of murder. We consider the ways in which that offence has varied in its content throughout history and across jurisdictions. Finally, we explore the difference that a conviction for murder or manslaughter on the grounds of provocation makes in practice to an individual defendant.
- 2.8 We conclude that there is a need for a thorough consideration of the constituent elements of murder and its sentencing regime. Furthermore, we have doubts as to whether the proposals that we make in this report for the reform of the law of provocation will achieve their purpose in the long term unless there is a re-examination of the surrounding law of murder. We are acutely aware of the history of section 3 of the Homicide Act 1957.⁵ It has developed in ways which we do not believe were intended at the time of its enactment. It has been so subject to pressure to accommodate "hard" or "deserving" cases that in *Smith (Morgan)*⁶

³ Earl Ferrers opening for the Government in the debate on the Nathan Committee Report Hansard (HL) 6 November 1989, vol 512, col 455.

⁴ *R. v. Howe* [1987] 1 AC 417, 433, *per* Lord Hailsham of St Marylebone.

⁵ Section 3 states: "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

⁶ [2001] 1 AC 146.

each of their Lordships cast doubt on the usefulness of the concept of “the reasonable man” which lies at its heart. Following this lead the current specimen direction on provocation suggested to trial judges by the Judicial Studies Board⁷ contains no mention of that concept. Thus, the terms of section 3 are now, in large measure, effectively ignored and scarcely anyone has a good word for it. If the section is now amended in accordance with the principles that we recommend but there is no re-examination of the surrounding law of murder, there will be similar pressure to expand the reformed defence of provocation or the defence of diminished responsibility, or both. It may be possible to devise a formula that could withstand such pressure by making it highly prescriptive. However, we believe that such a formula would be too rigid and inflexible to be of use. Whilst we make our recommendations in the belief that the law will be greatly improved by their adoption, we do not envisage that alone they will make the law of murder in England and Wales satisfactory.

THE OUTCOME OF THE CONSULTATION

The questions we posed

- 2.9 Of necessity, consideration of the abolition of provocation and/or diminished responsibility also required us to have regard to the impact of the abolition of either of them on the continuation of the mandatory life sentence which presently applies on any conviction for murder. Accordingly, in Consultation Paper No 173, we posed certain general questions designed to encourage consultees to address the reform and the abolition options.⁸ On provocation we invited them to consider: whether the present law was flawed and if so, whether it was beyond organic reform by the courts; whether it was so flawed that it should be abolished and whether that would need to be accompanied by abolition of the mandatory sentence for murder. For diminished responsibility we posed questions on similar issues.⁹
- 2.10 On provocation the response was overwhelming that the law was flawed to the extent that it was beyond reform by the courts. A small number of consultees favoured abolition of provocation regardless of the retention or abolition of the mandatory life sentence.¹⁰ Approximately twice as many consultees favoured abolition but only if the mandatory life sentence were also abolished.¹¹ There was a third group, about equal in number to the second, who did not favour abolition but favoured reform.¹²

⁷ Specimen Direction No 51.

⁸ Part XIII, questions 1 and 3.

⁹ Part XIII, question 10.

¹⁰ 1 lay person, 4 judges, 2 individual members of the legal profession, 4 academics, 1 organisation within the criminal justice system and 2 non-governmental organisations (NGOs).

¹¹ 16 judges, 1 individual member of the legal profession, 9 academics, 4 professional bodies in the criminal justice system, 1 NGO, and 1 psychiatrist.

¹² 2 lay persons, 10 judges, 3 individual members of the legal profession, 10 academics, 5 professional bodies within the criminal justice system and 3 NGOs.

- 2.11 On diminished responsibility, only one respondent was in favour of its abolition regardless of the continuation of the mandatory life sentence. Twenty-five favoured its abolition in the event of the abolition of the mandatory life sentence.¹³ Forty-four were in favour of its retention whether or not the mandatory sentence was abolished.¹⁴

Response to issues not raised by us

- 2.12 By far the strongest message that emerged from the responses concerned matters which we had not addressed in Consultation Paper No 173 and upon which we had not posed any questions. Many consultees took the opportunity not only to address the questions which we had posed, but also to express in the clearest of terms their views on the matters which they felt lay at centre of the problems with the current partial defences, but which did not fall within our terms of reference.
- 2.13 Those matters were the pressing need for a review of the whole of the law of murder rather than merely some of the partial defences to murder and the question of the mandatory sentence of life imprisonment for every case of murder.
- 2.14 On the former, 38 consultees across the whole range of individuals and interest groups which responded¹⁵ expressed the view that there should be a review of the law of murder and, in particular, the ambit of the offence. Many of them indicated the way in which they would wish the offence to be defined. Others indicated that, whatever may be the appropriate definition for the basic offence of murder, the offence should be subject to grading so as to mark off the most heinous examples of the offence for sentencing purposes. A small number of eminent consultees criticised us for having accepted limited terms of reference which they feared would result in an inadequate “patching” exercise.
- 2.15 On the latter, the response was even more compelling. Sixty-four consultees expressed the view that, whatever may or may not be done about the partial defences, the application of a mandatory life sentence to every case of murder was indefensible and should cease. These views were expressed across the full range of consultees.¹⁶

¹³ 13 judges, 3 individual members of the legal profession, 5 academics, 3 professional bodies (including the Royal College of Psychiatrists) and 1 individual psychiatrist.

¹⁴ 1 lay person, 16 judges, 2 individual members of the legal profession, 13 academics, 9 professional bodies within the criminal justice system, and 8 NGOs.

¹⁵ 5 judges, 10 practitioners in the criminal justice system (including 1 psychiatrist and one senior police officer), 6 professional bodies involved in the criminal justice system (including the Rose Committee of senior judges, the CPS, the London Criminal Solicitors Association and the Royal College of Psychiatrists), 15 academics and 2 NGOs (JUSTICE and Victim Support).

¹⁶ 21 judges, 9 individual practitioners (including 2 psychiatrists), 7 professional bodies (including the Rose Committee, the Police Federation of England and Wales, the Royal College of Psychiatrists and the Association of Women Barristers) 20 academics, 5 NGOs (NACRO, JUSTICE, Rights of Women, Southall Black Sisters, Refuge and Victim Support). The only lay person to comment on these issues was in favour of abolition.

2.16 A point emphasised by some consultees was the difficulty of understanding the present law. In this respect our discussions with Victim Support and with Support after Murder and Manslaughter (SAMM) were of particular significance. They highlighted the situation where a defendant is charged with murder and is subsequently convicted of manslaughter, whether by jury verdict or after a plea has been accepted. There can be an acute sense of let down for the victim's relatives if, as Victim Support said was frequently the case, they are unable to understand the reason for such an outcome. Part of this concern might be addressed by a more careful explanation of the law and the reasons for the decision by the Crown Prosecution Service. Nonetheless we are in no doubt after our meetings with these bodies that much of the distress is caused by the complexity and lack of transparency in this area. If the law itself were coherent then decisions, which might be difficult both to take and to accept, would at least be capable of being understood and unnecessary distress avoided.

Conclusions

2.17 Caution must be exercised in drawing conclusions from these responses. They were unsolicited. We did not pose any questions or provide options so as to enable the views to be systematically collated or evaluated. For example, on the structure of homicide offences the responses expressed a wide range of views, and none on what specifically should be the definition or components of murder or on whether or not the offence should be graded. On the sentencing issue, it was not clear whether those who were against the mandatory sentence were against the concept, or the current broad application of it to cases which were, in relative terms, lacking in moral culpability. Similarly, although there was a very small minority of consultees who expressed reservations about a straightforward abolition of the mandatory life sentence,¹⁷ it seems that they were not expressing support for the retention of the mandatory sentence for all cases of murder under the current law.

2.18 Nonetheless, and bearing in mind the above reservations, we do regard this strong expression of views by our consultees as salutary and influential upon our work in the following ways:

- (1) We acknowledge the breadth and the depth of discontent with the substantive law and sentencing regime.¹⁸
- (2) In making our recommendations on provocation, diminished responsibility and excessive use of force in self-defence, we have been careful only to make those recommendations which we believe will significantly improve the law based on the current law of murder and sentencing regime.

¹⁷ 1 judge, 2 NGOs and 2 professional bodies.

¹⁸ The dissatisfaction emanates from all shades of opinion, including lawyers and victim groups. It was particularly articulated in the scathing comments made by Victim Support in their oral and written responses and by SAMM in the course of a very helpful meeting we had with their officers.

PUBLIC PERCEPTIONS OF MURDER

- 2.19 There is no doubt that some cases of alleged murder arouse public passions to a far greater degree than any other offence. Public attention naturally tends to focus on the most lurid or shocking cases.
- 2.20 We have discovered in the course of this consultation that there is profound ignorance of the breadth of unlawful and lethal conduct which falls within the meaning of murder, and of the circumstances in which certain defences, such as self-defence, may succeed. This is unsurprising as the classic description of murder as “unlawful killing ... with malice aforethought”, which is the most resonant phrase associated with the offence, is completely misleading as to the range of conduct which may constitute the offence. A person may be guilty of murder even though he neither intended to kill nor acted in a premeditated way.
- 2.21 Given that public perceptions about what murder involves are inaccurate and unrealistic, we suspected that public debate about the appropriate sentencing regime for murder might be conducted in equally distorted and unrealistic terms. With a view to ascertaining what properly informed public reactions might be to a range of conduct which would be capable of constituting murder as the law presently stands, we commissioned Professor Barry Mitchell of Coventry University to undertake the qualitative public attitude research which forms Appendix C to this report. In this Part we draw certain conclusions from that research.

Conclusions to be drawn from Professor Mitchell’s research

- 2.22 Professor Mitchell presented his interviewees with 10 scenarios and with variations in respect of some of them. In each case the defendant could, presently, have been convicted of murder in which case he or she would have received a mandatory life sentence. It is clear that the interviewees considered these instances as representing a very wide spectrum of culpability.

Can we ascertain any features which place an offence at the more heinous end of the spectrum?

PREMEDITATION

- 2.23 One feature which seems to have been regarded as marking an offence out as more serious than others was that of premeditation. It is present in its unalloyed form in scenario E (“the contract killing”).¹⁹ It is also present in scenario H (“the jealous husband”)²⁰ where the form of killing (by poisoning) seems to enhance its gravity. Similarly the two versions of scenario J (“the cuckolded husband” and

¹⁹ A man agreed to kill his victim for £5,000, and carried out his part of that agreement two days later. (Payment of the £5,000 was the only reason for the killing.)

²⁰ A man was told by his wife that as soon as their children had left home she would leave him and live with another man whom she’d known for many years. He brooded on this for four weeks and then killed her by poisoning her tea. He said he couldn’t bear the thought of her being with another man, and psychiatrists reported that he suffered from an extreme form of jealousy.

“the taunted husband” respectively)²¹ seem to bear out the impact of premeditation to aggravate and a spontaneous outburst to mitigate the gravity of the killing. The second variation in scenario C (“the attempted rape/burglary”)²² further confirms that premeditation is regarded by interviewees as an aggravating factor. This aggravating feature is also present in the responses to scenario D2 (“the noisy neighbour”)²³ and scenario F (“the argument”).²⁴ In these scenarios the carrying of a weapon evidences such aggravating premeditation.

- 2.24 Premeditation, however, does not always act as an aggravating feature. Scenario I (“the mercy killing”)²⁵ is a case where there is not only an intention to kill but also where the killing is foreseen and, indeed, the subject of previous discussion. The decisive feature in persuading interviewees to regard this killing as by far the least blameworthy seems to be that the killing, deliberate and premeditated as it was, was in response to the victim’s request to die.

INTENTION TO KILL

- 2.25 This is not directly addressed in the scenarios and so we are cautious about drawing any firm conclusions about this factor.²⁶ The use of a lethal weapon, namely a firearm, discussed under scenario F and present in scenario G (“the bailiff homicide”),²⁷ is likely to be an aggravating feature. It is not clear whether

²¹ Cuckolded: A man whose wife had had a series of affairs with other men, decided to kill her if she had another affair. Soon afterwards, he discovered she was having a further affair and he strangled her to death. Psychiatrists reported that he was not mentally ill.

Taunted: Suppose instead that when he discovered she was having an affair he confronted her and she taunted him about his sexual inadequacy – whereupon he lost his temper and killed her.

²² Standard version: An Asian woman returned home to find two white men attempting to rape her 15-year old daughter. She got a knife from the kitchen. The men shouted racist abuse at her and started to run away. She chased after them and stabbed one of them several times in the back, killing him.

Second variation: Suppose instead that when the men were attempting to rape the daughter, rather than chase them the woman waited for her husband to return home and told him what had happened. He realised who the men were. (1) He took a knife, went to the home of one of the men and stabbed him to death. Or (2) A week later he saw the other man in the street and deliberately ran him down in his car, killing him.

²³ Suppose instead that the young man was kept awake by his neighbour constantly playing loud music throughout the night. He had repeatedly asked the neighbour to keep the noise down. The night before the interview the music started at midnight. He got up, got a knife from the kitchen, went to the neighbour’s flat and asked him to lower the music. But the neighbour laughed and the man fatally stabbed him.

²⁴ There was an argument between two men and when one man began punching and kicking him, the other pulled out a knife and fatally stabbed his attacker with it.

²⁵ A man had nursed his terminally-ill wife for several years but eventually gave in to her regular requests that he should “put her out of it”, and he smothered her with a pillow.

²⁶ They were drawn up to examine factors which may illuminate cases which may or may not attract the partial defence of provocation.

²⁷ A man with a wife and three children of school age had been served with an eviction notice. The house had been his home for 20 years. He had lost his job and fell into substantial rent arrears. The loss of his job together with the eviction notice made him depressed. The bailiff arrived to enforce the notice but when he tried to enter the house the man shot him with a gun he was lawfully entitled to keep.

this goes to an intention to kill, or to the violence being premeditated. Conversely, in scenario F the interviewees responded to the possibility that the frenzied nature of the attack, involving multiple stab wounds, evidenced an intention to kill which, if present, would have made that scenario more grave.

DEFENCE OF PROPERTY AS OPPOSED TO THE PERSON

- 2.26 When a direct comparison is drawn, as in scenario C, between a killing in response to an attempted rape, and killing in response to a burglary, it is clear that the latter killing is regarded as more blameworthy. Those who kill in response to such a serious and degrading personal attack as rape are regarded with a great deal more sympathy than those who respond to an attack on their property. On the other hand, in scenario G, the fact that the killer was responding to a threat to his property was regarded as a matter of some limited mitigation.

THE VULNERABILITY OF THE VICTIM

- 2.27 The response to scenario D (“the baby killing”)²⁸ seems to indicate that killing a child, in particular a helpless baby, involves a breach of trust regarded as particularly grave. However, counteracting that element of gravity, there is a degree of sympathy for the young inexperienced parent who is driven, apparently on one occasion, to act in desperation.²⁹
- 2.28 In scenario G the fact that the victim is an innocent person trying to do his job by enforcing the law is regarded as aggravating, though other factors personal to the defendant operate in the contrary direction.

Conclusions

- 2.29 Whilst we can identify aggravating factors which interviewees are generally agreed upon, it is rare that such a factor will be treated alone as determinative of the perceived level of gravity of the offence. It is much more likely that other circumstances, which operate as mitigating factors, will also inform the assessment of gravity, making the overall perception a matter of balance and nuance.
- 2.30 It is, in our view, clear that informed public reaction recognises that conduct, which falls within the present offence of murder, encompasses a wide range of culpability.

²⁸ A 19-year old man was the father of a young baby who constantly cried. One night the man, who had an important job interview the next day, was kept awake by the baby crying. He went into her bedroom and violently shook her and hit her. The baby died.

²⁹ The facts of this scenario are similar to the case of *Michael Bennett* [2004] 1 Cr App R (S) 65. He was convicted by a jury, on a charge of murder, of the manslaughter of his young son (3 ½ months old) on the grounds of provocation caused by frustration at the child’s crying. The Court of Appeal upheld his sentence of 9 years imprisonment.

Can we discern anything about the public perception of the need for a mandatory life sentence?

- 2.31 Each of the scenarios was drawn so as to illustrate a case in which a conviction for murder would be proper under the present law. Accordingly, for each of the scenarios a mandatory sentence of life imprisonment might properly arise.
- 2.32 When asked the simple question whether there should be a mandatory penalty for what they regarded as the most serious criminal homicides, a substantial majority (62.9%) said no. Although the number questioned was small, their responses when asked to consider a range of scenarios covering a wide range of cases which could give rise to murder convictions tend to point against their being a popular mandate for the present mandatory sentence.
- 2.33 Furthermore, this overall response accords with what emerged when the interviewees were asked to ascribe a level of sentence for each of the scenarios and their variants. As can be seen from Appendix III to Professor Mitchell's report, in no case other than that of scenario E ("the contract killer") would a majority of interviewees have imposed a life sentence.³⁰ At the high end of the perception of culpability were the cases of the jealous husband who poisoned his wife, and the husband who premeditatedly killed his cheating wife. The percentages favouring a life sentence were 44% and 38% respectively. In the case of the husband who hunted down and killed his daughter's rapist the percentage was 33.3%, and in the case of the baby killer the figure was 32.2%.
- 2.34 In the case of scenario I ("the mercy killing") almost 60% would not have prosecuted at all and 77% would either not have prosecuted or would have given a non-custodial disposal or a sentence of less than two years imprisonment. At present, in such cases a conviction for murder, with consequent mandatory life sentence, can only be avoided by a "benign conspiracy" between psychiatrist, defence, prosecution and the court to bring them within diminished responsibility. From the evidence of this study, this is an eminently just and humane outcome that accords with the informed views of the public. It is, however, a blight on our law that such an outcome has to be connived at rather than arising openly and directly from the law.

Conclusions

- 2.35 The notion that all murders, as the law is presently framed, represent instances of a uniquely heinous offence for which a single uniquely severe penalty is justified does not reflect the views of a cross section of the public when asked to reflect on particular cases.

THE SHIFTING SANDS OF THE LAW OF MURDER

- 2.36 The law of murder in England and Wales has changed regularly over the last 50 years and is still not in a state of rest. Furthermore, the law in England and Wales

³⁰ In that scenario 79% would have. It is noteworthy that consultees were offered on each scenario a choice that included both a life sentence with release on licence and a "natural" life sentence.

is not the same as the law of Scotland and there is no unanimity elsewhere in the common law world. Nor is there any discernible commonality in continental jurisdictions. In this section we examine briefly the changes in the domestic law and the differences with other jurisdictions.

Malice aforethought

- 2.37 The foundation of the offence of murder has for centuries been the concept of 'malice aforethought'. Sir Edward Coke expressed it thus:

Murder is when a man ... unlawfully killeth ... any reasonable creature *in rerum natura* under the king's peace, with malice aforethought, either expressed by the party, or implied by law, so as the party wounded, or hurt, etc. die of the wound, or hurt, etc. within a year and a day after the same.

Its presence or absence is the distinction between murder and involuntary manslaughter: "Murder is unlawful homicide with malice aforethought. Manslaughter is unlawful homicide without malice aforethought".³¹

- 2.38 The phrase has such a persistent popular resonance that modern textbooks still feel obliged to open their treatment of murder by invoking it even though they quickly go on to explain that, though this is a traditional formulation, it is a technical term with a technical meaning.³² One of the classic texts on the subject described it as:

a term of art if not a term of deception. Murder does not require either spite or premeditation. Mercy killing can be murder, so can a killing where the intent is conceived on the instant.³³

- 2.39 It has been said to be "a mere arbitrary symbol ... for the 'malice' may have in it nothing really malicious; and need never be really 'aforethought'".³⁴ It has been criticised as "anachronistic and ripe for abolition".³⁵ It has been said that

"the expression 'malice aforethought' in whatever tongue expressed, is unfortunate, since neither the word 'malice' nor the word 'aforethought' is construed in its ordinary sense."³⁶

- 2.40 As recently as 1997 the following judicial criticism of the law of homicide was made:

³¹ *R v Doherty* (1887) 16 Cox CC 304, 307 *per* Stephen J.

³² For example, *Smith and Hogan, Criminal Law* (10th ed 2002) p 359, A P Simester and G R Sullivan, *Criminal Law: Theory and doctrine* (2nd ed 2003) p 334.

³³ G Williams, *Textbook of Criminal Law* (2nd ed 1983) para 11.2.

³⁴ Kenny *Outlines* (15th ed) 153 cited by *Smith and Hogan, Criminal Law* (10th ed 2002) p 359.

³⁵ *Hyam v. DPP* [1975] AC 55, 66, *per* Lord Hailsham of St Marylebone; *R v Moloney* [1985] AC 905, 920, *per* Lord Bridge of Harwich.

³⁶ *R v Cunningham* [1982] AC 566, 575, *per* Lord Hailsham of St Marylebone. See also, Carter & Harrison, *Offences of Violence* (2nd ed 1997) at paras 4-061 to 4-065.

the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning. One conspicuous anomaly is the rule which identifies the 'malice aforethought' (a doubly misleading expression) required for the crime of murder not only with a conscious intention to kill but also with an intention to cause grievous bodily harm. It is, therefore, possible to commit a murder not only without wishing the death of the victim but also without the least thought that this might be the result of the assault. Many would doubt the justice of this rule, which is not the popular conception of murder and (as I shall suggest) no longer rests on any intellectual foundation. The law of Scotland does very well without it, and England could perhaps do the same.³⁷

The shifting sands beneath the problematic foundation

- 2.41 Not only is the accuracy and utility of the fundamental expression of the essence of the offence problematic, but the substantive rules which underlie it have been shifting throughout the past 50 years and are still the subject of intense debate.
- 2.42 Until 1957 "malice aforethought mean[t] any one or more of the following states of mind preceding or co-existing with the act or omission ... [whether or not premeditated]
- (1) an intention to cause the death of, or grievous bodily harm to, any person whether such person is the person actually killed or not;
 - (2) knowledge that the act ... will probably cause the death of or grievous bodily harm to, some person ... although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (3) an intent to commit any felony whatever; ...
 - (4) an intent to oppose by force any officer of justice ... in ... the execution of [his duty] provided the offender has notice that the person killed is such an officer so employed."³⁸
- 2.43 The felony murder rule, as encapsulated in (3) and (4) above, was considered a species of "constructive malice" and was abolished in 1957.³⁹ This left two bases for the operation of malice, namely express and implied. The law as described by Stephen took recklessness as sufficient provided only that the killer knew of the probability that his act would cause death or grievous bodily harm.
- 2.44 For a short period of time the law changed so that subjective intent or recklessness was not necessary. It was sufficient if an objective test were

³⁷ *Attorney General's Reference (No. 3 of 1994)* [1998] AC 245, 250, per Lord Mustill.

³⁸ J F Stephen *A digest of the criminal law (Indictable offences)* (9th ed 1950) article 264, p 211.

³⁹ Homicide Act 1957, s 1.

satisfied. In *DPP v. Smith*⁴⁰ the House of Lords decided that a defendant could be presumed to have intended to cause death or grievous bodily harm to his victim if a reasonable person, placed in the same situation as the defendant and with his knowledge of the surrounding circumstances, would have foreseen the causing of death or grievous bodily harm as a natural and probable consequence of his conduct.

- 2.45 This state of affairs ceased in practice with the passage of section 8 of the Criminal Justice Act 1967.⁴¹ The Act did not directly address the question of the mental element for murder in the sense of what was meant by intention or foresight, but concerned *proof* of intention and foresight. Nonetheless, appellate courts regarded *DPP v. Smith* as overturned.⁴² The Privy Council in *Frankland v The Queen*⁴³ explicitly stated that *DPP v Smith* was based on a misunderstanding of the common law and should not be followed.
- 2.46 Notwithstanding the re-establishment of a subjective standard, the level of awareness required to satisfy that standard has continued to shift. For some time a subjective form of recklessness based on probability was sufficient. In *DPP v Hyam*⁴⁴ all five of their Lordships agreed that a person could be guilty of murder if he caused death as a result of consciously taking a specified degree of risk, though differing views were expressed as to the precise rule of law. The expressions varied from “serious risk”⁴⁵ to “highly probable”,⁴⁶ which in each of these cases applied to the risk of death or grievous bodily harm. The minority⁴⁷ on this issue expressed their test in terms of the knowledge that death was likely.
- 2.47 The test, based on reckless risk-taking, did not survive long. In a series of cases⁴⁸ the House of Lords and the Court of Appeal have formulated a test which abandons the notion that recklessness is sufficient, instead focusing on the meaning of “intention”. Murder is committed when the defendant unlawfully kills the victim in circumstances where he intends either to kill him or cause him grievous (i.e. really serious) bodily harm. The defendant intends to kill or cause

⁴⁰ [1961] AC 290.

⁴¹ This enacted part of the recommendations contained in Law Com No 10: Imported Criminal Intent (*DPP v. Smith*) 1967.

⁴² For example, see *Wallett* [1968] 2 QB 367.

⁴³ [1987] AC 576.

⁴⁴ [1975] AC 55.

⁴⁵ *Ibid*, at 65 *per* Lord Hailsham of Marylebone.

⁴⁶ *Ibid*, at 80 *per* Viscount Dilhorne.

⁴⁷ Lords Diplock and Kilbrandon. See for example, *ibid*, at 98 *per* Lord Kilbrandon:

if murder is to be found proved in the absence of an intention to kill, the jury must be satisfied from the nature of the act itself or from other evidence that the accused knew that death was a likely consequence of the act and was indifferent whether that consequence followed or not.

⁴⁸ *Moloney* [1985] AC 905; *Hancock & Shankland* [1986] AC 455; *Nedrick* [1986] 1WLR 1025; *Walker & Hayles* (1990) 90 Cr App R 226; *Woollin* [1999] AC 82; *Matthew & Alleyne* [2003] 2 Cr App R 30.

grievous bodily harm when it is his purpose to cause it. In addition, however, a court or a jury may also find that a result is intended, though it is not the actor's purpose to cause it, when, (a) the result is a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and (b) that the defendant appreciated that such was the case.

2.48 Even though this is now fairly well settled, it is not without controversy. In particular there is criticism of the fact that the second limb of the test is not expressed as a clear rule of law. The final question, whether a defendant had the requisite intent, does not follow as a matter of law from the jury's conclusion that it is sure of (a) and (b). In such circumstances the jury "may" find intention but it is implicit that it need not if it were to conclude that the defendant did not have the intention required for murder. This has been criticised as envisaging "that there is some ineffable, apparently indefinable notion of intent locked in the breast of jurors."⁴⁹ Other commentators have urged the courts to read the cases as if a rule of law, rather than a rule of evidence, has been established.⁵⁰ Commentators have also pointed out that it is an anomaly, when considering the state of mind required for murder, that the law focuses in part on whether, as a *fact*, death or serious injury was a virtual certainty rather than focussing exclusively on the defendant's *belief* that it was.⁵¹

2.49 Conversely, other critics have complained that the extension of "intention," beyond its primary meaning of generating a result as the purpose of an action, gives the word an unnatural meaning with which the jury must contend and that this is highly undesirable in such an important context.⁵² Furthermore, the exclusion of any form of recklessness, as distinct from intention, from the requirements for murder has been a cause for concern for some critics. They cite, as an example, the terrorist who plants a bomb in a shopping centre, gives a warning, but kills a person who does not hear of the warning and is caught in the blast. Such a defendant would not be guilty of murder under the present law if the jury thought that, by reason of the evidence of the warning, he might neither have had the purpose of killing or causing grievous bodily harm nor have had the necessary foresight to satisfy the requirement of "oblique intent". The concern of these critics is that the terrorist is morally, and should in law be, guilty of murder. They point out that such a person would be guilty of murder in Scotland. The consequence is that in England and Wales the proper verdict may only be achievable were the jury to "cheat".⁵³

⁴⁹ *Smith and Hogan, Criminal Law* (10th ed 2002) p 72.

⁵⁰ A P Simester and G R Sullivan, *Criminal Law: Theory and doctrine* (2nd ed 2003) p 337.

⁵¹ *Smith and Hogan, Criminal Law* (10th ed 2002) p 71. The academic literature on "intention" is vast.

⁵² See for example, Lord Goff of Chieveley, "The mental element in the crime of murder"[1988] LQR 30, repeated by him in the debate on the Report of the Select Committee on Murder and Life Imprisonment, *Hansard* (HL) 7 November 1989, vol 512, col 467-8. See the contrary view of Professor G Williams, "The *mens rea* for murder: leave it alone" [1989] LQR 387.

⁵³ Lord Goff of Chieveley, *Hansard, ibid*, at col 468. Such "under inclusiveness" might be said to arise in a case such as *Hyam*. In such a case the defendant might not *know* there was

- 2.50 As we have seen, the “intention” required may either be to kill or to cause grievous bodily harm. This was finally settled by the House of Lords in *Cunningham*.⁵⁴
- 2.51 There is no requirement that the harm be obviously life threatening. Thus, a person may be guilty of murder if he intends to do serious harm but in a way which he does not, or even could not, foresee would result in the victim’s death. This may be because the victim is unlucky in terms of the medical treatment received or other complications, or intrinsic weaknesses. Nonetheless, it follows from this formulation that the “uniquely heinous” crime of murder may be committed by a person who neither intends death, nor foresees it, nor ought to have foreseen its possibility.
- 2.52 This position has been the subject of repeated judicial criticism. Lord Edmund Davies in *Cunningham* said:

I find it passing strange that a person can be convicted of murder if death results from say, his intentional breaking of another’s arm, an action which, while undoubtedly involving the infliction of ‘really serious harm’ and, as such, calling for severe punishment, would in most cases be unlikely to kill.⁵⁵

It has been described as a “conspicuous anomaly” and an example of “constructive crime resulting in defendants being classified as murderers who are not in truth murderers”.⁵⁶

Other jurisdictions

- 2.53 There is no unanimity of approach in the common law world or beyond. A very brief survey of some jurisdictions reveals a range of approaches. In Scotland a person is guilty of murder if he intends to kill or acts with “wicked recklessness”. In the United States Section 210.2 of the Model Penal Code includes within murder those reckless killings, which manifest “extreme indifference to the value of human life”. It supplements this bare provision with a number of circumstances, which may involve extreme indifference. The practice in the individual states does not necessarily accord with this model. For example in Connecticut, Delaware, Kentucky, New York and Oregon an intention to cause death is required.⁵⁷ In Montana the mental element is with intent or knowingly.⁵⁸

anyone in the house which she was firebombing so as to have a belief that grievous bodily harm was virtually inevitable but may only think there was a *risk* that someone was. In law that person would not be guilty of murder as recklessness, even as to the risk of what is obviously life threatening harm, is not enough.

⁵⁴ [1982] AC 566.

⁵⁵ *Ibid*, at 582.

⁵⁶ *Attorney-General’s Reference (No 3 of 1994)* [1998] AC 245, 250, *per* Lord Mustill; *Powell and Daniels, English* [1999] 1 AC 1, 12-13 *per* Lord Steyn.

⁵⁷ CT ST section 53a-54a; DE ST TI 11 section 632; KY ST S 507.020; NY PENAL section 125.20; OR ST S 163.115.

⁵⁸ 45-5-103.

In Canada a person commits murder if he causes the death of another and meant to cause death or bodily harm knowing that death was likely and being reckless as to whether it ensued.⁵⁹

2.54 The Nathan Committee⁶⁰ took steps to inform itself on the law of homicide across the member states of the Council of Europe.⁶¹ We give very brief summaries below of the basic definitions of murder and the sentencing regimes which applied then. We also include summaries of the relevant law in France and Germany, taken from expositions gratefully received from consultees:

- (1) Cyprus distinguishes between premeditated murder and homicide. Premeditation differs from 'malice aforethought'. It is essential to show an intention to cause death, which was formed, and continued to exist, before the time of the act and at the time of acting, despite the opportunity to reflect and desist. There is a mandatory life sentence for premeditated murder.
- (2) In Denmark there is a fundamental distinction between intentional homicide and causing another person's death because of negligence. Intentional killing is divided into four categories: a general category, paedocide, homicide committed on request (euthanasia or mercy killing) and genocide. The sentence is between 5 years and life, though a lesser sentence than 5 years can be imposed in extenuating circumstances. The average sentence falls within the 8 to 16 year bracket but there is a small number of life sentences passed each year.
- (3) France: We are indebted to Professor John Spencer of the University of Cambridge for his account of the law of France which we briefly summarise. *Meurtre* is limited to homicide carried out with the intention of causing death. It does not carry a mandatory life sentence. Intention for this purpose carries broadly the same meaning as intention now carries in English law. There are aggravated forms of murder which carry a mandatory life penalty. They are where the murder is connected with another crime or wrong, or where it is carried out with premeditation, or where the victim falls within a range of specified victims such as relatives, minors, public officials or where the killing was a "hate crime" based on racism or homophobia.
- (4) Germany: We are indebted to Antje Pedain of the University of Cambridge for giving us an account of German law which we summarise briefly. The basic homicide offence is killing intentionally (with an intention to kill or cause grievous bodily harm). It carries a sentence ranging from 5 years to life. Murder is defined very narrowly as an intended killing (where there is an intention to cause death) "out of a lust for killing, [or] in order to satisfy his sexual desires, [or] motivated by

⁵⁹ Canadian Criminal Code ss 222(1) and 229(a).

⁶⁰ Report of the Select Committee on Murder and Life Imprisonment, (1988-89) HL 78-I.

⁶¹ *Ibid*, Appendix 5.

greed or other despicable reasons, [or] deviously or cruelly or with means capable of causing widespread mayhem or in order to enable or to cover-up the commission of another crime.” This offence carries a mandatory life sentence.

- (5) Italy has an offence of simple intentional homicide supplemented by certain identified aggravating circumstances. The difference between the basic and the aggravated offence is the different minimum lengths of a fixed term of imprisonment. In every case the term is a maximum of 30 years.
- (6) In Luxembourg there is a distinction between voluntary and involuntary homicide. Within voluntary homicide, *meurtre* requires an intention to kill whereas *homicide volontaire* does not. Where there is both an intention to kill and premeditation the offence is *assassination*. There are also distinctions based on the means of killing, the circumstances of the killing and the status of the victim. The sentencing structure operates by specifying a particular sentence for a type of crime but it can be reduced either compulsorily, where certain extenuating circumstances are established, or at the judge’s discretion for other extenuating circumstances.
- (7) In Malta there is a distinction between wilful, justifiable and involuntary homicide. “Wilful” homicide requires malice and an intent to kill or to put the life of the other in manifest jeopardy. It carries a mandatory life sentence.
- (8) In the Netherlands there is a distinction between intentionally taking a person’s life and causing the death of another. Within each of these divisions there are subcategories. Within the former there are distinctions between:
 - (a) a person who acts with full knowledge;
 - (b) a person who must have foreseen that the primary though undesired result (death) was inevitable; and
 - (c) a person who is indifferent whether the primary, though undesired, result (death) will follow or not.

The sentence is at large.

- (9) In Norway the main criterion for distinguishing is between negligence, intent or premeditation. The main use of this distinction is for sentencing. The sentence for murder ranges from a minimum of 6 months to 21 years. Sentences for premeditated killing are on average 15.2 years and for intentional killings, 7.3 years.
- (10) In Spain there are three categories of intentional homicide: Parricide, where the victim is a blood or marriage relative, carries a penalty of between 20 and 30 years. Murder, where the death of the person falls within one of the following circumstances (1) by treachery, (2) for a price, (3) by means of inundation, fire, poison or explosive, (4) with proved

premeditation, (5) by aggravated brutality, deliberately and cruelly increasing the pain of the victim, carries a penalty between 26 and 30 years. Homicide where none of these elements are present, carries a penalty between 12 and 20 years. There are also three levels of non-intentional homicide which range from recklessness (penalty six months to six years), to negligence without breaking any rules, for which the penalty is a fine or reprimand.

- (11) In Sweden there is a distinction between murder and manslaughter. The distinction seems to be a matter for the judge in each case, depending on intentions, motives and the way the defendant acted. The sentence is at large including a discretionary life sentence.
- (12) In Switzerland the basic offence of *meurtre* is for intentional killing and carries a sentence of at least 5 years, up to a maximum of 20. There is an aggravated offence of *assassination* which is *meurtre* plus one of a number of aggravating features: premeditation, depravity, where the defendant is particularly dangerous by reference to the means used, the level of cruelty or treachery, the motives, relationship with the deceased, or the presence or absence of remorse. This offence carries a presumptive life sentence subject to extenuating circumstances.
- (13) In Turkey homicide requires intent to kill, defined as a willing and conscious desire to commit homicide and to expect its consequences. The penalty for the basic offence is 24-30 years. The offence can be aggravated based on the identity of the victim: family, or member of the National Assembly or civil servant on duty and the motive (premeditation in pursuit of or avoiding detection of crime)⁶². Matters such as provocation are taken into account in deciding punishment.

Previous attempts at reform

- 2.55 The Criminal Law Revision Committee considered the law of murder in 1980.⁶³ It concluded that it should be murder (a) if a person with the intent to kill causes death; or (b) if a person causes death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death. They also included as an optional additional basis for the offence, which would cover the terrorist case referred to above, that it should be murder if a person causes death by an unlawful act intended to cause fear (of death or serious injury), and known to the defendant to involve a risk of causing death.

⁶² When the Nathan Committee reported, the death penalty was in force in Turkey for certain aggravated murders – if the victim was a member of the National Assembly or civil servant on duty and if the murder was premeditated or committed in pursuit of or avoiding detection of crime. Since then, Turkey has abolished the death penalty for all offences. See further R Badinter, “Moving towards universal abolition of the death penalty” in *Death Penalty – Beyond Abolition* (2004) p 7 at p 9.

⁶³ Fourteenth Report: Offences Against the Person (1980) Cmnd 7844.

2.56 The Law Commission, in the Draft Criminal Code of 1989,⁶⁴ defined murder in clause 54(1) as follows:

A person is guilty of murder if he causes the death of another – (a) intending to cause death; or (b) intending to cause serious personal harm and being aware that he may cause death, unless sections 56, 58, 59, 62 or 64 applies.⁶⁵

2.57 It defined “intention” for the purposes of the Code in clause 18(b) in the following terms: “A person acts ‘intentionally’ with respect to ... a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events.”

2.58 We have already referred to the Nathan Committee Report.⁶⁶ They concluded that the offence of murder should be defined by statute and that the basis should be the recommendations of the Law Commission in the Draft Criminal Code, both in terms of the definition of murder and in the definition of intention. That report was the subject of a lengthy debate⁶⁷ in the House of Lords at the end of which the House “took note” of it. The record of that debate is, in its own right, a rich source of wisdom and of a range of views both on the definition of the offence of murder and on the case for and against the mandatory life sentence for murder.

THE IMPACT OF THE MANDATORY SENTENCE

The difference between a murder and a manslaughter conviction

2.59 Throughout the responses to Consultation Paper No 173 there was a single, prominent and endless refrain: the partial defences of provocation and diminished responsibility have as their origin and main purpose the protection of the defendant from the mandatory death/life sentence for murder. The huge discrepancy in sentence for a person who succeeds, or fails, in those defences has generated pressures to expand those defences.

2.60 Even before the passage into law of the Criminal Justice Act 2003 (“the 2003 Act”), the discrepancy in the sentence a person would expect to receive depending on whether they fell one or other side of the line was massive.

2.61 A life sentence for murder comprises three elements. The first element is a minimum term during which the convicted murderer must be detained for the purposes of retribution without any prospect of release. The second, which starts on the expiry of the first, runs until the parole board decides that the person safely may be released on licence. The third period runs for the remainder of the convicted person’s life. During that period the convicted person may be recalled to prison by administrative act and will be detained there until a decision is taken

⁶⁴ A Criminal Code for England and Wales (1989) Law Com No 177, vol 1.

⁶⁵ These sections set out the partial defences contained in the code of diminished responsibility, provocation, use of excessive force, suicide pact killing and infanticide.

⁶⁶ Report of the Select Committee on Murder and Life Imprisonment (1988-9) HL 78-I.

⁶⁷ *Hansard* (HL) 6 November 1989, vol 512, cols 448-530.

that it is safe to release him again on licence. This third element is an onerous burden placed on a lifer and does, in a real sense, amount to a life sentence.

- 2.62 The initial retributive term has recently, and prior to the 2003 Act, been fixed by the Lord Chief Justice after a report prepared by the trial judge which concluded with a recommendation of a minimum term. Prior to the coming into effect of the 2003 Act⁶⁸ the trial judge's recommendation was, in turn, informed by a practice statement⁶⁹ issued following advice tendered to the Court of Appeal by the Sentencing Advisory Panel. It provided for two starting points for the minimum term: 15/16 years, where culpability was exceptionally high or the victim was particularly vulnerable, and 12 years where the killing arose from a quarrel or loss of temper between two people known to each other. There were potential aggravating factors: planning, firearms, advanced preparation, the culmination of cruel and violent behaviour over a period of time.
- 2.63 The 2003 Act provides that the minimum term is stated by the trial judge in open court.⁷⁰ The determination of the length of the minimum term is governed by a complex and sophisticated set of provisions.⁷¹ They require the judge to determine the minimum term by reference to one of three starting points. Those are: whole life, 30 years and 15 years. A case falls within one or other of these categories depending upon whether it is of "exceptionally high seriousness", "particularly high seriousness", or neither of the other two. For the first two categories the statute provides a list of elements which would normally result in the case falling within one or the other. Once the starting point has been chosen, the court has to take into account any aggravating or mitigating factors that it has not allowed for in its choice of starting point. The statute provides a list of potential aggravating factors and mitigating factors.
- 2.64 The effect of this statutory scheme is that the lowest starting point provided for is 15 years as opposed to 12 years under the practice direction, and the starting point for particularly serious cases is raised from 15/16 years to a minimum of 30 years or whole life for cases of exceptional seriousness.
- 2.65 These minimum terms are the actual number of years which must be served in custody before there can be any release on licence.
- 2.66 Where a person is convicted of manslaughter on the basis of provocation there are certain established patterns of sentence.⁷² There is a clear difference between cases which are "domestic" and those which are "non-domestic".⁷³ The

⁶⁸ On 16 December 2003.

⁶⁹ Practice Statement: Minimum Periods (Life Imprisonment) [2002] 1 WLR 1789.

⁷⁰ As such it is subject to appeal under the Criminal Justice Act 2003, s 271.

⁷¹ Criminal Justice Act 2003, sched 21.

⁷² The following details are extracted from the Sentencing Advisory Panel's Consultation Paper, "Sentencing of manslaughter by reason of provocation" (11 March 2004), available at www.sentencing-guidelines.gov.uk.

⁷³ "Domestic" is defined by the Sentencing Advisory Panel, *ibid*, at para 3, as:

level of sentencing for domestic incidents is on the whole lower than for non-domestic incidents. The majority of those convicted for domestic manslaughter receive a sentence of 5 years or less whereas those convicted for manslaughter in a non-domestic setting generally receive higher sentences.

- 2.67 Where the killing is by a firearm carried and used after provocation, the sentence is generally around 12 years. Where a knife is carried and used or there is great brutality the range of sentence is between 10 and 12 years. Where there is moderate provocation and sudden retaliation, a sentence of the order of 7 years is the normal. In contrast, a high level of provocation leading to sudden retaliation with strong mitigation may attract a sentence of 5 years. Where there has been a very high level of provocation including violent attack, or a level of terror evoking extreme passion, a sentence of less than 3 years may be expected. Where manslaughter is committed under provocation arising out of possessiveness or jealousy or unfaithfulness, the ordinary sentencing range lies between 5 and 7 years.
- 2.68 When it is recalled that determinate sentences mean that a person may be released on licence after serving half the term, and must be released on licence after serving two thirds of the sentence, in each case including time spent on remand awaiting trial, and that the licence period does not normally extend beyond the end of the nominal sentence, the gulf in penalty following a conviction for manslaughter or for murder is apparent. In those circumstances, it is no surprise that great efforts are made to secure a manslaughter conviction and for that purpose there is the greatest of pressure to distort the concepts of provocation and diminished responsibility to accommodate deserving or hard cases. This pressure will continue for as long as each case of murder carries the mandatory life sentence.
- 2.69 There has been controversy over Schedule 21 of the Criminal Justice Act 2003, which contains the provisions concerning the determination of the minimum term for a mandatory life sentence. Much of the discussion has focussed on the number of years which constitute the various starting points. There has been less comment on the fact that the schedule provides a detailed description of circumstances which will raise the level of seriousness of an instance of murder and identifies and describes a large number of second tier, aggravating or mitigating, factors. This is a form of statutory recognition that within murder there are gradations of gravity, but all attract an indeterminate sentence.

THE POSITION OF CHILDREN

- 2.70 Our terms of reference made no specific mention of the special position of children who kill. It became apparent from the comments of a small number of consultees that this subject deserves separate and full consideration. Of particular importance are the responses of those from outside the legal

Any criminal offence arising out of physical, sexual, psychological, emotional or financial abuse by one person against a current or former partner in a close relationship, or against a current or former family member.

This is the same definition as that used by the Crown Prosecution Service.

professions: Professor Susan Bailey, whose views were endorsed by the Royal College of Psychiatrists, Dr Eileen Vizard, whose views were submitted as those of the NSPCC, and NACRO.

2.71 We discuss the particular problems of the law of provocation and diminished responsibility in relation to children who kill in later Parts of this report.⁷⁴

2.72 Furthermore, the law and practice concerning the detention of children who have been convicted of homicide offences is hugely complex and problematic and has been recently criticised as such by the Master of the Rolls.⁷⁵ He said:

An outstanding issue of principle may remain in relation to the anomaly identified in the difference in treatment of young persons sentenced to be detained during Her Majesty's Pleasure and young persons sentenced to determinate sentences. Further legislation may well prove necessary. It is certainly desirable. The legislative history that we have outlined has culminated in a maze of statutory provisions that are almost impenetrable.

2.73 There is, in our view, a particular need for a review of the law of murder as it applies to children who kill.

CONCLUSION AND RECOMMENDATIONS

2.74 The present law of murder in England and Wales is a mess. There is both a great need to review the law of murder and every reason to believe that a comprehensive consideration of the offence and the sentencing regime could yield rational and sensible conclusions about a number of issues. These could include the elements which should comprise the substantive offence; what elements, if any, should elevate or reduce the level of culpability; and what should be the appropriate sentencing regime. **We recommend that the Law Commission be asked to conduct a review of the law of murder with a view to:**

- (1) **considering the definition of the offence, together with any specific complete or partial defences which may seem appropriate.**
- (2) **considering whether the offence of murder should be further categorised on grounds of aggravation and/or mitigation and if so what those categories should comprise.**
- (3) **in the light of (1) and (2), considering the application of a mandatory life sentence to the offence of murder or to any specific categories of murder**
- (4) **Examining how each of (1), (2) and (3) may differently be addressed where the offender is a child.**

⁷⁴ See Part 3, paras 3.131 – 3.134 and Part 5, paras 5.102 – 5.105.

⁷⁵ *R (on the application of Smith) v Secretary of State for the Home Department; R (on the application of Dudson) v Secretary of State for the Home Department* [2004] EWCA Civ 99, para 110.

PART 3

PROVOCATION

STRUCTURE OF THIS PART

- 3.1 The subject of the defence of provocation is central to this project. In this part we set out our recommendations and the thought process which has led us to make them. To assist readers to follow that thought process, we begin by outlining the structure of this part.
- 3.2 In paras 3.13 – 3.14 we refer to the relevant parts of Consultation Paper No 173 without recapitulating their contents.
- 3.3 In paras 3.15 – 3.17 we refer to the provisional conclusions which we published in April 2004.
- 3.4 In paras 3.18 – 3.19 we comment on the response of many consultees about the need for a wider review of the law of murder.
- 3.5 In paras 3.20 – 3.31 we identify the major sources of consultees' dissatisfaction with the present law – the lack of a clear rationale and the unsatisfactoriness of its key components (the concept of provocation, the supposed requirement of a sudden and temporary loss of self-control and the supposed objective test). We explore each of those factors in the paragraphs which follow, but not in the same detail as in Consultation Paper No 173.
- 3.6 In paras 3.32 – 3.46 we address the question whether the defence should be abolished or retained in some form.
- 3.7 In paras 3.47 – 3.59 we consider the case for reshaping the defence along the lines of the EMED (Extreme Mental or Emotional Disturbance) defence under the American Law Institute Model Penal Code.
- 3.8 In paras 3.60 and following we set out our approach to the reform of provocation. We deal with:
 - the rationale (paras 3.63 – 3.64)
 - the trigger (paras 3.68 – 3.108)
 - the objective test (paras 3.109 – 3.134)
 - the exclusion of considered revenge (paras 3.135 – 3.137)
 - the exclusion of self-induced provocation (paras 3.138 – 3.140)
 - the role of judge and jury (paras 3.141 – 3.152)
 - accident and mistake (paras 3.153 – 3.160)
 - the exclusion of duress (paras 3.161 – 3.162)

- 3.9 In para 3.163 we refer to the question whether there should be a separate partial defence of excessive force in self-defence.
- 3.10 In paras 3.164 – 3.166 we refer to the proposal for merging provocation and diminished responsibility.
- 3.11 In para 3.167 we consider the question of the burden of proof.
- 3.12 In para 3.168 we set out our recommendations.

CONSULTATION PAPER¹

- 3.13 Part III of our Consultation Paper described the history of the development of the defence of provocation.² In Part IV we summarised the present law and considered its defects. In Part V we considered the law of provocation in other common law jurisdictions. In Parts IX and X we considered the topics of excessive use of force in self-defence and abused women who kill. In Part XI we referred to previous recommendations for the reform of provocation, and in Part XII we set out options for reform. The principal options discussed were abolition of the defence of provocation, its retention in a modified form or merger of provocation and diminished responsibility into a single partial defence.
- 3.14 The first question which we posed was

Do consultees agree:

(1) that the law of provocation is unsatisfactory; and

(2) that its defects are beyond cure by judicial development of the law?³

An overwhelming majority of consultees agreed with both parts of the question, but there was a wide diversity of views about what should be done.

PROVISIONAL CONCLUSIONS

- 3.15 At the end of April 2004 we sent to all consultees and published on our website a document setting out our provisional conclusions.⁴ In it we provisionally concluded on balance that, even if the mandatory sentence of life imprisonment for murder were abolished, the arguments for retaining some form of provocation defence outweighed the arguments for its abolition. We provisionally proposed⁵ that the following principles should govern a reformed provocation defence:

¹ Partial Defences to Murder Consultation Paper No 173 (2003).

² See also Consultation Paper No 173 paras 1.24 - 1.32.

³ Consultation Paper No 173, para 12.5.

⁴ Partial Defences to Murder Provisional Conclusions on Consultation Paper No 173.

⁵ *Ibid*, para 58.

(1) Unlawful homicide that would otherwise be murder should instead be manslaughter if the defendant acted in response to

(a) gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); or

(b) fear of serious violence towards the defendant or another; or

(c) a combination of (a) and (b); and

a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.

(2) In deciding whether a person of the defendant's age and of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court should take into account all the circumstances of the defendant other than matters (apart from his or her age) which bear only on his or her general capacity for self-control.

(3) 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 pre-meditated desire for revenge.

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

(5) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

3.16 We emphasised that this was not put forward as a statutory formula. Rather, we were seeking to identify the principles which should govern any legislative reform. If those principles were accepted, the drafting of legislation would be a matter for Parliamentary Counsel.

3.17 We had 146 written responses to Consultation Paper No 173 and 30 responses to our provisional conclusions.

THE WIDER LAW OF MURDER

3.18 Many consultees have argued that there is a need for a broader review of the law of murder, and that the problems associated with the defence of provocation

cannot be satisfactorily tackled in isolation from other parts of the law of murder. We agree.⁶

- 3.19 Different systems of criminal law have different ways of grading homicides, but our law with its broad definition of murder, mandatory sentence and patchwork partial defences is a product of piecemeal development and reforms, rather than systematic thought. The expansion of provocation over the past half century can be seen as an attempt by courts and juries to avoid a conviction of murder with a mandatory life sentence in cases where the court has had some degree of sympathy for the defendant. A reformulation of provocation, without regard to the surrounding law of murder, would not be satisfactory in the long term and would leave the law still subject to the same pressures as have led to the past expansion of provocation.

THE MAJOR PROBLEMS WITH PROVOCATION

- 3.20 There was widespread dissatisfaction among consultees both with the theoretical underpinning of the defence of provocation and with its various component parts. It is not underpinned by any clear rationale. There is widespread agreement that the concept of provocation has become far too loose, so that a judge may be obliged to leave the issue to the jury when the conduct and/or the words in question are trivial. The concept of loss of self-control has proved to be very troublesome. The supposed requirement of a sudden and temporary loss of self-control has given rise to serious problems, especially in the “slow burn” type of case. There is much controversy about the supposed objective test (that the provocation was enough to make a reasonable person do as the defendant did), which has been interpreted by the majority of the House of Lords in *Smith (Morgan)*⁷ in a way that may enable a defendant to rely on personal idiosyncrasies which make him or her more short tempered than other people.

Rationale of the defence

- 3.21 The rationale underlying the defence of provocation is elusive. As we said in Consultation Paper No 173,⁸ a study of the cases and textbooks (including particularly *Provocation and Responsibility* (1992) by Dr Jeremy Horder)⁹ suggests that the doctrine has never been truly coherent, logical or consistent. At the time of the Homicide Act 1957 there was theoretically an excusatory rationale of sorts, namely that the defendant had suddenly and temporarily lost his or her self-control as a result of provocation which might have caused a reasonable person to do the same. However, this rationale did not bear too close scrutiny, particularly in relation to the requirement of loss of self-control (to which we will return).

⁶ We discuss the need for a broader review in Part 2 and do not repeat the arguments here.

⁷ [2001] 1 AC 146.

⁸ Para 1.23.

⁹ Dr Horder is among those to whom we are particularly grateful for his help in the course of this project.

3.22 In Consultation Paper No 173 we invited consultees to consider the moral basis of a defence of provocation.¹⁰ We discussed possible justificatory and excusatory bases¹¹ and we asked the question:

Do consultees consider that, morally speaking:

(1) a killing with the intent required for murder should be classified as murder notwithstanding any amount of provocation or loss of self-control; or

(2) there ought to be a partial defence, leading to a conviction for manslaughter, based:

(a) on the narrower (justificatory) ground; or

(b) on the broader (excusatory) ground?¹²

3.23 The views of those consultees who responded to this question were fairly evenly split between those who considered that provocation should in no circumstances amount to a partial defence to murder, those who considered that there should be a partial defence on a narrower (justificatory) ground and those who considered that there should be a partial defence on a broader (excusatory) ground. However, that statement needs to be amplified and qualified for two reasons. First, a good number of respondents were unhappy with our use of the labels justificatory and excusatory. Secondly, the overwhelming majority of those who considered that no amount of provocation should ever provide a partial defence to murder also considered that the abolition of the defence should be conditional on the abolition of the mandatory sentence.

3.24 In seeking the views of consultees about what should be the underlying basis of a defence of provocation, if any, we are concerned that we may not have helped by the way we formulated our reference to excusatory and justificatory bases. But, however imperfectly the question may have been phrased, it served to produce helpful arguments. We will return to this subject when we discuss whether there should be a partial defence of provocation and on what rationale.

¹⁰ Paras 12.10 to 12.20.

¹¹ Historically English law distinguished justifiable homicide from excusable homicide, but the practical significance of the distinction diminished in 1828 on the abolition of forfeiture of a defendant's possessions to the Crown, which had previously applied in the case of excusable but not justifiable homicide. In modern scholarship a good deal has been written about the concepts of justificatory and excusatory defences. Essentially, justificatory defences are those which recognise that the conduct was legitimate in the circumstances e.g. self-defence. Excusatory defences involve recognition that although the conduct was not legitimate, the actor lacked personal culpability for some reason or another, e.g. because of a disability.

¹² Consultation Paper No 173 para 12.19.

The provoking conduct

- 3.25 In Consultation Paper No 173 we explained that because the word “provoked” in section 3 of the 1957 Act has come to be interpreted as meaning no more than “caused”, conduct can qualify as provocation although it is of a minor character or even entirely lawful.¹³ We did not put a specific question to consultees about this, but one highly experienced judge expressed the views held by many respondents when she wrote:

The scope of provocation has been so enlarged that a judge is obliged to leave it when ... the conduct and/the words in question are trivial. The issue should only arise where circumstances are sufficiently grave to justify it. Such tightening up would not remove the last straw in the slow burn of domestic violence, although provocation must always be distinguished from revenge.

Sudden and temporary loss of self-control

- 3.26 In Consultation Paper No 173 we discussed this ingredient of the defence and the problems to which it has given rise.¹⁴ There is no satisfactory definition of loss of self-control. In *Oneby*¹⁵ it was said that to reduce a crime from murder to manslaughter the provocation had to arouse in the defendant “such a passion as for the time deprives him of his reasoning faculties”. Similarly in *Duffy*¹⁶ Devlin J spoke of provocation “rendering the accused so subject to passion as to make him or her for the moment not master of his mind”.¹⁷
- 3.27 However, the equation of loss of self-control with deprivation of reasoning faculties has been only partial. The courts have rejected the argument that a reasonable person who has lost self-control cannot be fully responsible for their conduct. In *Phillips v The Queen*¹⁸ Lord Diplock said:

Before their Lordships, counsel for the appellant contended, not as a matter of construction but as one of logic, that once a reasonable man had lost his self-control his actions ceased to be those of a reasonable man and that accordingly he was no longer fully responsible in law for them whatever he did. This argument is based on the premise that loss of self-control is not a matter of degree but is absolute; there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships’ view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand,

¹³ Paras 4.8 – 4.11.

¹⁴ Paras 4.15 – 4.28.

¹⁵ (1727) 2 Ld Raym 1485; 92 ER 465.

¹⁶ [1949] 1 All ER 932.

¹⁷ *Ibid.*

¹⁸ [1969] 2 AC 130.

possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon.¹⁹

- 3.28 The term loss of self-control is itself ambiguous because it could denote either a failure to exercise self-control or an inability to exercise self-control. To ask whether a person could have exercised self-control is to pose an impossible moral question. It is not a question which a psychiatrist could address as a matter of medical science, although a noteworthy issue which emerged from our discussions with psychiatrists was that those who give vent to anger by “losing self-control” to the point of killing another person generally do so in circumstances in which they can afford to do so. An angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker. An angry person is much less likely to “lose self-control” and attack another person in circumstances in which he or she is likely to come off worse by doing so. For this reason many successful attacks by an abused woman on a physically stronger abuser take place at a moment when that person is off-guard.
- 3.29 The courts have responded to the criticism that the law of provocation treats an angry strong person more favourably than a frightened weak person by extending the concept of loss of self-control to include “slow-burn” cases but in so doing they have made the concept of loss of self-control still more unclear.
- 3.30 In summary, the requirement of loss of self-control was a judicially invented concept, lacking sharpness or a clear foundation in psychology. It was a valiant but flawed attempt to encapsulate a key limitation to the defence - that it should not be available to those who kill in considered revenge.

The reasonable person test

- 3.31 In Consultation Paper No 173 we discussed at length the reasonable person test²⁰ and the way in which the law has developed in a series of cases up to *Smith (Morgan)*.²¹ We asked whether consultees favoured the approach of **(a) the majority in *Smith (Morgan)*,**²² **(b) the New South Wales Law Reform Commission**²³ **or (c) of the minority in *Smith (Morgan)*,**²⁴ **or whether they**

¹⁹ *Ibid*, at pp 137-138.

²⁰ Paras 4.29 – 4.150.

²¹ [2001] 1 AC 146.

²² According to this approach, it is for the jury to decide whether the circumstances were such as to make the defendant’s loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter, applying the appropriate standards and deciding what degree of self-control everyone is entitled to expect that his or her fellow citizens will exercise in society as it is today, but taking into account such characteristics of the defendant (but not defects of character) which affected the degree of control which society could reasonably have expected of him or her and which it would be unjust not to take into account.

²³ New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide: Report 83(1997)* at para 2.81. This report proposed a test whether “taking into account all the characteristics and circumstances of the accused, he or she should be

had any alternative suggestion. Views were divided between the three options with few respondents offering any alternative formulation.

ABOLITION OR REFORMULATION OF PROVOCATION?

3.32 As we have said, there was overwhelming agreement among consultees that the law of provocation is unsatisfactory and that its defects are beyond cure by judicial development of the law. We asked consultees whether they favoured:

- (1) abolition of the defence of provocation, whether or not the mandatory sentence is abolished;**
- (2) abolition of the defence of provocation, conditional upon abolition of the mandatory sentence, or**
- (3) retention of the defence of provocation, whether or not the mandatory sentence is abolished.²⁵**

3.33 Consultees were nearly unanimous that the defence should not be abolished while the mandatory sentence remained. This view accords with the opinion which we expressed in Consultation Paper No 173.²⁶ We know of no common law system where provocation has been abolished as a defence to murder but a mandatory sentence of life imprisonment retained, nor of any law reform body which has made such a recommendation.

3.34 The major differences were between those who favoured abolition of the defence (conditional on abolition of the mandatory sentence) and those who favoured its retention in a reformed version. The arguments involved questions of principle about whether provocation should be capable of providing a partial defence to murder and questions as to whether the defence is capable of being reformed satisfactorily. Among those who favour retention of some form of provocation defence, there were diverse views about the directions which reform should take.

3.35 As long as it is the Government's position that it does not intend to consider abolition of the mandatory sentence, it could be argued that it is pointless for us to consider the arguments for and against abolition of the defence if we were no longer to have the present mandatory sentence. However, this is an issue on which consultees have devoted a good deal of time and effort in setting out their views. It is right that we should summarise them and state our conclusion. Moreover, the debate regarding the best model of reform within the constraints of

excused for having so far lost self-control as to have formed an intention to kill or inflict grievous bodily harm ... as to warrant the reduction from murder to manslaughter."

²⁴ Under this approach the test should be whether a person with ordinary powers of self-control might have acted as the defendant did. In assessing the gravity of the provocation, the jury is to take the defendant as he or she is. They must then consider whether that degree of provocation might have caused a person of the defendant's age, and with the powers of self-control of an ordinary person, to have reacted as the defendant did.

²⁵ Para 12.26.

²⁶ Paras 12.23 –12.25.

the mandatory sentence has been enhanced by the depth of principled discussion in relation to the position of provocation if the mandatory sentence were to be abolished.

- 3.36 Powerful arguments can be advanced for and against the abolition of provocation as a defence. Abolitionists argue that a person who is sane and who kills another person unlawfully, with the intent required for murder, ought to be guilty of murder however great the provocation may have been. Provocation may be a mitigating circumstance which should be taken into account in passing sentence, but not in defining the offence. Assessing sentence requires a balanced appraisal of all the circumstances of the case (aggravating as well as mitigating), and this is a judicial rather than a jury function. Not only is it inappropriate that provocation should be singled out among other possible mitigating circumstances as providing a special partial defence, but there are great difficulties in trying to define what may amount to provocation and how serious it has to be in order to amount to a partial defence.
- 3.37 Those who argue for the retention of some form of provocation defence, whether or not the mandatory sentence is retained, say that there are moral and practical reasons for doing so. Where the defendant's conduct was precipitated by really serious provocation, it is morally right that this should be reflected in the way that society labels and sentences the defendant; and it is desirable that the factual and evaluative question whether the defendant was provoked in that sense should be taken by the jury. A short sentence (or even in some circumstances a non-custodial sentence) for a provoked killing will be more understandable by, and acceptable to, the public if it results from a conviction by a jury of an offence not carrying the title of murder, than a decision by a judge after a conviction for murder. The existence of such a partial defence is justifiable in the law of murder, although there is no similar partial defence to non-fatal offences of violence, not only because the sentence for murder is fixed by law but also because of the unique gravity and stigma attached to murder. The real problem with provocation is not the underlying concept, but the way it has developed. It needs to be reshaped.
- 3.38 The debate has generated interesting discussion about the moral qualities of the emotions of anger and fear. One school of thought holds that anger cannot ethically afford any ground for mitigating the gravity of deliberately violent action, or at any rate violent action which threatens life. The counter argument is that anger can be an ethically appropriate emotion and that in some circumstances it may be a sign of moral weakness or human coldness not to feel strong anger. That does not legitimise a violent response; one of the functions of the legal system is to channel legitimate anger at wrongdoing in ways that are considered just and proportionate. Nevertheless, a killing in anger produced by serious wrongdoing is ethically less wicked, and therefore deserving of a lesser punishment, than, say, a killing out of greed, lust, jealousy or for political reasons.
- 3.39 The paradigm case of provocation involves inter-action between two people, the provoker and the provoked. The emotion aroused in the provoked contains a cognitive component, viz. the belief that the provoked has been wronged by the provoker. If that belief is justified, it does not justify the provoked person in giving vent to his or her emotions by resorting to unlawful violence, however great the provocation. Two wrongs do not make a right. However, the argument states that

there is a distinction in moral blameworthiness between over reaction to grave provocation and unprovoked use of violence.

- 3.40 A just system of law should reflect this. If it be right that a killing under grave provocation is made less wicked by that factor, the question whether a distinction should be drawn in the classification of the offence or at the sentencing stage is not a matter of simple ethics.
- 3.41 Some have said that it is unfortunate that one is forced to refer to provocation as a 'defence', when the critical question is whether a killing under provocation should be categorised as a less grave offence than murder. There is general agreement that provocation (subject to what is meant by that word) should be capable of making a significant difference in the sentence passed on the defendant. That result could be achieved by a variety of routes: by labelling a killing under provocation as a separate offence; by labelling it as murder, but with different statutory sentencing provisions for different categories of murder; or by labelling it as murder with the same sentencing provisions for all cases of murder and leaving it to the judge to set the appropriate sentence having regard to the provocation.
- 3.42 As some consultees have pointed out, the problems about what should or should not be regarded as provocation would not disappear by abolishing the defence of provocation, but would be faced at a separate stage of the proceedings. Some, including Victim Support, consider that there would be real advantages in terms of justice and transparency if issues of provocation were considered as part of the sentencing process, if necessary through a Newton hearing. The family would have an opportunity to counter allegations raised by the defendant against the deceased and to set the matter in context in a way which is sometimes not presently possible. The court would then pass sentence based on full information about any relevant background circumstances, and this process would be more understandable than the present. We recognise fully the importance that the public generally and all affected by the criminal justice process should be able to understand how it works.
- 3.43 We are also not surprised, as was made clear to us by representatives of both Victim Support and Support After Murder and Manslaughter (SAMM), that victims' families are often confused about how it may come about that a person charged with murder may be convicted of manslaughter, either on a plea accepted by the prosecution or by a verdict of the jury. The law of murder and manslaughter is complex because of the way in which it has developed. That is part of the reason why we believe that it is high time for a wider review of the law. We are also highly sympathetic to the argument that if an issue of provocation is raised by a defendant, the rules of evidence and procedure should enable the prosecution to put before the court any additional relevant material. The problem is not so much one of admissibility but of ensuring, through rules of procedure and pre-trial case management, that the nature of the defence is sufficiently disclosed in advance.²⁷

²⁷ The topic of defence disclosure has been addressed in section 33 of the Criminal Justice Act 2003.

- 3.44 We have considerable respect for the arguments of those who advocate the abolition of the defence of provocation and the mandatory sentence, although (as we have noted) that would not remove all problems relating to provocation but would move them to a different stage of the proceedings in which the jury would not be involved. Abolition of the defence was recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General of Australia in 1998²⁸ and by the New Zealand Law Commission in 2001.²⁹ However, through the course of the debates which we have had both internally and with consultees, we have come to favour the reform rather than the abolition of the defence. Most civilised systems of law have gradations of homicide which allow for the existence of extenuating circumstances and, although the wider structure of the law of homicide is outside our terms of reference, we see a case for retaining grave provocation within it as a form of extenuating circumstances.
- 3.45 Some whose first option would be to abolish the defence (conditional on abolition of the mandatory sentence) would, as their second choice, prefer to leave the defence as it is than to attempt statutory reform of it. The main argument for this approach is that, although at a conceptual level the problems associated with the defence are very difficult, at a practical level it works satisfactorily in the majority of cases. We should wait to see what difference *Smith (Morgan)*³⁰ makes in practice before deciding whether and, if so, how the law in this area should be reformed. We are not persuaded by the “leave it alone” arguments. The great majority of consultees agreed with the views expressed in Consultation Paper No 173 that the law of provocation is unsatisfactory and beyond cure by judicial reform. We believe that the defence is capable of significant improvement, but we add an important caution. Bluntly, we think that provocation has got out of hand because of pressures on the defence which result from the present scope of the offence of murder and the mandatory sentence. We have a real and serious concern that reforming the law of provocation without a wider review of the law of murder may in the long run fail to achieve its objective, because the same pressures are liable to lead in practice to a stretching either of the reformed provocation defence or possibly of diminished responsibility in cases where the judge and jury have a degree of sympathy for the defendant.
- 3.46 Before we set out our approach, we consider the possibility of reforming the law on the lines of the EMED provisions of the American Law Institute Model Penal Code, 1985.³¹

²⁸ Modern Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper, Draft Model Criminal Code: Chapter 5, Fatal offences Against the Person* (1998).

²⁹ *Some Criminal Defences with Particular Reference to Battered Defendants: Report 73* (May 2001).

³⁰ [2001] 1 AC 146.

³¹ Referred to as “the MPC”.

EXTREME MENTAL OR EMOTIONAL DISTURBANCE (EMED)³²

3.47 Clause 210.3(1)(b) of the MPC provides:

[A] homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

3.48 In Consultation Paper No 173³³ we asked:

Should the concept of “loss of self-control” be retained or should it be replaced by a test of acting “under extreme emotional disturbance” or some similar phrase?³⁴

3.49 A majority of judges and academics were opposed to a test of extreme emotional disturbance, principally on the ground that it was too vague. However, a significant number of respondents, including particularly representative bodies of the legal profession, women's groups and JUSTICE, thought that a test involving extreme emotional disturbance would be preferable to a test based on loss of self-control.

3.50 We have looked at the experience of EMED in the USA, and we have been greatly helped in this regard by a paper written for us by Professor Sanford Kadish (Alexander F. and May T. Morrison Professor of Law Emeritus, University of California).³⁵ The EMED defence has been a source of controversy in those states (known as “reform states”) which have adopted the MPC or a version of it.³⁶ In particular, controversy has arisen over fundamental aspects of the defence. One issue concerns the focusing of the requirement for a “reasonable explanation or excuse” on the extreme emotional disturbance but not the defendant's conduct. It is not difficult to imagine circumstances in which there may be a reasonable explanation for a person being in a very disturbed

³² In places our discussion relates to extreme emotional disturbance (EED). The difference between these two expressions is that the former includes extreme “mental” disturbance. The terms are sometimes used interchangeably by commentators on the Model Penal Code.

³³ Para 12.37.

³⁴ In a recent article James Chalmers has suggested that under US case law EED has not, in substance, proved to be an alternative to loss of self-control but a restatement in different guise – “Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism” [2004] Crim LR 198, at p 204.

³⁵ This paper is included in Appendix F to this Report.

³⁶ Of some 34 jurisdictions that revised their criminal codes in the post MPC era none adopted the MPC proposal as a whole, although 5 adopted it almost whole, omitting the term “mental”. Those 5 states were Arizona, Arkansas, Connecticut, Kentucky and New York. About a dozen other states adopted some of the Code's features but only with significant alterations, either explicitly requiring a provocative act or rejecting the subjectivity of “the actor's situation” standard, or both, and in some other ways.

emotional state, but no reasonable explanation or excuse for killing another person.

- 3.51 The defence is rooted in the excuse based category of defences, founded on the defendant's state of mind (whatever may have caused it), although some states have adopted the MPC in an amended form narrowing the causes of the defendant's disturbance. (New Hampshire requires that the extreme mental or emotional disturbance be "caused by extreme provocation".)
- 3.52 Victoria Nourse,³⁷ addressed this controversy in a study of jurisdictions in the USA, some of which have kept a 'traditional' law of provocation while others have moved to a more 'liberal' scheme based on the MPC. Professor Nourse presents a strongly reasoned case why wrongdoing by the victim is an important part of the proper moral foundation of the defence of provocation, providing a justifiable reason for the defendant's sense of outrage, and therefore a partial excuse (but not a justification) for the defendant's over-reactive response. She has written:

The most persuasive scholarly defences of provocation have all invoked examples ... in which the defendant's emotion reflects the outrage of one responding to a grave wrong that the law otherwise punishes. Commentators frequently use examples of men killing their wives' rapists or children who kill abusive parents as clear cases of provoked murder. When, for example, the MPC drafters sought to justify their expansion of the defence, they relied on a case involving forcible sodomy.

The problem comes when we focus on cases in which the emotion is based on less compelling 'reasons' – when women kill their departing husbands or men kill their complaining wives. Under conventional liberal theory, if extreme emotion is shown, these cases should be handled no differently from cases where victims kill their rapists and stalkers and batterers. The quantity or intensity of the emotion provides the excuse, not the *reasons* for the emotion. This focus on emotion, to the exclusion of reason, reflects a very important assumption made by liberal theories of the defence, that emotion obscures reason. When we distinguish the rapist killer from the departing wife killer, we acknowledge a very different view of emotion, one in which emotion is imbued with meaning. Both the departing wife killer and the rapist killer may be upset, but the meanings embodied in their claims for emotional understanding are quite different. In distinguishing these cases based on the reasons for the claimed emotion, we acknowledge a view of emotion in which emotion is not the enemy of reason but, instead, its embodiment... .

In the past two decades, the idea of emotion as the natural enemy of reason has been seriously questioned by brain scientists and

³⁷ "Passion's Progress: Model Law Reform and the Provocation Defense" (1997) 106 Yale LJ 1331.

psychologists, by rhetoricians and philosophers, by classicists and even by legal scholars. That both brain scientists and philosophers may now agree that emotion reflects or assists our reasoning processes tells us something that law, and life, already reflect. When we see that someone is angry we do not call ... [a] psychiatric expert for a diagnosis, we simply ask "why?" We expect reasons, and they are typically attributions of wrongdoing and blame.³⁸

3.53 She goes on to argue:

Conventional understandings of criminal law place defences in two mutually exclusive categories: as excuse or justification. In the excuse category are defences, such as insanity, that focus on state of mind; these defences do not embody judgements that what the defendant did was 'right' or 'justified', but that the defendant was less blameworthy. In the 'justification' category are defences, such as self-defence or necessity, which assume that what the defendant has done, overall, was 'right' or 'warranted'. Traditionally, 'excuse' and 'justification' have been viewed as mutually exclusive categories: a defendant cannot both be excused and justified because an excused action presupposes that the action was wrong and therefore unjustified. This assumes, however, a crucial feature of the inquiry – that we are evaluating acts and acts alone. To say that an act cannot be both justified and excused is to say something about acts, not emotions. It is perfectly consistent to say that one's emotions are justified or warranted even when one's acts are not. Indeed, as I have noted above, we may easily say that passionate killings are not justified even if we believe that the emotions causing some killings are, in some sense, the 'right' emotion.³⁹

3.54 Provocation, she argues, is on the cusp because it applies (or should apply) in a case where the defendant's sense of outrage is warranted, but not the manner or scale of reaction. She terms this a 'warranted excuse'.

3.55 Moving on to the practical application of the EMED test, Victoria Nourse observes that:

Jurors are told to put themselves in the defendant's position, to adopt his or her perspective and, yet, at the same time, to be 'reasonable'. They are asked to exercise independent 'moral judgement', and, at the same time, adopt the defendant's vantage point. In practice, this has done little to resolve the problem and much to confound judges and jurors. After days of deliberation in a case in which a defendant killed a man who had parked in his parking place, one jury summed up its conclusion about the EED

³⁸ *Ibid*, at pp 1390-91.

³⁹ *Ibid*, at p 1394.

defence by sending a note to the judge, asking, *Whose norms apply, his or ours?*⁴⁰

- 3.56 Victoria Nourse also cites many other cases of EMED defences being left to the jury where there was no reasonable ground to regard the defendant as having been seriously wronged by the victim. She says:

Reform has permitted juries to return a manslaughter verdict in cases where the defendant claims passion because the victim left, moved the furniture out, planned a divorce, or sought a protective order. Even infidelity has been transformed under reform's gaze into something quite different from the sexual betrayal we might expect – it is the infidelity of a fiancée who danced with another, of a girlfriend who decided to date someone else, and of the divorcee found pursuing a new relationship months after the final decree. In the end, reform has transformed passion from the classical adultery to the modern dating and moving and leaving. And because of that transformation, these killings, at least in reform states, may no longer carry the law's name of murder.⁴¹

- 3.57 Professor Kadish has pointed out that Victoria Nourse's study was of cases in which manslaughter was left to the jury as a possibility, and that in the cases instanced by her the defence failed. However, we would not favour developing a test which opened the possibility of a defence in such a broad range of circumstances.
- 3.58 Professor Kadish has also pointed out that many "reform states" have not adopted the second part of the EMED provision in the MPC ("the reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be"), but the mental and emotional character of the defendant remains central to the question whether he or she was acting under the influence of extreme mental or emotional disturbance for which there was reasonable explanation or excuse.
- 3.59 In the USA there is no general equivalent of the defence of diminished responsibility. In that context the development of the EMED defence with its concentration on psychiatric evidence is supported by some scholars (including Professor Kadish). We would not recommend importing a defence based on EMED. We think that it is too vague and indiscriminate. We favour as the moral basis for retaining a defence of provocation that the defendant had legitimate ground to feel seriously wronged by the person at whom his or her conduct was aimed, and that this lessened the moral culpability of the defendant reacting to that outrage in the way that he or she did. It is the justification of the sense of outrage which provides a partial excuse for their responsive conduct.

⁴⁰ *Ibid*, at p 1372.

⁴¹ *Ibid*, at pp 1332-33.

OUR APPROACH TO REFORM OF PROVOCATION

- 3.60 A number of approaches could be taken in seeking to define what may found a defence of provocation. It could be limited to, or exclude, precisely defined categories of conduct (providing the maximum certainty of outcome and minimum evaluative role for the judge and jury) or broader principles could be adopted.
- 3.61 In our provisional conclusions we set out⁴² principles on which we thought a reformed defence of provocation should be based. The comments which we have received have been mainly supportive, with certain qualifications, but some consultees have been critical of the principles. Having considered these responses, for which we are grateful, we have not changed our conclusions in substance. From the comments which we have received, we recognise that there are matters which require further explanation. There have also been helpful suggestions how some of our proposed principles might be clarified or improved. We also identify and address the principal criticisms made of the approach put forward in our provisional conclusions.
- 3.62 A major criticism by some was that our provisional conclusions failed adequately to explain the rationale underlying our proposed approach. We will address that issue first and then explain our proposed principles. We emphasise, as we did in our provisional conclusions, that what we are putting forward are principles, rather than a statutory formula. If our approach is accepted, the drafting of legislation will be a matter for Parliamentary Counsel.

Rationale of provocation

- 3.63 Putting it in broad and simple terms, we think that the moral blameworthiness of homicide may be significantly lessened where the defendant acts in response to gross provocation in the sense of words or conduct (or a combination) giving the defendant a justified sense of being severely wronged. We do not think that the same moral extenuation exists if the defendant's response was considered, unless it was brought about by a continuing state of fear. (There are also strong policy reasons for the law not to treat vendettas as partial excuses.) We do not suggest that these are the only circumstances which could significantly extenuate moral responsibility for homicide, but we do think that they fall into a distinct category. Another distinct category is where the defendant suffers from some mental condition by reason of which he or she ought not to be regarded as fully responsible for his or her actions. Because we see these as essentially different, we do not favour amalgamating them in a single defence, but we will refer to this in further detail later. There are also other circumstances which may significantly extenuate moral responsibility for homicide. An example is the genuine case of mercy killing, but that falls outside the terms of our present review. This project is confined by our terms of reference to the present partial defences and the possibility of a partial defence of excessive force in self-defence.
- 3.64 We would not favour extending provocation to cover cases where there was no gross provocation in the sense suggested above, but where the defendant acted

⁴² Paras 18–59.

under extreme or extraordinary stress.⁴³ We recognise that, tragically, there are cases in which a person who is not ordinarily violent may do a sudden act of serious violence under stress, not intending to kill but in fact resulting in death. Such a person will be guilty of murder if there was an intention to cause serious harm; but that is a consequence of the broad definition of murder in England and Wales, which, as we have already said, we consider to be in need of review.

PROVOCATION: HOW TO RESHAPE IT

- 3.65 We think that the defence as it presently operates is in some respects too broad and in other respects too narrow. We think that it is too broad in that it can apply to conduct by the victim which is blameless or trivial. It is too narrow in that it provides no defence to a person who is subjected to serious actual or threatened violence, who acts in genuine fear for his or her safety (but not under sudden and immediate loss of self-control) and who is not entitled to the full defence of self-defence (either because the danger is insufficiently imminent or their response is judged to have been excessive). We are satisfied from consultees' responses that this is a real and not merely an academic problem, particularly in cases of defendants who have been victims of long-term abuse.
- 3.66 In principle, we consider that the first pre-requisite of a defence of provocation should be **that the defendant acted in response to (1) gross provocation or (2) fear of serious violence towards himself or herself or another, or (3) a combination of (1) and (2)** (the trigger).
- 3.67 The second should be **that a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way** (the objective test).

The trigger: gross provocation

- 3.68 We consider that **the essence of gross provocation is that it is words and/or conduct which caused the defendant to have a justifiable sense of being seriously wronged**. The preferred moral basis for recognising a partial defence of provocation is that the defendant had legitimate ground to feel strongly aggrieved at the conduct of the person at whom his/her response was aimed, to the extent that it would be harsh to regard their moral culpability for reacting as they did in the same way as if it had been an unprovoked killing. It is important to note that there are two aspects to this.

“Caused” the defendant to have a ... sense of being seriously wronged

- 3.69 The first is that the words or conduct should have caused the defendant to have a sense of being seriously wronged and therefore to react as he or she did. (This follows from the requirements that the defendant acted in response to gross

⁴³ We have discussed whether “extreme emotional disturbance” should be the test in paras 3.47 to 3.59. We discuss whether “abnormality of mind” for the purpose of the defence of diminished responsibility should include, for example, people who are physically and mentally exhausted by over work or lack of sleep, or distracted by shock or grief, in paras 5.72-5.75.

provocation, and that to be gross provocation there must have been words or conduct, or both, which caused the defendant to have a sense of being seriously wronged.)

“Justifiable” sense of being seriously wronged

- 3.70 The second aspect is that the defendant’s sense of being seriously wronged should have been justified. In deciding whether there was gross provocation in the sense of words and/or conduct which caused the defendant to have a *justifiable* sense of being seriously wronged, we do not intend the test to be purely subjective, i.e. what the defendant thought. It is for the jury to decide whether there was gross provocation in the relevant sense. In making that judgement the jury must of course consider the situation in which the defendant found him or herself and take into account all the characteristics of the defendant which they consider to be relevant. Taking into account the circumstances and characteristics of the defendant does not mean that if the defendant considered it to be gross provocation, the jury must therefore accept that it was gross provocation. The jury may conclude that the defendant had no sufficient reason to regard it as gross provocation, or indeed that the defendant’s attitude in regarding the conduct as provocation demonstrated an outlook (e.g. religious or racial bigotry) offensive to the standards of a civilised society. Dr Horder gives an example:

Reconsider the imaginary case of Terreblanche, whose deep-rooted beliefs include the belief that it is the gravest of insults for a coloured person to speak to a white man unless spoken to first. If he became enraged and killed a coloured person for speaking to him in this way, is the jury to be directed to take his beliefs into account – *qua* characteristics – in judging the gravity of the provocation (assuming there is held to be a ‘real connection’ between the provocation and those beliefs, or that the victim deliberately spoke to him as a challenge to those beliefs)? Would not such a direction be an outrageous compromise of society’s commitment to racial tolerance?⁴⁴

- 3.71 Our answer to the question posed in the last sentence is yes. No fair-minded jury, properly directed, could conclude that it was gross provocation for a person of one colour to speak to a person of a different colour. In such a case the proper course would therefore be for the judge to withdraw provocation from the jury. (We discuss the role of judge and jury below.)⁴⁵

Does the provocation need to emanate from the deceased?

- 3.72 We have not stipulated that the provocation should come from the deceased. Our only reason for not doing so is that there may be cases of accident or mistake where we consider that the defence should be capable of applying. We discuss

⁴⁴ *Provocation and Responsibility* (1992) p 144.

⁴⁵ Paras 3.141 – 3.152.

this topic below.⁴⁶ Except in such cases, we are satisfied that where D kills V in response to provocation by a third party the objective test would preclude this defence. No person of ordinary tolerance and self-restraint would deliberately respond to provocation from one person by using violence to another.

Does the defendant need to be the sole or immediate sufferer from the provocation?

3.73 We do not intend that the defence of provocation should be restricted to cases where the defendant is the sole or most immediate sufferer from the provocation. It would be an absurdly narrow approach to suggest, for example, that it could not apply to a parent whose child was raped but only to the child. The Western Australian Criminal Code⁴⁷ limits provocation to a wrongful act or insult done to the defendant or “to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant.” We see problems in trying to define a precise list, and most jurisdictions have not done so. We think that a jury would be able to recognise that where there is a close personal connection between the defendant and the person directly wronged, the defendant may well have a feeling of suffering jointly from the wrongdoing so as to fall within the principle of the formula which we have proposed.

3.74 We have considered whether provocation should be confined to cases of serious and unlawful actual or threatened violence to the person; or criminal conduct; or provocation by conduct only, as distinct from words. In common with many respondents, we see real difficulties with inflexible provisions of that kind for reasons which we develop in the following paragraphs. We begin with the general observation that it is very difficult to foresee and catalogue in specific terms every form of conduct which might deservedly be thought to qualify for the defence, but that the governing principles ought to be capable of articulation.

The impact on domestic violence

3.75 Our terms of reference ask us to have particular regard to the impact of the partial defences in the context of domestic violence, and we have done so. The responses which we have received for the most part have not been polarised on male – female lines. There is not, for example, a single ‘feminist’ position. We have had very helpful responses from a number of women’s groups, and these expressed a range of views. One theme which emerged strongly is that a person may feel imprisoned in an abusive and humiliating relationship without being the victim necessarily of serious physical violence. One group proposed abolishing the defence of provocation and replacing it with a partial defence of self-preservation on the grounds of domestic violence, but they recommended the definition of domestic violence used in the New Zealand Domestic Violence Act 1995, which defines it as physical, sexual or psychological abuse, including but not limited to intimidation and harassment. This group was not alone in recommending that any reforms should include a comprehensive legal definition

⁴⁶ Paras 3.153 – 3.160.

⁴⁷ Section 245.

of domestic violence based on the definition in the New Zealand Domestic Violence Act 1995.

3.76 Another group argued for an approach to domestic violence which may include 'physical, sexual, emotional or financial abuse'. They stressed that concentration on the purely physical can lead to a failure to understand the position in which vulnerable people may find themselves.

3.77 In considering the impact of the law of provocation in the context of domestic violence, our approach remains as stated in Consultation Paper No 173:⁴⁸

Domestic violence is an extremely worrying problem. The law must deal with it in a way which is fair and shows proper respect for human life. At the same time it would be wrong to introduce special rules relating to domestic killings unless there is medical or other evidence which demonstrates a need and a proper basis on which to do so.

3.78 As a matter of principle, the criminal law should be gender neutral unless it is absolutely necessary to depart from that principle. Our proposals do not depart from that principle. Our provisional conclusions have received a considerable degree of support from those women's groups who have commented on them.⁴⁹

"Gross Provocation" need not involve a risk of physical violence

3.79 Turning to cases other than domestic violence, we would not want to narrow the law of provocation as it currently affects householders. There is undoubtedly a very strongly held view among many members of the public that the law is wrongly balanced as between householders and burglars.⁵⁰ We think that much of the public anxiety is possibly based on a misunderstanding of the present law and of the highly unusual facts of the Tony Martin case. However, we do accept that many members of the public are genuinely worried about what may happen to them if they use force against intruders and are subsequently judged to have gone too far. Sometimes burglaries involve the most vile acts of desecration of a person's home and of belongings which may be cherished for highly personal reasons. If, for example, a householder confronted a burglar responsible for such behaviour and immediately attacked him, causing fatal injury, we think that it would be a harsh law which precluded the jury from considering provocation and we doubt whether such a law would command public support or respect.

⁴⁸ Para 1.67.

⁴⁹ Association of Women Barristers; Justice for Women (but who prefer the majority view in *Smith (Morgan)*); Refuge (but who would like to see inclusion of a partial defence comprising realistic fear of serious harm or death coupled with extreme emotional distress); Rights of Women (but who would like to have a definition of domestic violence enshrined in English law).

⁵⁰ When a BBC radio programme recently invited listeners to send in their suggestions for a new law on any subject, the proposal which received the greatest number of votes was to legitimise any use of force by householders towards burglars. See further <http://www.bbc.co.uk/radio4/today/>.

3.80 In our Consultation Paper⁵¹ we gave other examples of cases in which the defendant would not have been at risk of serious physical violence, but where the deceased's conduct was nevertheless such that we can see a moral case for allowing a partial defence of provocation. Some respondents suggested other examples. One consultee said:

We do not agree that words alone should never constitute provocation since there may be some circumstances where a person is subjected to a campaign of abuse which when combined with a complete lack of options of escape can amount to provocation. A good example of this is someone subject to racism in the workplace ... The racist conduct may fall short of violent conduct, threats of violence or threats to kill, but may nevertheless count as seriously inhumane and degrading treatment and amount to provocation.

3.81 Some consultees expressed concern that "gross provocation" and "words and/or conduct which caused the defendant to have a justifiable sense of being seriously wronged" were unacceptably vague.⁵² Others supported the proposals as well balanced.

3.82 Professor Andrew Ashworth wrote:

I think the proposals represent a fine attempt to tread the difficult lines, and enable some flexibility while maintaining a much more structured approach than would have resulted from combining provocation with DR or introducing the EMED doctrine.

3.83 Lord Justice Kennedy wrote:

I agree with paragraph 18 of the Provisional Conclusions⁵³ as to the "trigger". The defendant must have legitimate ground to feel strongly aggrieved at what has been said or done to him, and I would not like to see what is capable of amounting to provocation being at all closely confined. Juries can deal with that.

3.84 We will return to this issue after setting out our proposal about the roles of the judge and jury.⁵⁴

The trigger: response to fear

3.85 In paragraph 3.66 above, we referred to a defendant who acts in response to fear of serious violence to him or herself or another. Lord Hoffmann in *Smith*

⁵¹ Para 12.25(3).

⁵² One consultee suggested that "gross" might be misinterpreted by a jury as meaning crude rather than grave.

⁵³ Reproduced at para 3.66 above.

⁵⁴ Para 3.151.

(*Morgan*)⁵⁵ suggested that provocation under the present law is not confined to anger, but may include fear; and in many cases there will be an overlap between conduct which is gross provocation and conduct which causes the defendant to fear serious violence. However, the proposed partial defence would go beyond the traditional limits of provocation.

- 3.86 It is important to emphasise that before the defence arises the jury will, where it has been raised, first have had to exclude self-defence, which operates as a complete defence.
- 3.87 We recognise the need for the scheme of defences and partial defences to murder to be coherent and also to do justice.
- 3.88 Consider the case of D, who has suffered regular violent assaults by V. D eventually responds to an assault by fatally stabbing V. D has a complete defence if D's conduct was proportionate to the immediate risk. If it was disproportionate, D has a partial defence only if D acted in sudden and immediate loss of self-control. Consultees with experience of such cases have told us of the "catch 22" dilemma which faces D (and D's lawyers) in such a case. If the defence want to obtain an acquittal, it is unhelpful to present D as somebody who lost self-control. Running a defence of provocation based on loss of self-control resulting from years of abuse makes it correspondingly difficult to present D's acts as proportionate to the immediate risk. We are told that sometimes in such cases a defendant may plead guilty to manslaughter, although arguably D's conduct may have been in lawful self-defence, for fear of the risk of conviction of murder with the mandatory sentence.
- 3.89 The dilemma facing D in such a case is not confined to those of domestic violence. One consultee⁵⁶ drew our attention to a recent newspaper report⁵⁷ about the case of *Osborn*, who stabbed an intruder to his friend's home late one bank holiday evening. The defendant was watching television with four friends. The intruder was under drug induced illusions and was covered in blood as a result of smashing windows in the street with his head and fists. Hearing the commotion, one of Osborn's female companions had gone outside and was assaulted by the intruder, who pursued her into the house. He was ejected once but forced his way back inside. Osborn stabbed him five times with a knife. One of the stab wounds punctured his lung with fatal results. Osborn was charged with murder, but the prosecution offered to accept a plea of guilty to manslaughter on the ground of provocation. He took that option and was sentenced to five years imprisonment.⁵⁸ According to the newspaper article, Osborn was advised by his counsel that it was very unlikely that a jury would reject his plea of self-defence, but they could not exclude a small chance that the jury would decide that his use of the knife was disproportionate, in which case he would be convicted of murder and sentenced to life imprisonment. Osborn

⁵⁵ [2001] 1 AC 146, 168.

⁵⁶ Colonel David Whitaker.

⁵⁷ Sunday Telegraph, 9 May 2004, at p 20.

⁵⁸ Currently subject to appeal.

decided that he could not face the risk and therefore pleaded guilty to manslaughter.

- 3.90 Under our proposal, the jury would first consider whether D acted in lawful self-defence. If the jury is satisfied that the killing was unlawful, they would then consider whether D was entitled to a partial defence of provocation under either limb. We believe that this represents a coherent and just approach. D would not be in the dilemma identified in the previous paragraphs and therefore under pressure to plead guilty to manslaughter in circumstances where the jury might well have concluded that D's conduct was lawful.
- 3.91 Consider also the case where D is the victim of long-term abuse by V. After a grave attack or threat of attack, D waits until V is asleep and then kills V. D acts in fear and despair, thinking that this is the only way of being able to live a life free from a risk of grave violence from V. Under present law D is guilty of murder (unless entitled to a partial defence of diminished responsibility) because D's acts were not done at a time of imminent danger.
- 3.92 Some take the view that D ought properly to be regarded as guilty of murder and are worried about the "floodgates" risk if a partial defence were available to D in such circumstances. We think that such a result would be overly harsh and we believe that the floodgates risk can be satisfactorily met by the objective test which we discuss below.
- 3.93 In informal discussions our proposal has been subject to criticism from two sources: academics and the senior judiciary. At the heart of each there is a common concern: whether conduct in response to provocation and conduct in response to fear should be joined in a single defence, or whether there should be a separate partial defence for those who kill in fear, but who do not attract the full defence that they acted in lawful self-defence.
- 3.94 A number of academics favour separate defences, because they say that the situations are morally different. Their concern is that we are inappropriately linking two conceptually different partial defences: provocation and excessive force in self-defence.
- 3.95 The partial defence of provocation arises in the case of conduct by the defendant which, it is said, the actor acknowledges is unlawful but for which there is a sufficient excuse or justification from an external source so as to permit a different label to be attached to the defendant's conduct.
- 3.96 By contrast, a partial defence of excessive force in self-defence would apply to a person who thinks that he or she is acting lawfully but who has miscalculated the extent of the action open to him or her and so has fallen into unlawfulness. This is sufficient to prevent the label of murder to be attached to the defendant's conduct.
- 3.97 It is, therefore, said to be conceptually confused to join them together as we suggest.
- 3.98 While we respect this view, we question how far it corresponds with the likely thought processes of a defendant. It will be seldom that a defendant does other

than merely react to the external stimulus. We also think that there is medical, practical and moral justification for the proposed combination.

- 3.99 First, the Royal College of Psychiatrists said in their response to Consultation Paper No 173:

[W]e would point out that the approach adopted within the document to the relationship between provocation and self-defence, with the suggestion of a new partial defence of 'excessive self-defence', is based, at least partly, upon a legal misrepresentation of psychology and physiology. Hence, one way of reading the proposal to abolish the provocation defence 'in favour' of the new partial defence of self-defence is that it rests upon the assumption that 'anger' cannot be a justification for 'responsive violence', but 'fear' can be. However, this assumes that the two emotions of anger and fear are distinct. In medical reality they are not. Physiologically anger and fear are virtually identical, whilst many mental states that accompany killing also incorporate psychologically both anger and fear. Hence, the abused woman who kills in response even to an immediate severe threat will also be driven at least partly by anger at the years of abuse meted out to her, and perhaps her children. Again, the woman who waits until the man is 'helpless' to kill him, is likely not merely to be angry but also fearful that eventually he will kill her, and/or her children, and that there is no way of preventing it other than by the death of the man (partly because her cognitions have been so distorted by the years of abuse that she does not perceive the options for escape, for example legal options, at all in the same way as an ordinary person would do). Any legal solution to the current perceived problems with partial defences to murder which rested upon the assumption that fear and anger can (even usually) be reliably distinguished must, from a medical perspective, therefore fail.

- 3.100 Secondly, from a practical perspective, it is desirable to try to keep jury directions as broad and simple as possible.
- 3.101 Thirdly, from a moral viewpoint, there is a common element namely a response to unjust conduct (whether in anger, fear or a combination of the two).
- 3.102 A different criticism made by one consultee is that the expression "serious violence" needs further clarification and may be too narrow. This consultee proposed that the wording should be "fear of serious violence or significant harm towards the defendant or another". Whatever form of words is used, there may be borderline cases but we think that the concept of serious violence is one which a jury should not find it difficult to grasp or to apply in a sensible way. To introduce the alternative "or significant harm" would in our view tend to blur the test. Conduct may be harmful in a broad sense without involving any physical threat and without being deliberate. We think that this would be too wide. Those criticisms could be met by adapting the phrase to "significant intentional physical harm" but that is not far removed from "serious violence". On consideration, we prefer a straightforward test of "serious violence". This would obviously include sexual as well as other physical violence, and what was judged to be serious

would have to be considered in the context of the relationship between the defendant and the victim.

- 3.103 The question has been raised whether any statement of a reformed provocation defence should make express reference to emotions other than fear. We recognise that provocation may give rise to a range of emotions, e.g. anger, fear, disgust and despair. It may be appropriate for a judge to refer to these matters in his summing up, when inviting the jury to think about how provocation might cause a person to respond with violence, but we do not think it necessary to incorporate a list of all such emotions in a definition of provocation.

The trigger: combination of gross provocation and fear

- 3.104 HHJ Stewart QC has brought to our attention the case of Annette and Charlene Maw⁵⁹ in which he appeared as junior counsel for the defendants. The case aroused considerable public interest at the time. Annette was 21 and Charlene was 18. They lived with their father, mother and younger brother in Bradford. The father was a drunkard and a bully and habitually treated their mother with violence. On the night of the offence he had a blood alcohol level equivalent to at least ten pints of cider. He was in an ugly mood and assaulted both defendants and their mother. There was a fight in a bedroom which ended only when the mother smashed a mirror over the father's head. The women came downstairs, leaving him in the bedroom. The girls then decided that they could stand no more of his treatment and would finish him off by stabbing him. Before they did anything, the father came downstairs, made a grab at Annette and hit her. He then hit the mother. Annette called for Charlene to fetch a knife. Charlene did so and handed it to Annette, who stabbed the father below the neck, severing the jugular vein. They called the police and initially told a false story that the father had been trying to knife Annette.
- 3.105 The sisters were charged with murder but pleaded guilty to manslaughter. Their plea was accepted with the approval of the trial judge. The basis of the plea was not specified in open court. There was good reason for this. As a matter of law they were guilty of murder. They were not acting under a sudden loss of self-control and there were other ways in which they could have protected themselves against the immediate risk than by killing the father. As Lord Lane CJ said in the Court of Appeal "unhappily, the case was not merely a simple one of self-defence nor was it simply one of the agony of the moment."
- 3.106 The trial judge sentenced both defendants to three years' imprisonment. There was a public outcry that the sentences were too severe. On appeal, Charlene's sentence was reduced to six months imprisonment and Annette's sentence was upheld.
- 3.107 It is unsatisfactory that the case could only be treated as manslaughter by prosecutorial discretion which involved turning a blind eye to the law with the connivance of the judge. Under our proposals, the conviction for manslaughter would have been available on a principled and transparent basis.

⁵⁹ Court of Appeal (Criminal Division) 3 December 1980, No. 4795/R/80.

3.108 HHJ Stewart QC has commented on our provisional conclusions:

I agree that the trigger should be gross provocation by words or conduct or fear of serious violence to self or another which caused the defendant to have a justifiable sense of being seriously wronged in the situation in which he found himself. This would cover the *Maw* situation to which I have referred in earlier correspondence.

The objective test

3.109 Even if there was gross provocation, it by no means follows that an ordinary person would have reacted in the way that the defendant did. Most people from time to time suffer gross provocation without resorting to lethal violence. **The defence should only be available if a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.**

3.110 In deciding whether a person of ordinary temperament in the circumstances of the defendant might have reacted in the same or similar way, the court should take into account all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they "bear simply on [his or her] ... general capacity for self-control" (to adopt a succinct expression used by Professor Glanville Williams⁶⁰ in his analysis of the decision in *Camplin*).⁶¹ The only qualification which we would make is that the court should have regard to the defendant's age, because capacity for self-control is an aspect of maturity, and it would be unjust to expect the same level of a twelve-year-old and an adult (as was recognised in *Camplin*). In other words, we prefer the minority position in *Smith (Morgan)*,⁶² which also accords broadly with the law in Australia, Canada and New Zealand, and with the recent provisional recommendations of the Irish Law Reform Commission.

3.111 This is not to deny a defence to an abused person whose temperament may have been changed as a result of the provocation, for that would be a matter which bore not simply on the defendant's general temperament independent of the provocation but on the effect of the provocation itself. As Lord Millett said in *Smith (Morgan)*⁶³ about such a case:

The question for the jury is whether a woman with normal powers of self-control, subjected to the treatment which the accused received, would or might finally react as she did... . It does not involve an inquiry whether the accused was capable of displaying the powers of self-control of an ordinary person, but whether a person with the power of self-control of an ordinary person would or might have

⁶⁰ *Textbook of Criminal Law* (2nd ed 1983) p 540.

⁶¹ [1978] AC 705.

⁶² [2001] 1 AC 146.

⁶³ *Ibid.*

reacted in the same way to the cumulative effect of the treatment which she endured.⁶⁴

- 3.112 We think that the objective test should apply in the case of a person responding to fear of serious violence as in the case of a person responding to provocation. It might be argued that self-restraint is a relevant factor when considering provocation but not when considering the position of a person acting in fear, but we would disagree. Ordinarily it would not be even partially excusable for a person in fear, but not in imminent danger, to take the law into his or her own hands. We would not, for example, want a partial defence to be available to criminal gangs who choose to deal with threats of violence from rival gangs by striking first. Our proposals regarding the role of the judge and jury⁶⁵ would properly preclude such a defence from being left to the jury in those circumstances (on the basis that no properly directed jury could reasonably conclude that a gangster who chose to act in such a way could satisfy the objective test).
- 3.113 Some concerns have been expressed about our formulation of the objective test on the basis that persons of ordinary temperament do not kill in face of provocation. The “reasonable person” test in the law of provocation has always involved this problem. In *Campbell*⁶⁶ Lord Bingham CJ observed that “it is not altogether easy to imagine circumstances in which a reasonable man would strike a fatal blow with the necessary mental intention, whatever the provocation”.⁶⁷ Nevertheless juries have recognised that there may be circumstances in which an ordinary person may be driven to use fatal violence in response to provocation.
- 3.114 It seems to us that there must be some objective assessment of the response and its causes. As Lord Hoffman said in *Smith (Morgan)*.⁶⁸
- A person who flies into a murderous rage when he is crossed, thwarted or disappointed in the vicissitudes of life should not be able to rely upon his anti-social propensity as even a partial excuse for killing.⁶⁹
- 3.115 Moreover our proposals involve abandoning the loss of self-control test, which has proved very unsatisfactory, and this makes the need for an objective test still greater.
- 3.116 It is clear from our consultation process that different judges and practitioners have had different experiences of how the *Smith (Morgan)* test has worked in

⁶⁴ *Ibid*, at p 213.

⁶⁵ See paras 3.141 – 3.152.

⁶⁶ [1997] 1 Cr App R 199.

⁶⁷ *Ibid*, at p 207.

⁶⁸ [2001] 1 AC 146.

⁶⁹ *Ibid*, at p 169.

practice. Some have said that juries in their experience appear to have no difficulty with the present test. Others have reported otherwise and cases have reached the Court of Appeal in which juries and the court do appear to have had difficulties.

- 3.117 In *Lowe*⁷⁰ the judge, after consultation with counsel, directed the jury that the prosecution had to make them sure that the defendant “was not acting under provocation” and gave them an explanation of provocation in which she said:

The law expects everyone to exercise control over their emotions and it is for you to decide whether the circumstances may have been such as to make [the defendant's] loss of control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter. That is because you represent the community and decide what may count as a sufficient excuse. Apply what you consider to be appropriate standards of behaviour, on the one hand making allowance for human nature and the power of emotions but, on the other hand, not allowing someone to rely on his own particular inability to control himself.

- 3.118 The Court of Appeal commented:

It is apparent that the direction owes more than a little to the speech of Lord Hoffmann in *R v Smith*. Whatever may be said about its correctness there can be little doubt that it achieves the object of explaining the principles in simple terms. Even so, following retirement the jury came back with two questions. The first was: “can we have clarification of the term ‘not acting under provocation’” and “does there have to be a certain degree of provocation and does it matter when the provocation took place?”

- 3.119 In *Weller*⁷¹ the judge's direction on the objective element of provocation read as follows:

The second aspect is this. The fact that someone may have lost their self-control as a result of some provocative act cannot by itself be a defence to murder, because if it were it would mean anybody who found it difficult to control their emotions or their temper could kill and then say, “Well, I lost my self-control. I'm not guilty of murder.” The law is not that stupid, members of the jury. The law expects people to control their emotions. It expects people to exercise reasonable restraint. Even if you are an unusually excitable person the law expects you to control yourself. So that is why you have the second aspect and that is why the section keeps referring to the role of the jury and what a reasonable person would do. So the law says, right, you the jury, you decide, representing the

⁷⁰ [2003] EWCA Crim 677.

⁷¹ [2004] 1 Cr App R 1.

community as you do, you decide whether the circumstances were such or may have been such as to make the loss of self-control excusable so that you reduce the offence from murder to manslaughter. You apply the appropriate standards of behaviour and again you consider all the circumstances. You of course make allowances for human nature and the power of emotions but you have to consider and decide what society expects of a man like this defendant in his position. If you are sure his behaviour was not a reasonable reaction, if you are sure his behaviour was inexcusable, then the verdict will be one of guilty of murder. If it was or may have been excusable your verdict would be “not guilty of murder but guilty of manslaughter by reason of provocation”.

3.120 The Court of Appeal noted that following retirement it was clear that the jury had difficulty in following the direction on provocation, because they sent a note. The issue on appeal was whether the judge ought to have directed the jury to take into account the defendant’s obsessive and jealous nature in determining whether or not the provocation was sufficient to provide such excuse as might reduce the offence from murder to manslaughter. The judge had declined to direct the jury that they should do so, but the Court of Appeal concluded that it was inconceivable that the jury would not have taken those matters into account, since they had not been told to disregard them. The court therefore did not find it necessary to decide whether the judge was right or wrong in declining to tell the jury that they should take those matters into account.

3.121 In *Rowland*⁷² the Court of Appeal referred to *Weller*, and to the commentary on that case by Professor Ashworth in the *Criminal Law Review*,⁷³ which expressed concern at the “evaluative free-for-all” resulting from the speeches of the majority in *Smith (Morgan)* as applied in *Weller*, and to the problems set out in Consultation Paper No 173 at paragraphs 1.34-1.53 and 4.16-4.173. The court continued:

Whatever those concerns, however, until the outcome of the Law Commission’s review is embodied in a change in the law, the practical problems remain of providing a good working guide for judges faced with summing up in cases where the defence of provocation is raised in circumstances where no fixed standard of self-control can be provided by the judge against which to measure the defendant’s conduct.

3.122 The court concluded that before speeches the trial judge should discuss with counsel the terms of the appropriate direction and added:

In this connection, the judge should bear in mind ... that, in addition to cases where particular factors clearly have a bearing on the issue, there may be difficult borderline cases, particularly as

⁷² [2003] EWCA Crim 3636.

⁷³ [2003] Crim LR 724, at pp 725-727.

between mere bad temper or excitability on the one hand and identifiable mental conditions and personality traits on the other. In such cases, after prior discussion with counsel, the judge should be careful to include all potentially relevant factors at the appropriate point in his summing up to the jury.

- 3.123 In serious or complex cases it is always wise for the judge to identify with counsel before summing up any issues or points of law which may be in doubt. However, the basic principles of provocation ought to be sufficiently clear so that there should be no need for counsel and the judge to embark on a difficult exercise discussing how the law should be put and how the jury should be directed, in particular, regarding the defendant's personality traits.
- 3.124 We also think that it is not satisfactory that the jury should be asked to decide what are the legal standards which differentiate murder from manslaughter. That should be a matter of law on which the jury should be given a clear direction. Our proposal does so.
- 3.125 Alternatives have been suggested along the lines proposed by the New South Wales Law Reform Commission,⁷⁴ which would require the jury to consider whether:

Taking into account all the characteristics and circumstances of the accused, he or she should be excused for having so far lost self-control as to have formed an intention to kill or inflict grievous bodily harm ... as to warrant the reduction of murder to manslaughter.⁷⁵

- 3.126 We invited consultees' views on this option. It had some distinguished supporters, but the majority were against it. It provides the jury with no yardstick by which to decide whether the offence was murder or manslaughter. As Professor Alan Norrie put it:

Option B really does subjectivise the law, or at least it seriously understates the complementary objective requirement.

- 3.127 The test under our proposal is not whether the defendant's conduct was reasonable, but whether it was conduct which a person of ordinary temperament might have been driven to commit (not a bigot or a person with an unusually short fuse). We believe that a jury would be able to grasp and apply this idea in a common-sense way. Because the test is not whether the defendant's conduct was reasonable, there is no illogicality in providing only a partial defence.
- 3.128 It has also been suggested that the test should be whether a person of ordinary temperament in the circumstances of the defendant *would* (rather than *might*) have reacted in the same or similar way. The difficulty is that if a test including the word "would" were strictly applied, it would be near to impossible, because even under extreme provocation killing is not the probable reaction of a person of

⁷⁴ *Partial Defences to Murder: Provocation and Infanticide: Report 83* (1997).

⁷⁵ *Ibid*, at para 2.82

ordinary temperament.⁷⁶ We can see the counter argument that, read literally, a test including the word “might” could include almost every homicide, since the possibility always exists, however remote, that a person might completely take leave of his or her senses. We do not believe, however, that a jury would understand the test in that way.

3.129 It has been argued by some that in applying the objective test the court should take into account not only the defendant’s actual age but also their mental age.

3.130 In the case of those whom the law regards as adults, although we recognise the logic of that argument, we do not support it for policy reasons. From our discussions with psychiatrists, we understand that mental age is a complex subject. People’s cognitive and emotional development is infinitely variable. Many people who kill are emotionally immature. To introduce a test which would lead to psychiatric and psychological evidence about the particular intellectual and emotional development of a defendant, in order to provide some kind of benchmark by which to judge whether his or her conduct was that of a person of ordinary temperament for such level of development, would be complicated and would go a significant way to undermining the objective test. A person who is a psychopath or suffers from retarded development of mind may be eligible for a defence of diminished responsibility. We do not think that factors of that nature should be taken into account in adjusting the objective test for the purposes of the defence of provocation.

3.131 Children who kill present special problems. Their position is special by reason of their youth, and the criminal law must take proper account of this both in its substance and in its procedures. Children mature at different rates and it is frequently the case that children who kill come from significantly disturbed backgrounds. In the case of children who commit homicide, a Consultation Paper on tariffs in murder cases issued by the Sentencing Advisory Panel in November 2001 recognised that:

What does appear to be a common factor among these young offenders is that they tend to come from seriously dysfunctional families, many are the victims of abuse, and they are often themselves seriously disturbed.

3.132 This is reinforced by comments which we have received from psychiatrists in response to Consultation Paper No 173. Dr. Eileen Vizard wrote:

[T]here is a very robust evidence base which shows that children who kill are very much more disturbed than ordinary child delinquents. These children are co-morbid (have several psychiatric disorders at the same time) [have] many serious psychiatric disorders and abusive past experiences which impair their emotional and cognitive development and their moral judgement. Children who

⁷⁶ There is also the point made by Professor Glanville Williams that since the law’s reasonable person is an invention, there is no sense expressing the test in terms of statistical probability *Textbook of Criminal Law* (2nd ed 1983) p 537.

murder are, by any standards 'unreasonable', they are also seriously disturbed and developmentally immature.

3.133 A recent report by the Royal College of Psychiatrists on Child Defendants⁷⁷ contains, and refers to, important material on this subject. It states

Intelligence is a somewhat blurred concept, consisting of many different facets. In children intellectual development is a changing, dynamic process which is affected by other aspects of the child's development and which can be helped or hampered by environmental and other factors in the child's life Improved cognitive or thinking capacities are only one aspect of the maturational and learning processes which need to occur to turn the naturally impulsive, self-centred, short-term thinking toddler into a reasonably self-controlled, reflective young adult, able to take a long-term view... .

The child with general learning disabilities (mental retardation) functions overall at a lower mental age. However, there are also difficulties from the psychological perspective in the casual use of the term "mental age", although this can be a useful legal concept. Whatever the cause of the child's disability, its effect is usually to give uneven, superimposed selective deficits. The result may be to leave the individual with misleading islands of ability that may encourage the interviewer to see the child as more competent than is the case....

The acquisition of self-control will overlap with the development of other characteristics. For example, understanding the emotional consequences of their actions does much to shape the behaviour of the normally developing young child and adolescent. Another important aspect of emotional development is the capacity of children to monitor their own behaviour and to alter it accordingly. Gaining self-control, deferring impulses, recognising the impact of behaviour on others and monitoring one's own behavioural patterns are also part of the process of developing insight into how one's own mind works, how one's behaviour affects relationships with other people and how to make the right choices about behaviour in the future.

These aspects of emotional development are highly relevant in the assessment of child defendants, many of whom are emotionally immature, impulsive and lacking in insight into the impact of their criminal behaviour on others

Another important child-related aspect of social development is moral development and this is of particular relevance to children

⁷⁷ Royal College of Psychiatrists, Occasional Paper OP 56, July 2004. (As yet unpublished.)

facing criminal charges, where certain assumptions are made about moral understanding. Moral development is also a crucial issue to be addressed within clinical psychological assessment and also within a psychiatric assessment of the child defendant. The moral development of children is a complex issue which has implications for both the understanding of the seriousness of the offence and the presence or absence of any subsequent empathy for the victim or remorse for the crime.

- 3.134 Permitting the jury to take account of the age of the defendant in assessing provocation allows for the child of normal development (who very seldom kills) but not for the child with significant developmental problems. There is also a problem with the defence of diminished responsibility, which does not include developmental immaturity unless of such a degree as to amount to an “abnormality of mind”. We have considered the possibility of proposing special versions of provocation and diminished responsibility for the child with particular difficulties, but there are real problems in the notion of judging such a defendant by the standards of an ordinary child suffering from the particular child’s personal disabilities. We consider that there is an imperative need for a review of the law of homicide in relation to child and young person defendants, but this goes beyond our present terms of reference. One possibility would be to introduce in their case a single offence of culpable homicide, but we have not consulted about this.

Exclusion of considered revenge

- 3.135 **The defence should not be available if the defendant acted in considered desire for revenge.** In our provisional conclusions we used the words “premeditated” but it has been suggested to us that “considered” might be a better word and on reflection we are happy to accept that suggestion. A defendant who acts in considered desire for revenge is to be distinguished from a defendant who acts on impulse or in fear or both. There may be borderline cases on the facts, but we think that the distinction is one which a jury would be able to recognise and apply.
- 3.136 We prefer this approach to the present requirement that the defendant should have acted in sudden and temporary loss of self-control (*Duffy*).⁷⁸ The *Duffy* test has been troublesome, and those who have commented on our provisional conclusions have largely welcomed its removal. From its earliest years, provocation was limited to a person who acted “on the sudden” (as it is put in some jurisdictions)⁷⁹ and not in considered revenge, but we think that Devlin J’s test in *Duffy*⁸⁰ was with hindsight an unsatisfactory way of doing so. The rule has operated harshly in so-called “slowburn” cases, where the defendant is acting out of fear rather than a considered desire for revenge. However, attempts to redress

⁷⁸ [1949] 1 All ER 932.

⁷⁹ See for example, Canadian Criminal Code, s.232(2); Northern Territory of Australia Criminal Code, s.34 (2)(c).

⁸⁰ [1949] 1 All ER 932.

the hardship by stretching the requirement for sudden and temporary loss of self-control to include slowburn cases have had undesirable side effects, as illustrated by *Baille*.⁸¹ In that case the defendant armed himself with a sawn off shot gun and cut throat razor, drove to the home of the deceased and shot him, because he had been supplying drugs to the defendant's teenage sons. His conviction for murder was quashed by the Court of Appeal on the ground that provocation ought to have been left to the jury as a possible defence on the slowburn approach. In our view it was a clear case of considered revenge.

- 3.137 **A person should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.** Without such a principle the extension of the defence to those who kill in fear could be nugatory, because (as the Royal College of Psychiatrists has pointed out) "many mental states that accompany killing also incorporate psychologically both anger and fear"⁸², in which case the killing may have an element of retaliation. In practice, we think that a jury would be able to differentiate between a defendant who killed out of fear, although angry at the same time, and a defendant who was not truly killing out of fear for their future safety (or that of the children) but for other reasons.

Exclusion of self-induced provocation

- 3.138 **The defence should not be available if the gross provocation relied upon was incited by the defendant for the purpose of providing an excuse to use violence.**
- 3.139 It has been pointed out to us, correctly, that this only deals with self-induced provocation in a narrow sense. In Consultation Paper No 173 we said as follows⁸³:

Self-induced provocation might be taken to refer to two different situations. In its narrower sense it would refer to a situation in which a defendant has formed a premeditated intent to kill or cause grievous bodily harm to the victim and incites provocation by the victim so as to provide an opportunity for attacking him or her. In that situation the "provocation" by the deceased will not in truth have been the cause of the fatal attack, which the defendant already intended. In a broader sense, self-induced provocation could also include a situation in which the defendant exposes himself or herself to the likelihood of provocation and then retaliates by killing the provoker. The conduct which exposes the defendant to the provocation might in itself be morally laudable (for example standing up for a victim of racism in a racially hostile environment), morally neutral or morally evil (for example blackmail).

⁸¹ [1995] Crim LR 739.

⁸² See para 3.99.

⁸³ Paras 12.59 - 12.62.

We can see strong arguments for a rule of law precluding self-induced provocation in the narrower sense from affording a partial defence to murder, and we can see no good argument to the contrary.

To exclude from a defence of provocation all forms of conduct which might fall within the broader sense of self-induced provocation would in our view go too far. While there is much to be said, for example, in denying the defence to criminals whose unlawful activities expose them to the risk of provocation by others, we see considerable problems in trying to devise a rule of law which would differentiate satisfactorily between forms of self-induced provocation in the broader sense which should, and which should not, preclude a defence of provocation. The circumstances are too potentially variable for a clear and simple rule.

We are not putting any particular question to consultees on the topic of self-induced provocation, **but we would be interested in any observations by consultees who disagree with our comments on this subject.**

- 3.140 We had no comments on those observations and we adhere to them. Where an issue arises about self-induced provocation in the broader sense, it would be for the jury to take a common-sense view whether the defendant's conduct met the requirements of the objective test.

Role of judge and jury

- 3.141 **A judge should not be required to leave the defence of provocation to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.**
- 3.142 If provocation is to be defined by general principles rather than specific categories, this proposal is important. The restoration of this power to the trial judge (which was removed by section 3 of the Homicide Act 1957), coupled with the supervision of the appellate courts, will enable the law to set boundaries in a reasoned, sensitive and nuanced way, whereas an inflexible statutory formula would have no room for development.
- 3.143 Consider, for example, the decision of the High Court of Australia in the leading case of *Stingel*.⁸⁴ The defendant stalked a former girlfriend. She obtained a court order preventing him from approaching her, but he ignored it. After a party he found her (according to his account) in a car with another man having sex. He was sworn at and told where to go. He fetched a knife from his car and killed the man. The judge withdrew the defence of provocation from the jury and the High

⁸⁴ (1990) 171 CLR 312.

Court upheld his decision. In *Smith (Morgan)*⁸⁵ Lord Hoffmann, agreeing with the decision, said:

Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover. In Australia the judge was able to give effect to this policy by withdrawing the issue from the jury. But section 3 prevents an English judge from doing so.⁸⁶

- 3.144 Under our approach provocation should not be left to the jury in such a case because we do not see how any reasonable jury, properly directed, could conclude there had been gross provocation or that a person of ordinary tolerance and self-restraint might have acted in the same way as the defendant.
- 3.145 Unfortunately our empirical evidence about the success rate of provocation defences before juries is not as good as our empirical evidence about the success rate of diminished responsibility. The evidence which we have tends to suggest that juries are less prone than is sometimes thought to return verdicts of manslaughter on grounds of provocation where the provocation alleged is simple separation or infidelity, but in our view such cases ought not to be left to the jury. To leave such a case to the jury would imply that a properly directed jury could reasonably conclude that a person of ordinary tolerance and self-restraint might respond to such a situation by killing the other person. We do not believe this to be so. More than fifty years ago in *Holmes*⁸⁷ Lord Simon said that Othello would be guilty of murder, even if Iago's insinuations had been true, and we think that this should be so.
- 3.146 There are also cases in which a defendant relies on additional taunts or insults. Any study of the history of the defence of provocation shows that it has changed as public values have changed, and that the change of social attitudes is a gradual process. Public opinion should not necessarily decide what the law should be, for public opinion may not be carefully thought out and the law may itself help to shape public opinion, but it should properly be taken into account. As part of our research we commissioned Professor Mitchell (Professor of Criminal Law and Criminal Justice at Coventry University) to interview a small group of individuals drawn from various parts of the country, who reflected a wide cross-section of backgrounds and personal circumstances, and a subgroup of next-of-kin of victims of unlawful homicide (contacted through the organisation Support After Murder and Manslaughter (SAMM)). Interviews were conducted with 62 respondents (including 15 SAMM respondents) and the interviews lasted on average for 1 hour 15 minutes.⁸⁸ The sample was small but nevertheless provided an interesting pointer towards public attitudes. The interviews were

⁸⁵ [2001] 1 AC 146.

⁸⁶ *Ibid*, at p 169.

⁸⁷ [1946] AC 588, 598.

⁸⁸ Professor Mitchell's report "A brief empirical survey of public opinion" set out in Appendix C.

recorded and contemporaneous notes made. Interviewees were given scenarios of various homicides and questioned about their assessment of the seriousness of each scenario. One scenario involved a husband who killed his wife because she had been having an affair. A variant involved the husband being taunted by the deceased about his sexual inadequacy when he confronted her about the affair. Just over half the respondents thought that this lessened the gravity of the crime, giving as their reason that the husband reacted spontaneously to the taunt. Interestingly, there was no significant difference between the replies of male and female respondents.

- 3.147 It is a sad commonplace that when relationships break up there are often arguments and mutual recriminations. We think that it would be seldom that words spoken in such a situation could legitimately make the other party feel severely wronged, to the extent that a person of ordinary tolerance and self-restraint in such a situation might have used lethal violence; but there may be cases where one party torments another with remarks of an exceptionally abusive kind or where one party's behaviour puts quite exceptional emotional pressure on the other. Unless the law is reduced to a formula which removes any evaluative function from the judge and jury (which we would not favour) there are bound to be borderline cases.
- 3.148 Examples of other cases which under our approach ought not to be left to the jury are *Baille*,⁸⁹ *Doughty*⁹⁰ and *Dryden*.⁹¹
- 3.149 We return to the question, discussed above, whether our approach to provocation is too vague. We think that to attempt to set the bounds of provocation within narrowly defined categories, for example, limiting it to cases of unlawful violence, would be too restrictive and that too inflexible an approach would rapidly prove to be unsatisfactory.
- 3.150 Our approach has been to seek to set out broad principles, to rely on the judge to exercise a judgement whether a reasonable jury could regard the case as falling within those principles and then to rely on the jury to exercise its good sense and fairness in applying them.
- 3.151 This will place significant responsibilities on the judge, but his or her decision whether or not to withdraw provocation from the jury will be given after argument from the prosecution and the defence and will require to be supported by reasons.

⁸⁹ [1995] Crim LR 739.

⁹⁰ [1986] 83 Cr App R 319. The defendant killed a crying baby. There would be a strong case for arguing that the defendant should be guilty of manslaughter rather than murder if he acted without intent to kill (as would be the case under the law of Scotland). But under our approach a crying baby could not be regarded as "provocation".

⁹¹ [1995] 4 All ER 987. The defendant killed a court official enforcing a court order. The court official acted in a perfectly proper manner and was only doing his duty. Under our approach his behaviour could not be regarded as provocation.

- 3.152 Nobody pretends that this is an easy area of the law, but we believe that this scheme would be workable and it would be a real improvement on the present law.

Accident or mistake

- 3.153 In an earlier draft of our proposals, which we circulated for informal discussion, we referred to “grossly provocative words or conduct or what the defendant [reasonably] believed to be grossly provocative words or conduct”. This provoked an interesting and difficult debate with a number of academics about whether the word “reasonably” should be included.

- 3.154 However, we have come to the view that it is not necessary to include any such provision. We have been influenced in this by Professor Ashworth, who commented:

I feel that the reasonableness requirement is out of place when we are thinking of people who are acting out of fear or anger and are therefore likely to be in a somewhat disturbed emotional state. Moreover, we have managed without a reasonableness requirement for mistake in provocation cases for almost a hundred years and probably longer.

- 3.155 Our research confirms that this has indeed been one part of the law of provocation which appears not to have been problematical and we do not wish to create problems. At common law, where there has been something which amounts to provocation, but the defendant made a mistake as to who was responsible for it, the defendant has been given the benefit of the mistake. (This was the case in *Brown* (1776),⁹² where the defendant mistakenly believed that the victim was part of a violent street mob.) We would expect the same to apply if, for example, through poor sight or poor hearing, the defendant believed mistakenly that he was being insulted or attacked. East in his *Pleas of the Crown* (1803) stated:⁹³

Yet still if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, and under that supposition killed him; although it should afterwards appear that there was no such design, it will only be manslaughter, or even misadventure; according to the degree of caution used, and the probable grounds for such belief.

- 3.156 The passage is not entirely clear, with its reference to “manslaughter or even misadventure according to the degree of caution used and the probable ground for such belief.” East referred to the case of *Brown*, commenting that “the circumstances being such as might reasonably have induced him to believe that the deceased was one of the [attackers], it was still but the same degree of offence”, although it does not appear from the report of *Brown* that the reasonableness of the defendant’s belief was an issue in the case.

⁹² 1 Leach 148, 168 ER 177.

⁹³ Vol. 1 p 273.

3.157 In *Letenock*⁹⁴ the defendant, a soldier, was convicted of murder after drunkenly killing a corporal. His defence was that he acted under the mistaken belief that the corporal was about to attack him. The judge directed the jury that his drunkenness was irrelevant unless he was so drunk as to be incapable of knowing what he was doing. The Court of Criminal Appeal quashed his conviction for murder and substituted a verdict of manslaughter. Lord Reading CJ said that:

The only element of doubt in the case is whether or not there was anything which might have caused the applicant, in his drunken condition, to believe that he was going to be struck.⁹⁵

This suggests that the question is whether there was any intelligible basis for the defendant's belief. If so, the defendant is entitled to be judged on the facts as he believed them to be, whether or not his belief was reasonable.⁹⁶

3.158 We would not expect or intend provocation to be available as a defence in a case where the defendant had no intelligible basis for believing in the supposed provocation. Professor Mackay's study on the diminished responsibility plea in operation has shown a number of cases where defendants have killed under a paranoid delusion about threatening or insulting conduct by the victim. In such cases we think that diminished responsibility, not provocation, is the appropriate defence.

3.159 The common law has also adopted a merciful position towards a defendant who in response to provocation attempted to attack the provoker, but by mistake hit the wrong target. Such a defendant was treated in the same way as if he or she had hit the intended target.⁹⁷

3.160 We think that the way in which the courts have dealt with accident and mistake in relation to provocation has been sound. There is no need, therefore, to supplement the common law in these cases.

⁹⁴ (1917) 12 Cr App R 221

⁹⁵ *Ibid*, at p 224.

⁹⁶ The law relating to self-induced intoxication as applied to defences to crimes of specific intent is controversial. See *O'Grady* [1987] QB 995; *O'Connor* [1991] Crim LR 135; McAuley, "The Intoxication Defence in Criminal Law" (1997) 32 Irish Jurist 243; Simester and Sullivan, *Criminal Law Theory and Doctrine* (2000) p 561; *Smith and Hogan, Criminal Law* (10th ed 2002) pp 246-247. The Law Commission is reviewing the general principles of criminal law in relation to intoxication and its bearing on criminal liability as part of its work on a criminal code and will be publishing a consultation paper in 2005.

⁹⁷ *Gross* (1913) 23 Cox CC 455; *Porritt* [1961] 1 WLR 1372.

DURESS

- 3.161 The Law Commission has in the past considered and made recommendations about duress as a defence to murder,⁹⁸ but these have not yet been accepted. We have not consulted again on duress as part of this project.
- 3.162 We therefore exclude from our proposals a defendant who kills or takes part in the killing of another person under duress of threats by a third person. We wish to make it clear that this does not represent a policy judgement that such a person should not be entitled to a defence or partial defence to murder. On the contrary, we have in the past advocated that duress should be available as a defence to murder. If, for example, a terrorist hijacks a motorcar and forces the driver to drive at gunpoint to a place where the driver knows that the terrorist intends to carry out a murder, and the terrorist does so, under English law both the terrorist and the driver are guilty of murder.⁹⁹ There is a strong case for arguing that this is unjust and that the driver should either have a complete defence or be guilty of a lesser offence. We believe that the matter needs to be considered, but any further consideration of the subject would fall within a wider review of murder.

EXCESSIVE FORCE IN SELF-DEFENCE

- 3.163 Since our proposal for provocation is that it should be recast in a way which would include (subject to safeguards) excessive force in self-defence, we do not propose a separate partial defence of that kind. This subject is discussed more fully in Part 4.

MERGER OF PROVOCATION AND DIMINISHED RESPONSIBILITY INTO A SINGLE DEFENCE

- 3.164 The proposal by Professors Mitchell and Mackay for a merger of these defences (discussed in Consultation Paper No 173 at paras. 12.77-12.81) has stimulated a lively debate in recent issues of the *Criminal Law Review*.¹⁰⁰
- 3.165 It attracted a small amount of support from consultees, but a far greater number were opposed to it. These included the Royal College of Psychiatrists who wrote that:

[W]e ... agree emphatically with your conclusion in your paragraph 61 [of your provisional conclusions paper], that the defences of provocation and diminished responsibility should not be merged into a single defence. Diminished responsibility and its underlying concepts of mental abnormality are complex enough already. We

⁹⁸ Most recently in Consultation Paper No 218 (1993) *Offences Against the Person and General Principles*, pp 48-64 and 104 –107 (clauses 25 and 26 of the draft Bill).

⁹⁹ This is the effect of *R v Howe* [1987] 1 AC 417.

¹⁰⁰ Mackay and Mitchell "Provoking Diminished Responsibility: Two Pleas Merging into One?" [2003] *Crim LR* 745; Chalmers "Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism" [2004] *Crim LR* 198; Gardner and Macklem "No Provocation Without Responsibility: A Reply to Mackay and Mitchell" [2004] *Crim LR* 213; Mackay and Mitchell "Replacing Provocation: More on a Combined Plea" [2004] *Crim LR* 219, and Susan Edwards "Abolishing Provocation and Reforming Self-Defence – the Law Commission's Options for Reform" [2004] *Crim LR* 181.

also think that provocation is probably a concept that the jury can understand relatively easily but we are not impressed that the complexities of mental abnormality are easily understood by jurors.

- 3.166 A merger of the two defences would not be compatible with our present thinking about the way in which the defence of provocation should be reshaped, and we do not recommend it.

BURDEN OF PROOF

- 3.167 In Consultation Paper No 173 we raised the question whether the prosecution should continue to bear the legal burden of disproving the defence of provocation. Of those respondents who addressed this issue, the majority thought that the burden should remain on the prosecution. We agree with this view, particularly in the light of two changes which we are recommending. One is that the judge should not leave the issue to the jury unless there is material on which a properly directed jury could reasonably conclude that the defence was available. The other is the extension of provocation to include cases where a defendant acts in fear of serious violence. If the burden is on the prosecution to disprove a full defence of self-defence, it seems fair in principle that the same should apply to the partial defence. Moreover, since the jury will in many cases have to consider both the full defence and the partial defence, we think that it would make for unnecessary complexity, as well as possible unfairness, if the jury were to be given different directions on the burden of proof in relation to the two defences.

RECOMMENDATIONS

- 3.168 We recommend that the defence of provocation should be reformed in accordance with the following principles:

1) Unlawful homicide that would otherwise be murder should instead be manslaughter if

the defendant acted in response to

(a) gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); or

(b) fear of serious violence towards the defendant or another; or

(c) a combination of (a) and (b); and

a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.

2) In deciding whether a person of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court should take into account the

defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.

3) 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.

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

5) The partial defence should not apply to a defendant who kills or takes part in the killing of another person under duress of threats by a third person.¹⁰¹

6) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

¹⁰¹ Pending a wider review of the law of murder. See paras 3.161-3.162.

PART 4

EXCESSIVE FORCE IN SELF-DEFENCE

INTRODUCTION

- 4.1 In Consultation Paper No 173¹ we presented the arguments for and against the development of a new partial defence of excessive force in self-defence. We asked consultees to consider two distinct options. One (option A) involved the extension of the common law defence of self-defence so as to provide a partial defence in circumstances where some force by the defendant, based on the defendant's subjective belief, was lawful but the amount of force used exceeded that which was reasonable. That option was limited to the defence of the person or another. The second (option C) involved the pre-emptive use of force in self-defence of the person or another in a situation where any use of force is presently unlawful because it would be in response to a threat of violence insufficiently imminent to give rise to the defence of self-defence. We consulted about two other options, B and D, which involved extending A and C respectively to include defence of property.
- 4.2 Only 12 consultees stated a preference for any form of partial defence of excessive force in self-defence being applicable to the defence of property. Of those, only two favoured option D.
- 4.3 The creation of a partial defence to murder based on excessive use of force in self-defence has been the subject of previous recommendations by the Criminal Law Revision Committee,² a House of Lords Select Committee³ and the Law Commission. Clause 59 of the Law Commission's draft Criminal Code⁴ would provide a partial defence to murder reflecting option B.⁵ It claimed support, as a

¹ See Part IX and paras 12.84 – 12.94.

² Fourteenth Report: Offences Against the Person (1980) Cmnd 7844, para 288.

³ Report of the Select Committee on Murder and Life Imprisonment, (1988-89) HL 78-I, para 89.

⁴ Law Com No 177.

⁵ Clause 59 provides:

A person who but for this section would be guilty of murder is not guilty of murder if, at the time of his act, he believes the use of force which causes death to be necessary and reasonable to effect a purpose referred to in section 44 (use of force referred to in public or private defence) but the force exceeds that which is necessary and reasonable in the circumstances which exist or (where there is a difference) in those which he believes to exist.

Clause 44(1) provides:

A person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable –

(a) to prevent or terminate crime, or to effect or assist in the lawful arrest of an offender or suspected offender or of a person unlawfully at large;

(b) to prevent or terminate a breach of the peace;

matter of principle, from the way the law had developed in Australia⁶ but also stated that the draft clause avoided the complexity and difficulty which was thought to have influenced the High Court of Australia when, in *DPP v. Zecevic*,⁷ it overruled its previous decision in *Howe*.⁸

- 4.4 For the reasons set out below we do not recommend that there should be a *separate* partial defence of excessive force in circumstances, respectively: where it was lawful for the defendant to use some force but not as much as was, in fact, used; or where there has been pre-emptive use of force where the threat of force was insufficiently imminent potentially to attract the defence of self-defence. In our view, insofar as there is a need for such a partial defence, it is sufficiently catered for within our recommendations for reform of the law of provocation.⁹

THE DEFENCE OF SELF-DEFENCE

- 4.5 Self-defence, at common law, provides a complete defence to any charge of fatal or non-fatal violence. A person (D) whose conduct and state of mind falls within the parameters of the defence does not act unlawfully and so is not guilty of any offence. Conversely, a person whose conduct and/or state of mind does not fall within the defence acts unlawfully and therefore stands to be convicted.
- 4.6 The basis of the present common law of self-defence is that D has a complete defence to a charge of assault (of whatever seriousness, including murder) if two requirements are met. The first is that D performs the external element of such an offence in defence of himself or herself, or another, from what he perceives as an actual or imminent unlawful assault. The second is that the steps that he takes are reasonable in the circumstances as D believes them to be. Thus, D is to be judged on the facts as he or she believes them to be.¹⁰ The question of whether the force used was reasonable in those circumstances is, however, an objective one to be answered by the jury. The tests were succinctly described in *Owino* as

(c) to protect himself or another from unlawful force or unlawful personal harm;

(d) to prevent or terminate the unlawful detention of himself or another;

(e) to protect property (whether belonging to himself or another) from unlawful appropriation, destruction or damage; or

(f) to prevent or terminate a trespass to his person or property.

⁶ Law Com No 177, vol 2, para 14.19, citing *Howe* (1958) 100 CLR 448.

⁷ (1987) 162 CLR 645.

⁸ (1958) 100 CLR 448.

⁹ As we explain in Part 3.

¹⁰ *Williams (Gladstone)* [1987] 3 All ER 411 where it was held that if a defendant was labouring under a mistake of fact as to the circumstances when he committed an alleged offence, he was to be judged according to his mistaken view of the facts regardless of whether his mistake was reasonable or unreasonable. The reasonableness or otherwise of the defendant's belief was only material to the question of whether the belief was in fact held by the defendant at all. See also *Beckford* [1988] AC 130.

“a person may use such force as is [objectively] reasonable in the circumstances as he [subjectively] believes them to be.”¹¹

- 4.7 If the force used is more than is objectively reasonable in the circumstances as D believed them to be, then D will not be able to successfully use the defence of self-defence. This is so even if D believed that the force deployed was reasonable. In this sense, the defence is “all or nothing”. If successful the verdict will be an acquittal but if not it must be a conviction. This obvious result is unproblematic where the offence charged is non-fatal violence; the court has discretion in its powers of sentencing to reflect the facts of the case. The position is different where the offence charged is murder due to the existence of the mandatory life sentence. Whilst the alternative offence of manslaughter is available where the “partial defences” of provocation and diminished responsibility succeed, the law does not presently allow for a partial defence where excessive force in self-defence has been used. It is the possibility of developing such a partial defence that we examine in this chapter.
- 4.8 That self-defence operates in the same “all or nothing” manner for murder, as it does for other offences, has indisputably been the position since the decision of the Privy Council in *Palmer*.¹² In that case the issue for the court was whether, on a charge of murder, there was a rule of law which required the jury to be directed that D should be found guilty of manslaughter if they concluded that D may have acted in self-defence but were sure that he used more than reasonable force. The Privy Council concluded that there was no such rule.¹³ The speech of Lord Morris of Borth-y-Gest set out what has come to be regarded as the classic exposition of the law of self-defence; a person who is attacked may defend him or herself but may only do what is reasonably necessary, which is a matter for the jury to decide.¹⁴
- 4.9 This decision of the Privy Council was reached after a detailed consideration of English authority. It included consideration of a number of nineteenth century cases which were cited as support for the contention that there was such a rule.¹⁵ In addition, detailed consideration was given to the judgment of the High Court of Australia in *Howe*¹⁶ which was cited by the appellant in support of the proposition that there was a partial defence of excessive use of force in self-defence. Thus, the decision in *Palmer* was based on a full consideration of domestic and comparative authority.

¹¹ *Owino* [1996] 2 Cr App R 128, 134, citing Criminal Law Revision Committee, Fourteenth Report: Offences Against the Person (1980) Cmnd 7844.

¹² [1971] AC 814.

¹³ *Ibid*, at p 824.

¹⁴ *Ibid*, at pp 831-832.

¹⁵ *Ibid*, at pp 824-826. It is worthy of note that a number of these authorities predated the drafting of the Indian Penal Code which provides for a partial defence to murder of excessive use of force in self-defence. We consider this below. It may be that the author of the Code believed that such a provision reflected the then state of the common law. If so, the Privy Council, after detailed examination, does not appear to have shared that view.

¹⁶ (1958) 100 CLR 448.

- 4.10 The apparent harshness of the conclusion that, in cases of murder, self-defence is an “all or nothing” defence and that there is no partial defence was, however, mitigated by two important elements in the exposition of the defence in that case. The first is expressed in the passage set out below. This passage has invariably provided the basis of guidance given by trial judges to the jury on the approach to take where the circumstances, or the inability of defendant to explain himself, deny the jury a fully reasoned account for what happened.

If there had been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be the most potent evidence that only reasonable defensive action had been taken.¹⁷

The second demonstrates how, notwithstanding the complete nature of the defence, the facts which fall short of substantiating self-defence may, nonetheless, form the basis for a conviction for manslaughter:

The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then that matter would be left to the jury.¹⁸

This decision was followed in *McInnes*¹⁹ where the Court of Appeal expressed itself in the following terms:

[I]f [a plea] of self-defence fails for the reason stated, it affords the accused no protection at all. But it is important to stress that the facts upon which the plea of self-defence is unsuccessfully sought to be based may nevertheless serve the accused in good stead. They may, for example, go to show that he may have acted under provocation or that, although acting unlawfully, he may have lacked the intent to kill or cause serious bodily harm, and in that way render the proper verdict one of manslaughter.²⁰

- 4.11 *Palmer* was followed by the House of Lords in *Clegg*.²¹

- 4.12 Some consultees have suggested that although the *Palmer* direction is theoretically generous to the defendant, it does not always work justly where a

¹⁷ *Palmer* [1971] AC 814, 832.

¹⁸ *Ibid*, at p 832.

¹⁹ *McInnes* [1971] 1 WLR 1600.

²⁰ *Ibid*, at p 1608, *per* Edmund Davies LJ.

²¹ [1995] 1 AC 482. See paras 9.10 – 9.11 of Consultation Paper No 173.

weaker party uses a degree of force against a stronger opponent which is greater than would be proportionate as between people of equal strength. We endorse what was said in response to Consultation Paper No 173 by HHJ Goddard QC about such a case:

Such a woman may use a weapon against an unarmed but violent man. I believe that I could properly direct a jury that the use of a weapon in circumstances does not per se rule out self-defence i.e. necessarily make the woman's acts unlawful because the jury have to consider the nature of the threat against the background.

4.13 However, from consultees' responses, it appears that not all judges give directions to juries about the need to carefully consider the disparity of strength and vulnerability between the defendant and the other party in cases where it is relevant on the facts.

4.14 It is axiomatic that directions need to be appropriate to the facts of the case. We suggest, however, that the Judicial Studies Board may wish to consider whether it would be helpful for it to provide for use in appropriate cases a specimen direction for trial judges to consider adopting or adapting. That direction would invite the jury to take account of any disparity between the protagonists which may affect their perception of reasonableness of the fatal force used by the defendant. We put forward for consideration:

It is insufficient to weigh the weapons used on each side; sometimes there is an imbalance in size and strength. You must also consider the relationship between the defendant and [the other party]. A defendant who has experienced previous violence in a relationship may have an elevated view of the danger that they are in. They may honestly sense they are in greater danger than might appear to someone who has not lived through their experiences. All these matters should be taken into account when considering the reasonableness of the force used.²²

4.15 This is no more than a skeleton which would need to be adapted or expanded according to the facts. Vera Baird QC MP proposed the following new direction on self-defence. She states that although this direction is designed primarily for a female under attack from a man, paragraph 4 may be equally applicable to a man in the event that the same issues about imbalance of strength arose.

1. Self-defence is not just for two evenly matched people in a street fight, it can also present in a way which requires more careful evaluation of its elements. This is such a case. It is insufficient to weigh what weapons were used on each side. Sometimes there is an imbalance in size.

2. And gender is an important factor. Of course little girls fight as well as little boys and it is not unknown for adult women to fight, but it is rare. It is common sense, but also clear from crime figures, that it is overwhelmingly males rather than females who fight and there

²² Adapted from a suggested formulation put forward by Justice for Women.

is an awareness of the possibility of needing to defend oneself in a man's psyche in a way which is not present for most women. It is part of social conditioning for a man, though it plays a low-level role in their makeup in times of peace and for most of men's lives. If attacked most men would be able to parry and retaliate in a reasonable way. You should make allowances for this absence of social conditioning, about how to deal with a fight, in a woman.

3. In addition, men fear injury less than women. If a fist came at a woman, she would be afraid that her nose would be smashed, lips burst and mis-shaped, a punch to the breast would be a more painful and intimate an injury. Women are more vulnerable physically and more fearful of being permanently damaged and are, for those reasons too, less likely to be composed enough to measure their response, when under attack.

4. They are usually weaker than men and would be less confident that any blow they used in return would be strong enough to discourage further violence, as opposed to annoying their assailant and provoking more. A man would know his own strength and expect to have a rough measure, from that, of how strong his opponent is likely to be.

5. There is still a judgement for you to make but it is not, in case of a woman under attack from a man as easy as it would be to assess proportionality between roughly equivalent protagonists of the same sex.

- 4.16 We would not suggest a specimen direction of that length, but the important thing is that the judge should identify factors which the jury ought fairly to have in mind in considering the defendant's perception of her or his danger and the reasonableness of her or his conduct.

THE CASE FOR SOME FORM OF PARTIAL DEFENCE TO MURDER WHICH IS ROOTED IN A RESPONSE BASED ON FEAR

Different sources of concern

- 4.17 The case for a partial defence to murder based on fear may be said to arise in two types of situation. The first is where the force used is unlawful, because it is excessive, even though the circumstances are such that some use of force would have been lawful in self-defence. The second is where the threat of attack was insufficiently imminent to attract any possible defence of self-defence.
- 4.18 The arguments in favour of the creation of such a partial defence have concentrated on two categories of defendant.
- (1) The householder who responds in fear of physical attack from an intruder and, whom it is said, the present law places in the exquisite dilemma of having to respond "reasonably" or not at all.
 - (2) The abused child, or adult, who fears further physical abuse at the hands of a serial abuser, who perceives no prospect of escape and who is well aware that there is such a physical mismatch that to respond directly and proportionately to an attack or an imminent attack will be futile and dangerous. Such a person, who uses disproportionate force, or who

chooses an advantageous moment to strike, is unassisted by the law of self-defence and may only obtain the benefit of a partial defence by distorting their true case, including, sometimes, their mental state, or by the willingness of the courts to distort the law in order to do justice.

The substance of these concerns

The threatened householder

- 4.19 As we have indicated in Part 3, there is a strongly held view among many members of the public that the law is wrongly balanced as between householders and intruders. We think that much of that public anxiety is based on a misunderstanding of the present state of the law, contributed to by incomplete understanding of certain notorious cases. We accept, however, that the law should provide explicitly for a partial defence to a charge to murder where a person of ordinary tolerance and self-restraint acts in fear of serious physical violence to himself or another. We acknowledge that such a person, though genuinely acting in fear, might not always act “reasonably” so as to attract the full defence of self-defence. In such a case, we conclude, he or she should not be convicted of murder but should receive a conviction which reflects his or her lesser degree of culpability. The law of self-defence should not be a case of “all or nothing”.

The abused person who kills

- 4.20 Criticism of the law of self-defence by those commentators concerned about abused people who kill tends to be focussed on what are perceived to be two separate limitations of the common law. First, it is said that the objective requirement of reasonableness applied to the amount of force used in response to the attack, or threat of attack, does not operate in a way that is realistic.²³ The requirement of proportionality as between attack and defence, which informs the decision whether the force deployed by the defendant was reasonable, is criticised as reflecting only cases where adversaries are of comparable strength. It is said that it fails adequately to reflect cases where there is a gross discrepancy in the strength of the protagonists, typically where the assailant is an adult male and the defender a child or a female. In such cases²⁴ the discrepancy in physical strength may force the person being abused to defend him or herself with an instrument, such as a knife, the use of which may result in the force being considered excessive.²⁵
- 4.21 Second, it is said that the common law fails to assist those abused people who kill their abusers when they are asleep or otherwise defenceless. They are precluded from being able to rely on self-defence because, in order to do so, they

²³ A McColgan, “In defence of battered women who kill” (1993) 13 Oxford Journal of Legal Studies 508 at p 515.

²⁴ *Ibid*, at p 520.

²⁵ S Edwards, “Injustice that puts a low price on a woman’s life” The Times, 2 September 2003 Law Supplement, at p 5. See also S Edwards, “Abolishing Provocation and Reframing Self-Defence-the Law Commission’s Options for Reform” Crim LR [2004] 181.

need to be able to demonstrate that the killing was necessary to resist actual or imminent violence. Accordingly, the view has been expressed that reform should “contemplate a re-thinking of self-defence, and a radical shift in some of the ideas that underlie it.”²⁶

- 4.22 Some consultees²⁷ have said that the absence of a partial defence of excessive force in self-defence means that abused people who kill often feel constrained to accept a plea to manslaughter on the basis of provocation or diminished responsibility rather than contest a trial on the basis of self-defence. This is for several reasons. First, the risk of conviction is high when the proportionality requirements of self-defence are juxtaposed with the, apparently inconsistent, requirement of loss of control necessary for provocation. Second, the “all or nothing” nature of the complete defence of self-defence²⁸ is too risky an option for a defendant when there is no partial defence available as an alternative.
- 4.23 We recognise that there may be cases in which a defendant’s conduct is unlawful because there is no immediate risk to the defendant (or another), or no sufficiently serious immediate risk to justify the defendant’s conduct, and yet the defendant has acted in genuine fear. One obvious example is the abused woman who kills her violent partner though not subject to an actual or imminent threat of serious violence. Provided the defendant was genuinely in fear of such serious violence and a person of ordinary tolerance and self-restraint might have responded in the same or a similar way, the partial defence of provocation we recommend in Part 3 would be available. It would be open for the jury to convict of manslaughter if they thought that the killing was the type of response which a person of ordinary tolerance and self-restraint might make in the circumstances notwithstanding that the force used was unreasonable so as to deny the defendant the complete defence of self-defence.
- 4.24 The availability of the partial defence recommended in Part 3 based in part on a response to fear would, in our view, make it easier than it is at present for defendants to run self-defence where that was the true nature of their case. Whilst we accept that there is a risk that in some cases juries might “compromise” and return a manslaughter verdict, whereas presently they would acquit on grounds of self-defence, we accept the views of our practitioner consultees who are more concerned that self-defence is simply not being run when it might be.

Conclusion

- 4.25 We believe that the reformulation of the partial defence of provocation that we recommend in Part 3 is a principled approach. It accommodates the legitimate concerns about specific categories of defendant, namely: the householder who responds to an intruder by the use of lethal violence and the person who has

²⁶ C Wells, “Battered Woman Syndrome and defences to homicide: where now?” (1994) 14 *Legal Studies* 266 at p 272.

²⁷ Justice for Women, Vera Baird QC MP, Jane Miller QC.

²⁸ Consultation Paper No 173 para 9.4.

been the subject of abuse and who, in extremis, responds lethally out of fear of serious violence, whether or not actual or imminent.

- 4.26 Furthermore, by introducing a robust, objective test based on the person of ordinary tolerance and self-restraint as a controlling mechanism, we believe that we have reduced to a minimum the possibility of the reformulation being used to extend the partial defence beyond its proper boundaries. This is, we believe, enhanced by giving the trial judge the power to remove the issue from the jury.

THE REASONS FOR NOT RECOMMENDING A SEPARATE PARTIAL DEFENCE OF EXCESSIVE USE OF FORCE IN SELF-DEFENCE

- 4.27 In Part 3 we have identified the concerns, which were expressed to us in the course of the consultation, that it was unwise to combine a fear and anger based defence within the single rubric of “provocation”. We explained in that part why we disagree with that view and that, in our view, nothing is lost but much gained in doing so. It would be possible, however, for us to respond to this concern by providing, in addition to our recommended reformulation of provocation, a separate partial defence of excessive use of force in self-defence.
- 4.28 One way of achieving this would be to have a defence which replicated the features of our reformulation but placed the “fear” based partial defence in a separate section. In our view this would be undesirable. As we have indicated, one of the strengths of having a single partial defence which potentially combines both emotions is that it accurately reflects reality, as perceived by the psychiatric community, and it reflects everyday experience. Having a separate defence would deny us this benefit.
- 4.29 Our reformulated provocation defence would be available to the defendant who acted through fear of serious violence to himself or another. That is a partially subjective requirement and, as such, it reflects the present state of the law of self-defence. The potential width of application of our recommended provocation partial defence is kept strictly in bounds by the further, objective, requirement that, “a person of ordinary tolerance and self-restraint might have acted in the same way as the defendant”. We do not think that this is an undue limit on the availability of such a defence. The defence works through the acknowledgement that even a person of ordinary tolerance and self-restraint might, on occasion, respond in fear by using an unreasonable amount of force. Without such a limitation the defence would be open, for example, to any professional criminal who decided that it was necessary to respond to threats of violence from a rival gang by a private execution.
- 4.30 In summary, in our view, our proposed reformulation set out in Part 3 will be the simplest and most effective way of ameliorating the deficiencies of the present law.
- 4.31 **We do not, therefore, recommend a specific separate partial defence to murder based on the excessive use of force in self-defence.**

PART 5

DIMINISHED RESPONSIBILITY

INTRODUCTION

5.1 Section 2 of the Homicide Act 1957 provides:

- (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing;
- (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder;
- (3) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

5.2 In Consultation Paper No 173¹ we asked whether consultees favoured:

- (1) **abolition of diminished responsibility, whether or not the mandatory sentence is abolished;**
- (2) **abolition of diminished responsibility, conditional upon abolition of the mandatory sentence;**
- (3) **retention of diminished responsibility, whether or not the mandatory sentence is abolished?**

What are their principal reasons?

5.3 Only about half of those who have commented on our Consultation Paper addressed the partial defence of diminished responsibility. What conclusion, if any, should be drawn from this? One is that there is a considerable body of opinion which believes that the partial defence is, in principle, justified, that it should continue to exist and that it is not in need of any significant reform. We should, however, be cautious about drawing such a conclusion from mere silence. Those who did not address the defence included mainly lay persons, whose responses were, mainly, brief and were directed to supporting the position

¹ Para 12.72.

principally articulated by Justice for Women, which focused on provocation and the pre-emptive use of force in self-defence.²

- 5.4 Before setting out our recommendations, we wish to make certain preliminary observations.
- 5.5 First, as we have indicated in Part 2,³ some consultees made it clear that they wished to see a wider review of the current law of homicide. Many of them did not focus on whether, in the meantime, the defence of diminished responsibility should be retained and, if so, in what form.
- 5.6 Second, a small number of consultees either expressed the view that it made “little sense” to review the law of diminished responsibility in isolation,⁴ or expressed regret that our terms of reference did not permit or require us to examine the whole area of mental abnormality, including the defence of insanity.⁵ In one response the authors prefaced their answers by saying that they favoured “a general review of the law relating to the effect of mental impairment on criminal liability”.⁶
- 5.7 Third, the most recent statistics contained in Crime in England and Wales 2002/2003: Supplementary Volume 1: Homicide and Gun Crime (01/04, January 2004) reveal that in 2001/2002 for the first time the total number of successful diminished responsibility pleas fell below 20 (the figure for 2000/2001). In 2001/2002 there were 15 successful pleas. The same table also shows that for 2002/2003 the number of convictions for manslaughter under section 2 was as few as five.⁷
- 5.8 Finally, we should bear in mind that, whereas all the other common law jurisdictions⁸ have a partial defence of provocation, though in various terms, the same is not true of diminished responsibility.⁹ The defence is not recognised in

² Justice for Women does, in fact, support the retention of diminished responsibility as a partial defence even if the mandatory sentence is abolished. It also supports the retention of the current formulation of the defence although, arguably, without a great deal of enthusiasm. Its support of the current formulation appears to be founded on the belief that it is better than the other alternatives posited in that it is the least “narrowly medically defined version”.

³ Paras 2.12 – 2.16 above.

⁴ Nicky Padfield.

⁵ JUSTICE.

⁶ The joint response of HHJ Clement Goldstone QC, HHJ Maddison, Honorary Recorder of Manchester and HHJ Geake.

⁷ Home Office Statistical Bulletin 01/04, cited in the Sentencing Advisory Panel Consultation Paper, Sentencing of manslaughter by reason of provocation, 11 March 2004. The 2002/2003 figures are, of course, not full year statistics. They appear, nonetheless, to be consistent with the trend observed. The next set of statistics, which will provide the full year statistics for 2002/2003, will be available in January 2005.

⁸ With the singular exception of Tasmania.

⁹ For a more detailed summary see Part VIII of Consultation Paper No 173.

either Canada or New Zealand.¹⁰ In Australia some, but not all, jurisdictions recognise the defence.¹¹ In Ireland the defence has not been recognised although clause 5 of the Criminal Law (Insanity Bill) 2002 would, if enacted, introduce the defence into Irish law.¹² It would operate as a partial defence solely within the confines of murder.¹³

A. ABOLISH OR RETAIN THE DEFENCE?

Retention of the defence as long as the mandatory life sentence is retained

- 5.9 Only one consultee expressly favoured abolition of the defence even if the mandatory life sentence for murder is retained.
- 5.10 There is, therefore, overwhelming support from those consultees who addressed the issue for the retention of a partial defence of diminished responsibility for as long as there is the mandatory life sentence for murder. We agree.
- 5.11 **We recommend that for as long as there is a mandatory sentence of life imprisonment for all who are convicted of murder there should be a partial defence of diminished responsibility which would reduce what would otherwise be a conviction of murder to one of manslaughter.**

¹⁰ Canada retains the mandatory life sentence for murder with different minimum periods of parole eligibility depending on whether the case is one of first or second-degree murder. In Canada there is a more expansive defence of insanity than that contained in the M'Naghten Rules, although it does not extend to volitional defects. In New Zealand the Sentencing Act 2002 provides that the maximum (rather than the mandatory) sentence for murder is life imprisonment, with a presumption in favour of its imposition in nearly every case where there is at least one serious aggravating factor. At a time when the mandatory sentence was applicable in all cases of murder, the New Zealand Law Commission did consider diminished responsibility in its investigation into criminal defences available to abused women who kill their partners (*Report on Some Criminal Offences with Particular Reference to Battered Defendants* Report 73 (2001)). The Commission recommended, at para 140, that the defence should not be adopted. In Appendix D to Consultation Paper No 173, Professor Brookbanks suggests, at paras 68-71, that it is arguable that the defence "has insinuated itself into New Zealand law via the 'back door' of provocation."

¹¹ It is not recognised in South Australia, Tasmania, Victoria, in each of which there is no mandatory sentence for murder, and Western Australia. In 1991 the Western Australia Law Commission recommended that a defence of diminished responsibility be introduced (*Criminal Process and Mental Disorder* Final Report No 69). The defence is recognised in Australian Capital Territory, New South Wales, Queensland and Northern Territory. In Queensland and Northern Territory there is a mandatory sentence for murder. In Australian Capital Territory and New South Wales the life sentence is discretionary. In *Report on Partial Defences to Murder: Diminished Responsibility* Report 82 (1997) para 3.20, the New South Wales Law Reform Commission "strongly recommended" that the defence should be retained notwithstanding the recent abolition of the mandatory sentence.

¹² As with Canadian law, Irish law adopted a more expansive test of insanity than the M'Naghten Rules. Indeed, the Irish test is more generous than that found in Canadian law in that it incorporates 'volitional insanity' (*Doyle v Wicklow County Council* [1974] IR 55).

¹³ The explanatory memorandum to the Bill states that there is no need to apply the concept in the case of other crimes where there is no mandatory sentence.

Retention of the defence even if the mandatory sentence of life imprisonment for murder were to be abolished

- 5.12 Opinion was divided on the merits of retaining the defence if the mandatory life sentence were to be abolished.¹⁴ All the non-governmental organisations, which addressed the issue, are in favour of retaining the defence. The preponderance of responses from academics and from individual members of the legal profession or organisations representing members of the legal profession was in favour of its retention. On the other hand, apart from those representing different levels of the police force, the professional bodies that addressed the question favoured abolition of the defence of diminished responsibility conditional on abolition of the mandatory life sentence. Judicial opinion was much more evenly balanced with 15 consultees favouring retention and 13 against.¹⁵
- 5.13 Overall, the preponderance of responses favoured retention of the defence even if the mandatory life sentence were to be abolished. It was not, however, an overwhelming preponderance. Thus were we, in this Report, to express a firm view on the merits of retaining the defence even if the mandatory life sentence were to be abolished, we would acknowledge that, whatever the view we expressed, it would be contrary to a considerable body of informed opinion.
- 5.14 We have thought it best not to express any such view. As has been made clear to us, there is no prospect of the removal of the mandatory life sentence for as long as the substantive law of murder remains in its unreformed state. We have, in Part 2, argued that the sound development of the substantive law of murder, including the existence and form of partial defences, together with the appropriate sentencing regime, requires a systematic review of the subject which the Law Commission is presently willing and able to undertake. Consideration of the place, if any, and the form of a partial defence of diminished responsibility in such a reformed law of voluntary homicide is best left to such an exercise. We think it useful, however, in order to inform further consideration of this subject, briefly to set out the arguments advanced on either side of the debate in response to our Consultation Paper.

Some introductory comments

- 5.15 One response¹⁶ referred to the Report of the Royal Commission on Capital Punishment 1949 – 1953.¹⁷ That Report did not recommend the introduction of

¹⁴ There were 68 responses which directly expressed an opinion. 44 favoured retention of the defence regardless of whether or not the mandatory sentence were to be abolished. That included the Rose Committee which represents the views of a number of the senior judiciary.

¹⁵ As pointed out above, the response of the Rose Committee represents the views of a number of senior judges. In addition, one response in favour of retention expresses the joint views of HHJ Clement Goldstone QC, HHJ Maddison, Honorary Recorder of Manchester and HHJ Geake. Thus, if one counts individuals as opposed to responses, the majority in favour of retention is more substantial.

¹⁶ JUSTICE. For a brief description of the reasoning and conclusions of the Royal Commission in relation to diminished responsibility see Consultation Paper No 173 Part VI paras 6.1 - 6.9.

¹⁷ (1953) Cmd 8932.

diminished responsibility as a defence (partial or otherwise) to murder. The reason was that it was felt that forms of mental abnormality, which resulted in a diminution of responsibility, were of frequent occurrence and potentially of importance to a wide range of offences. The Commission was of the view that its terms of reference did not allow it to consider offences other than murder. Further, as far as murder was concerned, it believed that a “radical” amendment to the existing law would not be justified for the “limited” purpose of enabling the court to take account of a special category of “mitigating” circumstances in cases of murder so as to avoid passing the death sentence.

- 5.16 Views expressed over fifty years ago, even those of a Royal Commission, need to be carefully scrutinised and considered, particularly when it is remembered that Parliament, in 1957, did not accept the Royal Commission’s advice but instead opted for what the Royal Commission had rejected. Nevertheless, the views expressed by the Royal Commission are of interest. The Royal Commission, referring to diminished responsibility as developed by Scots law, referred to it as “a device to enable the courts to take account of a special category of mitigating circumstances in cases of murder”.¹⁸
- 5.17 This is of interest because most of the consultees who supported abolition of diminished responsibility, provided the mandatory sentence were to be abolished, were of the view that the issues raised by the defence are no more than issues of mitigation which go to sentence.¹⁹ Adherents to this view emphasised that, in any other context, the issues raised by mental abnormality short of insanity are considered in the course of a “rational sentencing exercise”.²⁰

Arguments in favour of retention of the defence of diminished responsibility

- 5.18 The main rationale which underlies the body of opinion favouring retention of diminished responsibility, even if the mandatory life sentence were to be abolished, can be summed up in the phrase “fair and just labelling”. Consultees frequently expressed the view that it is unjust to label as murderers those not fully responsible for their actions. Some consultees²¹ referred to the stigma which attaches to a conviction for murder, the most serious of all crimes.²² According to those consultees, the reason why it is unjust is that their *culpability* is diminished.

¹⁸ *Ibid*, at para 413.

¹⁹ A view very forcibly expressed by Buxton LJ.

²⁰ *Per* Buxton LJ.

²¹ Mr Justice Richards; Mr Justice Poole.

²² As, indeed, the Law Commission did in 1989 in its Memorandum to the Select Committee on Murder and Life Imprisonment, in which it favoured abolition of the mandatory sentence but retention of diminished responsibility as a partial defence to murder (*Minutes of Evidence taken before the Select Committee on Murder and Life Imprisonment* (1988-89) HL Paper 20-vi, *Memorandum by the Law Commission* para 9.16).

Reduced culpability should be reflected in “fair and just labelling” and not just by mitigation of sentence.²³

- 5.19 This rationale merits two comments. First, the frequent reference to culpability is problematic because, traditionally, English law has employed the concept of mens rea (in conjunction with actus reus), and in particular the distinction between intention and subjective recklessness, as a means of assessing culpability and labelling conduct.²⁴ Murder stands at the apex of offences of physical violence because of the requirement of intent attached to the actus reus of unlawful killing. The partial defences represent an exception to the general approach precisely because they only come into play if the jury is satisfied beyond reasonable doubt that the defendant committed the conduct element and had the mens rea of murder. Further, they are not a complete defence exculpating the defendant from all liability.²⁵ Some would maintain that, for this reason, these partial defences are anomalous and owe their existence solely to the respective mandatory sentencing regimes, which have always existed for murder.
- 5.20 Professor Ronnie Mackay recognised the contradiction, namely that diminished responsibility allows a defendant to be convicted of one offence when he has the mens rea, and, on the traditional analysis, the culpability of another and more serious offence but stated:

There is, in my view, a clear moral distinction between murder and a diminished responsibility killing despite the presence of the mens rea of the former offence ... what is needed is a newly crafted plea which more appropriately reflects this moral distinction.²⁶

²³ A view strongly held by the New South Wales Law Reform Commission: “people who kill while in a state of substantially impaired responsibility should not be treated as ‘murderers’” (*Report on Partial Defences to Murder: Diminished Responsibility* Report 82 (1997) para 3.18). Mr Justice Stanley Burnton agreed that “the culpability of someone with reduced or damaged mental functioning is not the same as that of a normal and healthy person”. He, however, favoured the abolition of the defence provided the mandatory life sentence is abolished.

²⁴ Examples are the offences contained in the Public Order Act 1986. At the meeting with JUSTICE, Anthony Edwards, solicitor, cited these as an illustration of “fair and just labelling”. He argued that by analogy the partial defences should be retained regardless of the fate of the mandatory life sentence.

²⁵ Such as self-defence.

²⁶ This raises an important point and one which is not confined to the present context. Do we need to acknowledge that gradations of culpability are not always properly reflected by the intent/recklessness divide? Professor Sullivan – one of our consultees – has elsewhere written that “if particular incidents are appraised in terms of *substantive* (our emphasis) values we may be confronted with legal classifications which appear counter-indicated in moral terms” (“Intent, Subjective Recklessness and Culpability” (1992) 12 *Oxford Journal of Legal Studies* 380, 380). We may believe that the way we *legally classify* conduct should not be affected by either honourable or dishonourable *motives* but still maintain that mental disorder, although not negating mens rea, should be capable, if sufficiently serious and relevant, of impacting on traditional legal classifications. If, however, the reason for allowing mental abnormality to impact on legal classification is in order to reflect a moral distinction, those who advocate such an approach need to explain why other conduct resulting from honourable motives should not be afforded the same treatment. Some, of

5.21 Second, if the defence is necessary and desirable for labelling purposes, why should it be confined to the offence of murder? If the person who kills with the mens rea of murder can and should be labelled as somebody other than a murderer because of reduced responsibility, then why not the person who is guilty of attempted murder (with its stricter mens rea requirement) or who inflicts grievous bodily harm with intent? This issue is addressed by very few of our consultees, no doubt because non-fatal offences of violence are outside our terms of reference.²⁷

5.22 Apart from the need to ensure fair and just labelling, a number of other factors were mentioned in individual responses:

- the out-dated nature of the insanity defence as contained in the M’Naghten Rules. The narrowness of the Rules, in the sense of their preoccupation with cognitive understanding, is seen as reinforcing the need for a partial defence of diminished responsibility. In addition, the stigma which attaches to being labelled “insane” makes defendants reluctant to plead insanity;²⁸
- the need to enable jurors to convict a defendant of a homicide offence in cases where, if the only conviction open to them was for murder, they might otherwise (perversely) acquit altogether;²⁹
- the importance of ensuring that the issue, which goes to the culpability of the defendant, is determined by a jury and not by the judge as part of the sentencing process.³⁰

course, would say that the way diminished responsibility has been allowed to develop and operate has been as a means of affording legal recognition to honourable motives. The “mercy killer” is convicted of manslaughter rather than murder because of her honourable motives rather than because she is mentally disordered.

²⁷ No consultee who supported retention of the defence even if the mandatory life sentence were to be abolished argued that it should also be extended to other defences. Two consultees referred to the issue. HHJ John Griffith Williams QC, Honorary Recorder of Cardiff, stated that it is “unacceptable that the defence is unavailable to those charged with attempted murder and other serious offences”. He, however, favoured the *abolition* of the partial defence provided that the mandatory life sentence is abolished. Mr Justice Silber thought that the justification for restricting it to murder was the huge differential in sentences imposed for murder and those for manslaughter when the partial defences succeed.

²⁸ Judge Advocate Camp, Assistant Judge Advocate General; Mr. Justice Silber; Professor Ronald Mackay.

²⁹ Mr Peter Glazebrook. Mr Justice Silber made the same point although this was in the course of discussing provocation. The majority of the Criminal Law Revision Committee referred to this factor as a reason for retaining the defence even if the mandatory sentence was abolished (Fourteenth Report: Offences Against the Person (1980) Cmnd 7844).

³⁰ Spencer Stephens, solicitor. The majority of the Criminal Law Revision Committee, *ibid*, were influenced by this factor. It is a consideration which weighed very heavily with the New South Wales Law Reform Commission. It described it as being of “vital importance” (*Report on Partial Defences to Murder: Diminished Responsibility* Report 82 (1997) para 3.11). It did not, however, persuade the New Zealand Law Commission when it was considering what defences should be available to abused women who kill (*Report on*

- the need to ensure public confidence in sentencing. Sentences passed by judges following a finding by a jury that the defendant is guilty of manslaughter by reason of diminished responsibility are more likely to find public acceptance than sentences passed following a conviction for murder;³¹
- the need in a disputed case for a jury, rather than a judge, to determine between experts whether responsibility is diminished;³²
- the fact that diminished responsibility is presently often the only defence to murder available to abused women “driven to kill”;³³
- the fact that the defence may enable a merciful but just disposition of certain types of case where all parties consider it meets the justice of the case.³⁴

RESERVATIONS EXPRESSED BY THOSE WHO FAVOUR RETENTION OF THE DEFENCE

The pathologising effect of the defence

- 5.23 Not all the consultees who favoured retention of the defence viewed it with equanimity. There were reservations expressed, particularly by women’s groups, about the way the defence operates. These reservations centred on its pathologising effect.
- 5.24 The Middlesborough Domestic Violence Forum, Justice for Women, Rights of Women, Women’s Aid Federation of England and Southall Black Sisters all favoured retention of the defence, regardless of the fate of the mandatory

Some Criminal Offences with Particular Reference to Battered Defendants Report 73 (2001)).

³¹ Spencer Stephens, solicitor. He, however, favoured the defendant who successfully pleads diminished responsibility (and provocation) being convicted of “mitigated murder” rather than manslaughter. This would avoid “the conceptual difficulty of finding that the Defendant has the necessary state of mind and has committed the necessary act but nonetheless finding them guilty of an offence that is not murder”. The need to ensure public confidence in sentencing was emphasised by the New South Wales Law Reform Commission. In its view “there is a greater likelihood that the community will accept a sentence imposed on the basis of mental impairment if it is the community itself, as represented by the jury, that has participated in the process of deciding whether that mental impairment has sufficiently reduced the accused’s culpability. The alternative, that is a lower sentence imposed for murder where the sentencing judge considers there to be strong evidence of diminished mental capacity, would invariably attract criticism, and public confidence in the criminal justice system would suffer as a consequence. There is also a risk that sentences for mentally impaired offenders may increase if they are sentenced for murder rather than manslaughter, which may result in inappropriately harsh penalty in individual cases” (*Report on Partial Defences to Murder: Diminished Responsibility Report 82 (1997)* para 3.11). HHJ Michael Stokes QC also referred to the benefits flowing from the decision being made by the jury. Nevertheless, he favours abolition of the defence provided the mandatory sentence is abolished. He added “care would have to be taken to ensure that the sentencing process was made much more open and accountable to scrutiny than exists at present.”

³² The Rose Committee.

³³ Middlesborough Domestic Violence Forum; Justice for Women; Southall Black Sisters.

³⁴ Mr Justice Treacy. Professor Ronald Mackay stated that “certainly the fact that the plea ‘has come to the rescue’ of some mercy killers is not a good reason for abolition”.

sentence, partly because it was felt to be often the only defence to murder which is available to many abused women who are “driven to kill”.³⁵

- 5.25 These groups were concerned that many abused women are terrified of a psychiatric diagnosis and of being viewed as “mad”. This reluctance to accept a mental illness label is, in their view, understandable as the reactions of the women in question are, in one sense, quite normal responses to the abnormal violence and abuse to which they have been subjected. Yet, as the Royal College of Psychiatrists observed, these conditions can affect their cognitions and reactions so that they do not perceive the options for escape in the same way as an “ordinary person” would do.
- 5.26 In addition, these groups thought that pathologising of the woman could and did have adverse consequences with regard to her subsequently obtaining custody of or access to her children.
- 5.27 Notwithstanding their stated reservations about the potential adverse impact of its operation in such cases, with one exception, none of these groups recommended a new formulation for the defence.³⁶ They limited themselves to observing that the current wording of section 2 is preferable to the other alternatives because it is the least “narrowly medically defined” version.
- 5.28 In addition, these groups referred to a further cause of dissatisfaction with the defence, namely that, in their view, the courts and juries frequently lack the expert evidence which would enable them to understand the ways in which fear, anxiety and despair can affect a person’s mental state and their assessment of their current and future safety.

Evidential concerns

- 5.29 Some psychiatrists expressed concern about differences in the levels of knowledge and experience among psychiatrists who are called to give evidence on issues of mental abnormality in murder cases. Some women’s groups were critical of what they see as a lack of understanding among some psychiatrists of the dynamics of domestic violence.
- 5.30 One experienced judge raised evidential concerns of a different kind. He made the point that sometimes an accurate diagnosis of the defendant can only be made after the defendant has been observed and treated over an extended period in a secure unit in a mental hospital. That is generally not practicable before the trial as most defendants facing murder charges are kept in prison. The one or two interviews in prison by a consultant psychiatrist, which are all that can

³⁵ In this respect our proposals in relation to provocation are significant. Southall Black Sisters argued that one reason why historically the defence has been “more accessible” to women is that it marries with the notion that women are “weak and emotionally unstable”.

³⁶ Southall Black Sisters asked whether the defence can be reformulated so that “different forms of depression can be incorporated without having to meet strict clinical diagnosis of mental disorder which can be restrictive”.

realistically be arranged, are of “limited value” in enabling an accurate diagnosis to be made. He said:

I should make it clear that I have every confidence in the ability of a jury, with appropriate assistance from the psychiatrists, counsel and the judge, to reach a proper and reasonable conclusion on the evidence placed before them. The difficulty lies not in the ability of the jury to understand the evidence or the issues, but in the paucity of the evidence likely to be available at the time of the trial.

5.31 He acknowledged that:

There is something to be said for abolishing diminished responsibility as a partial defence, which has necessarily to be adjudicated on at the time of the trial, and leaving the issue to be determined by the judge on the evidence available at the time of sentence, some months “down the track”.

But he concluded that the defence should be retained, because he subscribed to the view that:

[T]here is much to be said for the view that cases [of diminished responsibility] do fall into a distinct category, in terms of culpability, and that it should be left to a jury to decide whether any particular case falls into that special category.

A discriminatory defence?

5.32 One consultee, argued that there is “an urgent need” to conduct research into whether the defence of diminished responsibility operates in a discriminatory fashion.

5.33 We now have the results of Professor Mackay’s current research.³⁷ This does not seem to support any general conclusion that the defence operates in a way which involves gender discrimination. Nor do our studies of Judge’s Reports on defendants convicted of murder.

5.34 Of the 157 cases studied by Professor Mackay, the prosecution accepted a diminished responsibility plea in 77.1% (n=121) of cases. Within the overall total of 157 cases, of the 29 cases where the defendant was female such a plea was accepted in 25 (86.2%) cases, a higher proportion than for the totality of the cases.

5.35 Of the 36 cases across the sample where there was a trial, over half (22 cases) resulted in a conviction of murder. In 20 of those 22 cases the defendant was male.

5.36 Of the 36 cases where there was a trial, only four involved female defendants. There was a murder conviction in two of them. Only one of those four cases involved a woman, in an abusive relationship, killing her male partner and she

³⁷ Appendix B.

was convicted of manslaughter pursuant to section 2. Of the remaining three cases, one arose out of a fatal argument with the defendant's lesbian partner, where both had been drinking and where a conviction of manslaughter was returned. It is unclear whether or not that verdict was on the basis of diminished responsibility. Another, which involved a 14-year-old female defendant, was the murder of a 71-year-old acquaintance. The defendant, together with her female co-defendant, had taken drink and drugs. She was convicted of murder. The last case concerned a mother who assisted her son to strangle her daughter. The daughter was pregnant from a liaison which was disapproved of by the family. The mother was convicted of murder.

- 5.37 Of the 25 women whose pleas to section 2 manslaughter were accepted, 11 killed a current or former male partner³⁸ (one killed a female partner) and of those 11, eight had been in relationships where they had suffered domestic violence.
- 5.38 Of the 128 males in the sample, 51 (39.8%) killed their current or former female partner, a similar proportion to females in the sample who killed their current or former male sexual partner where the number was 12 out of 29 (40.9%).
- 5.39 Of those 51 male defendants, the prosecution accepted a diminished responsibility plea in 38 cases (74.5%), a significantly lower proportion than for female defendants where 11 out of 12 (91.6%) had their pleas of diminished responsibility accepted. Of the 38, 17 arose out of sexual jealousy and in 12 of those cases the basis of the mental abnormality was depression whereas in five cases it was psychosis.
- 5.40 All three mercy killings were accepted as diminished responsibility pleas.
- 5.41 Of the 13 male defendants who killed their current or former female partner and whose case went to trial, nine were convicted of murder and four of manslaughter. Of the latter four, one was convicted of "unlawful and dangerous act" manslaughter, while three were convicted of manslaughter by virtue of diminished responsibility .
- 5.42 Thus, in the cases of males killing current or former female partners, the prosecution accepted a substantially lower proportion of diminished responsibility pleas than where a female killed a current or former male partner. Where the matter was contested, juries rejected diminished responsibility when pleaded by males who killed current or former partners in a significantly larger proportion of cases than over the sample as a whole. In the only case in the sample of a trial where a female killed a current or former male partner and pleaded diminished responsibility the jury convicted of manslaughter.

Arguments against retention of the defence of diminished responsibility

- 5.43 A significant minority of consultees, particularly amongst the judiciary, favoured the abolition of the defence provided that the mandatory life sentence was

³⁸ The term "partner" includes spouse, co-habitant and lover.

abolished. The arguments for adopting this view were not entirely uniform but can be summarised as follows:

- *logically*, as diminished responsibility reduces the defendant's *responsibility* for the killing, it ought to be viewed as a mitigating factor rather than a partial defence in a case where, by definition, the defendant's level of *culpability* is established by reference to the traditional concepts of conduct and mens rea.³⁹
- the issues addressed by the defence are matters of mitigation, which go to sentence. Instead, they have been, in the words of Buxton LJ, "artificially forced into the straightjacket of substantive liability". The defence was introduced to "sanitise the worst aspects of capital punishment";
- there are insuperable definitional problems. The definition contained in section 2 is "disastrous" and "beyond redemption";⁴⁰
- the "chaos of the present law" which has enabled the smuggling in of mercy is a very poor substitute for the rational sentencing exercise that could be undertaken, as in any other case of mental illness or social dislocation, once the mandatory sentence goes;⁴¹
- the defence is "grossly abused" and whether a defendant finds a psychiatrist who will be prepared to testify that, for example, depression was responsible for his behaviour is "a lottery";⁴²

The Response of the Royal College of Psychiatrists

5.44 The Royal College expressed concern in its response that in many homicide cases psychiatrists are pushed by the way the law is constructed into convoluted argument. For example, there are cases where the "abnormality of mind" is not that severe, but things were said or done as triggers which were very important in playing upon that abnormality. From a medical viewpoint, such cases sit on a continuum where there is a balance between factors in the defendant and the

³⁹ HHJ Michael Stokes QC. His reference to reduction of responsibility does, of course, raise the thorny question of what does it mean to say that somebody is partially responsible for his or her actions and what should the legal consequences be. Those Scottish judges who in the first half of the twentieth century were hostile to the defence and anxious to rein it back referred to the "basic doctrine of our criminal law that a man, if sane, is responsible for his acts and, if not sane, is not responsible" (*Kirkwood v HM Advocate* 1939 JC 36, 40, *per* Lord Justice General Norman). According to the Scottish Law Commission "if diminished responsibility is regarded as only a special means of giving effect to mitigating circumstances, this objection is merely a semantic and not a conceptual one" (*Discussion Paper on Insanity and Diminished Responsibility* (2003) Discussion Paper No 122 at para 3.16).

⁴⁰ Buxton LJ.

⁴¹ Buxton LJ.

⁴² Mr Justice Curtis. Dr Jeremy Horder, in his response to the Victoria Law Commission Defences to Homicide: Options Paper (September 2003), stated with reference to the position in England and Wales: "the defence can go from one doctor to the next, in search of someone willing to testify to the accused's mental disorder, until they find someone who will give the 'right' evidence".

victim which does not fit neatly with the thinking of the law. There is, in the view of the Royal College, a profound mismatch between the thinking of law and psychiatry in such areas. They say:

At least as far as psychiatric evidence is concerned, the vast majority of problems that arise in homicide cases could, and would, be abolished with the abolition of the mandatory life sentence on conviction of murder. Once psychiatry has placed solely within sentencing hearings, rather than within hearings directed towards jury decisions about verdict, the effect of the mismatch between legal and medical thinking is all but abolished.

- 5.45 This response might be read as implicitly urging the abolition of the defence of diminished responsibility, conditional on the abolition of the mandatory sentence, but the response does not explicitly go that far. Retention of the defence, even if the mandatory sentence were abolished, was favoured by one consultant forensic psychiatrist,⁴³ who said:

there seems to be a world of difference between ... the cases of homicide in which there is ... [an] absence of any mental disorder and homicides which are largely the product of a mental disorder for which the sufferer bears little or no responsibility.

- 5.46 That leads on to broader questions about the way in which the law deals with mentally disordered defendants. The Royal College made the points in its response that there is no logic in the adoption of one set of mental conditions for defendants facing a charge of murder but not for lesser charges, and that the “insanity” defences fail to represent the range of mental state abnormalities that the law might reasonably see, within its own terms, as relevant to verdict in a variety of criminal cases.

Conclusion

- 5.47 We are not persuaded that it is desirable to come to a final view about diminished responsibility in advance of a comprehensive review of the law of murder and the sentencing regime. A decision on the need for a partial defence of diminished responsibility can only sensibly be taken as a part of that review. In the next section of this Part we consider the case for reformulation of the partial defence under the present regime. We also tentatively consider, as an aid to further discussion and in the light of the many helpful responses we have received, how a partial defence of diminished responsibility might be framed in the event that it were to be a part of a reformed law of murder.

B. REFORMULATION OF THE DEFENCE

Introduction

- 5.48 In considering whether, and to what extent, the defence should be reformulated, pending any wider review of murder, the central issues might be thought to be: to

⁴³ Dr Keith Rix.

what extent is the defence accommodating cases which it should not be and to what extent is it failing to accommodate cases which it should be?

- 5.49 Other than the assertion of gender bias to which reference has already been made, there was little evidence in the responses of a concern that the partial defence of diminished responsibility was in general being applied too widely or too narrowly. At the same time, concerns were expressed that it is a lottery and that the outcome is more dependant on the persuasiveness of the psychiatrists and the advocates, and the degree of sympathy which the jury has for the defendant, than on any objective criteria.

The role of psychiatrists

- 5.50 The evidence we have received suggests that on the whole psychiatrists do not have difficulty in forming and explaining to the jury their reasons for an opinion whether the defendant was suffering from an abnormality of mind within section 2, although that term is broad and not legally defined.
- 5.51 The role of the psychiatrist is more difficult in relation to the second limb of the section, ie whether the defendant's abnormality of mind "substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing". It is apparent from Professor Mackay's study that although a minority of psychiatrists restrict themselves to the first limb of the section, almost 70% express an opinion on that "ultimate question". The psychiatrists to whom we spoke expressed real reservations about being asked to give evidence about that question, because it is not a matter of medical science, but in practice the forensic process frequently draws them into doing so, implicitly if not explicitly.

Consultees' views on alternative versions of the defence set out in the Consultation Paper

- 5.52 In Consultation Paper No 173⁴⁴ we asked consultees whether they favoured:

- (1) **the present wording of section 2 of the 1957 Act;**
- (2) **the alternative formula proposed in the Butler Report:**⁴⁵

"Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in [section 1 of the Mental Health Act 1983, that is, "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind"] and if, in the opinion of the jury, the mental disorder was such as to be an extenuating

⁴⁴ Part XIII question 11.

⁴⁵ Report of the Committee on Mentally Abnormal Offenders (1975) Cmnd 6244; in this Part referred to as "the Butler Report".

circumstance which ought to reduce the offence to manslaughter”,⁴⁶

- (3) the version proposed by the Criminal Law Revision Committee:⁴⁷

“Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in [section 1 of the Mental Health Act 1983] and if, in the opinion of the jury,”⁴⁸
“the mental disorder was such as to be a substantial enough reason to reduce the offence to manslaughter”⁴⁹

- (4) the version proposed by the New South Wales Law Reform Commission:

“A person, who would otherwise be guilty of murder, is not guilty of murder if, at the time of the act or omission causing death, that person’s capacity to:

- (a) understand events; or
- (b) judge whether that person’s actions were right or wrong;
or
- (c) control himself or herself,

was so substantially impaired by an abnormality of mental functioning arising from an underlying condition as to warrant reducing murder to manslaughter.

“Underlying condition” in this subsection means a pre-existing mental or physiological condition other than of a transitory kind”,⁵⁰

- (5) a version proposed by Professor Mackay:⁵¹

“A defendant who would otherwise be guilty of murder is not guilty of murder if, at the time of the commission of the alleged offence,

⁴⁶ *Ibid*, at para 19.17.

⁴⁷ Criminal Law Revision Committee, Fourteenth Report: Offences Against the Person (1980) Cmnd 7844.

⁴⁸ Replicating the beginning of the recommendation of the Butler Report.

⁴⁹ Criminal Law Revision Committee, Fourteenth Report: Offences Against the Person (1980) Cmnd 7844, para 93. In Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, clause 56, the Law Commission adopted the Criminal Law Revision Committee’s definition of diminished responsibility with the substitution of “mental abnormality” for “mental disorder”, but the definition of those terms remained identical.

⁵⁰ New South Wales Law Reform Commission, *Report on Partial Defences to Murder: Diminished Responsibility: Report 82* (1997) para 3.43.

⁵¹ R D Mackay, “Diminished Responsibility and Mentally Disordered Killers” in Professors A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (2000) 55.

his mental functioning was so aberrant and affected his criminal behaviour to such a substantial degree that the offence ought to be reduced to one of manslaughter;”⁵²

(6) an amended version which would provide:

“Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from an abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) and that abnormality of mind was a significant cause of his acts or omissions in doing or being a party to the killing”;

(7) some other version?

5.53 Our analysis of responses revealed that none of the versions which we put forward for consideration attracted widespread support. Fifty-five consultees chose one or more of the versions.⁵³ Versions (4) and (5) (the New South Wales Law Reform Commission version (NSW) and Professor Mackay’s version) attracted very little support.⁵⁴ Versions (2) and (3) (the Butler Committee version and the Criminal Law Revision Committee version) attracted a higher level of support.⁵⁵ Version (1) (the current formulation) was generally favoured by women’s organisations⁵⁶ on the basis that it is the least narrowly defined medical version.⁵⁷ Version (6) (our own formulation) attracted some support amongst the judiciary.⁵⁸

The pervasive “ought to be reduced to manslaughter” test

5.54 One common feature of versions (2), (3), (4) and (5) is that the ultimate question the jury has to decide is whether the offence “ought” to be reduced to manslaughter. This element in these versions appealed to some whose view was that the essence of the defence involves the jury making a moral choice. Version (3) was particularly favoured by two consultees because it introduces a societal test and is akin to the test set by Lord Hoffmann in *Smith (Morgan)*.⁵⁹

⁵² *Ibid*, at p 83.

⁵³ Mr Justice Curtis, Mr Justice Penry-Davey and Sally Cunningham chose both versions (2) and (3).

⁵⁴ Each of these versions attracted the support of four consultees. The two versions are very different from each other. The former stresses the accused’s mental *capacity* and it restricts the defence to “a notion of a pre-existing impairment requiring proof by way of expert evidence, which impairment is of a more permanent nature than a simply temporary state of heightened emotions”. Professor Mackay’s version incorporates neither of those features.

⁵⁵ 7 and 13 consultees respectively.

⁵⁶ Middlesbrough Domestic Violence Forum; Justice for Women; Southall Black Sisters.

⁵⁷ 11 consultees favoured retention of the current formulation.

⁵⁸ In total 11 consultees supported this version.

⁵⁹ [2001] 1 AC 146.

- 5.55 Conversely, others objected to a test that would involve the jury judging whether the offence should be reduced from murder to manslaughter because it is “very imprecise and subjective”⁶⁰ and gives the jury “a unstructured discretion”.⁶¹
- 5.56 We share those objections. To direct a jury that mental abnormality reduces murder to manslaughter if sufficiently serious that it ought to do so, leaves the jury to set its own standard for deciding what ought to reduce murder to manslaughter.

The Scottish Law Commission

- 5.57 In June of this year the Scottish Law Commission presented its Report on Insanity and Diminished Responsibility.⁶² Until the Full Bench decision of the Court of Session in *Galbraith v. Lord Advocate (No 2)*⁶³ the law on diminished responsibility in Scotland was set out in the direction to the jury of Lord Alness in *HM Advocate v. Savage*⁶⁴ as follows:

It is very difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on though not amounting to insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility-- in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied ... that there must be some form of mental disease.⁶⁵

- 5.58 *Galbraith* indicated a major change in judicial approach. The formula in *Savage* was not to be read in a narrow sense. It was not necessary that all the criteria in that formula should be present. Moreover, although the plea had to be based on some form of mental abnormality, a wide range of conditions could constitute diminished responsibility and they need not be bordering on insanity. The court in *Galbraith* ruled that diminished responsibility required the existence of an abnormality of mind which had the effect that the accused’s ability to determine or control his actions was substantially impaired. The court excluded from the scope of the plea (i) any condition brought on by the voluntary consumption of drink or drugs and (ii) psychopathic personality disorder.⁶⁶
- 5.59 It formulated the defence as follows:

⁶⁰ HHJ Robert Taylor.

⁶¹ Mr Justice Pitchers stated that he dislikes directions to the jury which “give an undue normative role to their decisions” and Mr Justice Stanley Burnton stated that he dislikes any definition that “involves the jury in a value judgment”.

⁶² Scot Law Com No 195.

⁶³ 2002 JC 1.

⁶⁴ 1923 JC 49.

⁶⁵ *Ibid*, at p 51.

⁶⁶ Scot Law Com No 195 para. 3.3.

In our law diminished responsibility applies in cases where, because the accused's ability to determine and control his actions is impaired as a result of some mental abnormality, his responsibility for any killing can properly be regarded as correspondingly reduced...⁶⁷

In essence, the judge must decide whether there is evidence that, at the relevant time, the accused was suffering from an abnormality of mind which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts. ... The abnormality of mind may take various forms. It may mean that the individual perceives physical acts and matters differently from a normal person. Or else it may affect his ability to form a rational judgement as to whether a particular act is right or wrong or to decide whether to perform it. In a given case any or all of these effects may be operating.

In essence the jury should be told that they must be satisfied that, by reason of the abnormality of mind of the person in question, the ability of the accused, as compared with a normal person, to determine or control his actions was substantially impaired.⁶⁸

- 5.60 The Scottish Law Commission, in its Discussion Paper on the subject⁶⁹ put forward a test which was similar to the versions (2) – (5) which we put forward for discussion in our Consultation Paper. It suggested that the test should explicitly state that its underlying rationale was that the plea acted as a mitigating circumstance so as to reduce the charge of murder to one of culpable homicide. The test envisaged the ultimate question to be posed to be whether:

his or her condition at the time of the commission of the offence amounted to such extenuating circumstances as to justify a conviction for culpable homicide instead of a conviction for murder.⁷⁰

- 5.61 This did not find favour with consultees to that Discussion Paper. They pointed out that the definitions of other defences in criminal law do not set out their rationales. The Scottish Law Commission accepted the point that had been made by consultees. It said that as the rationale of diminished responsibility is well understood, there is no need to include it as part of the test for the plea. Furthermore, it thought that there might be a danger of confusing the different roles of expert witnesses and jury were the test itself to refer to such matters as conditions which justify a conviction on the lesser charge.⁷¹

- 5.62 The Scottish Law Commission has not recommended this formulation but instead has recommended a statutory formulation which mirrors the essence of *Galbraith* namely:

⁶⁷ 2002 JC 1, para 41.

⁶⁸ *Ibid*, at para 54.

⁶⁹ Scottish Law Commission, Discussion Paper No 122 on Insanity and Diminished Responsibility (2003).

⁷⁰ *Ibid*, at para 3.38.

⁷¹ Scots Law Com No 195, para 3.16.

A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.⁷²

- 5.63 The Scottish Law Commission also recommends that the plea of diminished responsibility should not be excluded solely by virtue of the fact that at the relevant time the accused had any form of personality disorder.⁷³ It further recommends that a state of acute intoxication should not by itself constitute diminished responsibility but should not prevent it being established if the intoxication co-existed with or was the consequence of some underlying condition which meets the other requirements for the plea.⁷⁴

Reformulations of the defence suggested by consultees

- 5.64 One consultee suggested a version which provided:

A person shall not be convicted of murder, but shall be convicted of manslaughter, if his blameworthiness for killing or being a party to the killing of another is substantially diminished by reason of –

- (a) mental abnormality or disorder (other than that resulting solely and directly from his being intoxicated);
- (b) his youth or immaturity.⁷⁵

- 5.65 This formulation highlights the position of the young. There is a need to undertake a detailed review of the defence, and indeed the whole of the law of homicide, in the way it impacts on child defendants.⁷⁶ We believe, however, that any changes should only follow after a comprehensive review. We think that an extension of the present formula to include “immaturity” would be too broad and general.

- 5.66 Two versions have been proposed by consultees which have some similarities but significant differences. The first was:

⁷² Scots Law Com No 195, Appendix A: Criminal Responsibility and Unfitness for Trial (Scotland) Bill [Draft] clause 3(1).

⁷³ *Ibid*, at para 3.34 and draft Bill clauses 3(1)(2) and 8. Scots Law would mirror that of England and Wales.

⁷⁴ *Ibid*, at para 3.42 and draft Bill clause 3(3). If enacted, Scots Law would be similar to that of England and Wales.

⁷⁵ The formulation went on to include paragraphs dealing with a person who kills in fear induced by threats to the life of himself or another and duress by threats. For the reasons we explain in Part 3, we prefer to deal with a person who kills in response to fear (but who is not entitled to a complete defence) as part of provocation rather than in this partial defence. We have referred to duress in Part 3 paras 3.161 – 3.162.

⁷⁶ A point which was emphasised in the responses of NACRO, Dr Eileen Vizard and Professor Sue Bailey.

Mitigation by reduced capacity: Where a person kills or is a party to the killing of another, he shall be convicted of manslaughter and not murder if at the time of the commission of the offence he was in an abnormal state of mind which substantially impaired his ability to appreciate the wrongness of his conduct, or his ability to act in accordance with his recognition that his actions were wrong.

5.67 The second was:

A person who would otherwise be guilty of murder is not guilty of murder but is guilty of manslaughter if at the time of the act or omission causing death:

(1) that person's capacity to:

- (i) understand events; or
- (ii) judge whether that person's actions were right or wrong; or
- (iii) control himself;

(2) was substantially affected by a form of mental disorder as defined in section 1 of the Mental Health Act 1983, which shall not include any temporary alteration of mental state caused by drugs of any kind; and

(3) the mental disorder was a substantial cause of the act or omission causing death; and

(4) in the opinion of the jury, the mental disorder was an extenuating circumstance, which ought to reduce the offence to manslaughter.

5.68 These versions have in common that they identify the link explaining why the defendant's culpability should be regarded as reduced by his or her mental abnormality.

5.69 The second version has three ingredients which are not in the first version. One ingredient is that "the mental disorder was an extenuating circumstance, which ought to reduce the offence to manslaughter". For the reasons that we have already given, we are not attracted to that form of test.⁷⁷

5.70 Another difference is the stipulation that "the mental disorder was a substantial cause of the act or omission causing death", but we think that this difference may be more apparent than real because we think that a causative link may be regarded as implicit in the first version.

5.71 The most significant difference between the two versions is in the definition of mental abnormality or disorder. The first version refers simply to an abnormal state of mind; the second refers to a mental disorder as defined in section 1 of

⁷⁷ See paras 5.54 – 5.56 above.

the Mental Health Act 1983 (and would exclude any temporary alteration of mental state caused by drugs).

- 5.72 The proponents of the first version intended the expression “abnormal state of mind” to be capable of being given a very broad interpretation. They said:

What we have in mind are people who were (for example) physically and mentally exhausted from over work, disorientated by prolonged lack of sleep, or distracted by shock or grief. That people in these states are not really normal, and not to be judged as strictly as others, is reflected in a range of everyday sayings and expressions: “she was beside herself with grief”, “he was so tried he did not know what he was doing”. Even more to the point is the Jewish proverb, “do not judge a man in his grief”.

The following real situations come to mind: the parent (e.g. *Doughty*) who has not slept for nights because of a crying baby; the spouse who thinking, (s)he was happily married, discovers that the other spouse has been unfaithful for years and is about to leave with the lover – a situation which has sometimes led to the deserted parent killing their children and then committing suicide; or a parent who learns that the children have all been killed in an accident. Prolonged deprivation of sleep produce[s] psychological effects that can cause people to act strangely and out of character – and so, I believe, can extreme shock and grief.

- 5.73 We are troubled by such a broad approach.

- 5.74 The distinction between what is normal and abnormal is one of degree and can be difficult to draw. The requirement of a medically recognisable basis provides both a doctrinal justification (that a person suffering a medically recognisable abnormality of mind lacks full responsibility for his or her acts) and a practical limitation on the ambit of the defence. Without it, there would be a serious risk of an “evaluative free for all” such as some commentators describe existing in provocation post *Smith (Morgan)*.⁷⁸ Whilst the focus of the argument for such an approach might be the young parent who is driven to exhausted distraction by a crying baby we can see no reason why such a defence might not, consistently, be argued for where an insomniac, who is having a hard time at work, deliberately kills another motorist who cuts him up on the way home. The jury might feel more sympathetically disposed to one than the other, but we cannot see a principled test for differentiating between them. The problems are similar to those which we have discussed in relation to “extreme emotional and mental disturbance” (EMED) and we do not see a satisfactory solution if diminished responsibility were to be extended in the manner suggested.

- 5.75 A person who batters a child from distracted exhaustion may do so on an isolated occasion or regularly. If the fact that it happened out of distracted exhaustion should be a partial defence, in principle that should be so even if something similar had happened before. To many it would be abhorrent that such a defence

⁷⁸ [2001] 1 AC 146.

should be available to a serial child abuser at a time when child abuse is a grave problem. Acting out of character may be a ground of mitigation, but it is hard to see how it fits into a defence. If the defendant had no intent to kill and did not foresee causing life threatening injury, so that death was not only unforeseen but also unforeseeable, we can see a strongly arguable case for saying that he should not be guilty of murder.⁷⁹ The proper approach to removing this disfigurement of the law is to define murder in a rational way so that a rational sentencing regime may apply.

- 5.76 On the other hand, knowledge of mental illness is a developing science and to tie the definition to that contained in the Mental Health Act 1983 might be over restrictive.⁸⁰ We see some attraction in the part of the version proposed by the New South Wales Law Reform Commission, which refers to “an abnormality of mental functioning arising from an underlying condition” and defines “underlying condition” as meaning “a pre-existing mental or physiological condition other than of a transitory kind”.⁸¹
- 5.77 The New South Wales Law Reform Commission heard evidence that any reference to “abnormality of mind” or a similar phrase should be omitted.⁸² It heard evidence that the phrase led to disputes amongst experts as to its exact meaning and as to whether or not a particular mental condition could be said to fall within it. It was suggested that, instead, diminished responsibility could be defined solely in terms of whether or not the accused was affected as to capacity to understand, to judge or to control her actions. In this way the expert’s attention would be focused on describing the way the accused was affected at the time of the killing.
- 5.78 The Commission was not persuaded. It felt that a formulation which did not expressly link the defence to an underlying concept of mental impairment or mental disorder would risk widening the ambit of the defence too far. Any person who killed in a heightened emotional state might potentially plead the defence. Instead, the Commission recommended the term “abnormality of mental *functioning* arising from an underlying condition.”⁸³ The Commission preferred “mental functioning” to “mind” because it had been informed that there had been disagreements amongst expert witnesses as to the meaning of “mind”.⁸⁴

⁷⁹ Presently such a person would be guilty of murder if he foresaw that some serious injury was virtually inevitable, though not having it as his purpose (*Woollin* [1999] AC 82).

⁸⁰ Section 1(2) of the Mental Health Act 1983 states: “In this Act: “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind and “mentally disordered” shall be construed accordingly;...”

⁸¹ *Report on Partial Defences to Murder: Diminished Responsibility Report 82* (1997) para 3.43.

⁸² *Ibid*, at para 3.33 – 7.

⁸³ *Report on Partial Defences to Murder: Diminished Responsibility Report 82* (1997) para 3.43.

⁸⁴ *Ibid*, at para 3.34.

- 5.79 The Commission also recommended that “abnormality”, not being a precise expression, should be defined in terms of a person’s capacity to understand, judge and control actions. It is important to note that the Commission envisaged that such a definition would have the purpose of *limiting* the meaning of “abnormality of mental functioning.”⁸⁵
- 5.80 In proposing the phrase “underlying condition” which was defined as “a pre-existing mental or physiological condition, other than a condition of a transitory kind”, the Commission said:

Nor do we intend to limit the defence to endogenous mental diseases to the exclusion of, for example, people whose capacities are impaired by reason of brain injury. The term ... is intended to link the defence to a notion of pre-existing impairment requiring proof by way of expert evidence,⁸⁶ which impairment is of a more permanent nature than a simply temporary state of heightened emotions. This does not mean that the condition must be shown to be permanent. It simply requires that the condition be more than of an ephemeral or transitory nature.⁸⁷

Can the current formulation in section 2 be improved?⁸⁸

- 5.81 We are conscious that a new test may produce as many problems as it purports to solve. One consultee gave the salutary warning:

Change is always subject to the risk of unintended consequences together with an inevitable degree of speculation as to the extent of the need for change, leading to appeals. Unless there is a strong practical need to change section 2, demonstrated by evidence, it should be left as it is.

- 5.82 Professor Mackay, who has particular expertise in this area, points to arguments for and against change. He points to Professor Griew’s warning that, however conceptually flawed the wording of section 2, reformulation of the section is fraught with danger. The perceived advantage is its flexibility and the way it allows, as put by Buxton LJ, “the smuggling in of mercy”.

⁸⁵ At the same time, however, it says that the definition spells out “what has generally been regarded since *Byrne* as the essential meaning of ‘abnormality of mind’” (*Ibid*, at para 3.52). It is generally acknowledged that the interpretation accorded to “abnormality of mind” by the Court of Criminal Appeal in *Byrne* is a wide one. The Scottish Law Commission in Discussion Paper No 122, *Insanity and Diminished Responsibility* (2003) para 3.38, put forward a definition which speaks of substantial impairment of “ability to understand events, or to determine or control his or her acts.” As we have seen they now advance a version which incorporates a similar concept namely the “...ability to determine or control conduct...”.

⁸⁶ The definition which was put forward by the Scottish Law Commission in its Discussion Paper, *ibid*, referred to “medical or other evidence”(emphasis added).

⁸⁷ Para 3.51. The New South Wales Law Reform Commission recommended a specific provision to deal with cases of self-induced intoxication (*Report on Partial Defences to Murder: Diminished Responsibility* Report 82 (1997)).

⁸⁸ Buxton LJ gave an emphatic “no”. He stated it to be “beyond redemption”.

Professor Mackay's study of diminished responsibility cases

- 5.83 As we have stated we are grateful to Professor Mackay and the Nuffield Foundation for making available to us the results of his extensive study of diminished responsibility cases. His paper is published as appendix B to this Report.
- 5.84 The conclusion which we draw from this study is that, whilst there are some cases which may cause some surprise on the limited facts available, the picture which emerges is that the partial defence seems in the main to be reasonably applied by the courts and by juries. This study provides no evidence to support any contention that the defence should be drawn in such a way as to make it significantly broader or narrower in terms of the outcomes achieved. Diminished responsibility is readily accepted or succeeds where there is a clear psychosis. In other cases (such as depression) the success of the plea seems to be closely related to whether there is an established prior medical condition and its severity.

Alcohol, drugs and diminished responsibility

- 5.85 In Consultation Paper No 173 we set out briefly the essential elements of the relationship between the voluntary consumption of alcohol and drugs and the defence of diminished responsibility.⁸⁹ We considered, respectively, the way in which the courts have approached the questions whether alcoholism may be categorised as an abnormality of mind and the impact of the voluntary consumption of alcohol on the availability of the defence based on an abnormality of mind based on a pre-existing mental disorder. The law in connection with the latter is clear and satisfactory following the House of Lords decision in *Dietschmann*.⁹⁰ The law in respect of the former remains problematic. As we observed,⁹¹ the public policy is clear, namely if a person voluntarily takes a drink, knowing or believing that it will result in an uncontrollable craving for more alcohol, then the defence of diminished responsibility will not be available. The Court of Appeal in the case of *Tandy*⁹² approved the direction of the trial judge in that case which had focused on whether the first drink of the day had been taken voluntarily or involuntarily. If the former then the defence was not available. Whilst approving the policy, we saw force in academic criticism of that focus as perhaps unduly artificial and restrictive.⁹³ There was little comment by consultees about this issue.⁹⁴ In our view, to the extent that it remains a problem, it is on the margins and capable of being resolved by judicial development which might reflect the public policy without necessarily focussing exclusively on the first drink of the day.

⁸⁹ Paras 7.71 - 7.90.

⁹⁰ [2003] 1 AC 1209.

⁹¹ Consultation Paper No 173 para 7.82.

⁹² [1989] 1 WLR 350.

⁹³ Consultation Paper No 173 para 7.82.

⁹⁴ Only one consultee, HHJ James Stewart QC made express reference to this problem.

Our recommendation

- 5.86 Our view is that for the time being, and pending any full consideration of murder, section 2 should remain unreformed. There appears to be no great dissatisfaction with the operation of the defence and this is consistent with our consideration of the results of Professor Mackay's investigation of the defence in practice. To the extent that there is concern that certain defendants are forced to adopt the partial defence of diminished responsibility when their true defence is that they acted out of fear of future violence, our recommendations in respect of provocation would meet that concern more directly than tinkering with diminished responsibility. To the extent that there is some concern that the defence operates overly sympathetically to men who kill their partners, the evidence does not support that concern.
- 5.87 There is no substantial support for any of the alternative formulations which we canvassed. It would be wrong for us to make a recommendation which might simply give rise to a round of appellate hearings and which would not significantly improve this area of the law.

The burden of proof⁹⁵

- 5.88 A small majority of consultees who addressed this issue was in favour of the defence only bearing an evidential burden.⁹⁶ The judiciary was evenly split⁹⁷ but the professions were in favour of retaining the current arrangement.⁹⁸
- 5.89 The arguments in favour of placing only an evidential burden on the defence arose primarily from a perceived need for consistency between the two partial defences of provocation and diminished responsibility (particularly where, post *Smith (Morgan)*, there may be considerable overlap in the relevant evidence to which the jury may be directed to apply different burdens of proof), rather than from instances of perceived injustice.⁹⁹
- 5.90 The arguments on the other side focused on the fact that the defence was one where the matters relied on were peculiarly in the hands of the defence. In contrast to provocation, the defence depends not on external facts which might be investigated and challenged independently of the defendant but on the defendant's state of mind, a matter which can only be investigated with his co-operation. Furthermore, even where the medical evidence to support the defence is weak, it might be very difficult for the jury to conclude that the defence had been disproved to the criminal standard because of the limitations of the

⁹⁵ In *Lambert, Ali and Jordan* [2002] QB 1112 the Court of Appeal held that the imposition of the burden of proof on the defendant was compatible with the presumption of innocence contained in Article 6(2) of the European Convention on Human Rights.

⁹⁶ 33 for, 24 against.

⁹⁷ 12 for, 12 against.

⁹⁸ 7 for, 4 against.

⁹⁹ One judicial consultee suggested that the resolution of this dilemma would be to require the defence to bear the legal burden of establishing each of the partial defences.

evidence. One consultee¹⁰⁰ sought to address this difficulty by suggesting that it be a condition of the defence being run that the defendant afforded access to the prosecutor's psychiatrist.

5.91 We are persuaded that the reasons advanced for retaining the present burden of proof are reasons of substance and we do not recommend a change for the sake of conceptual neatness.

5.92 **We therefore recommend no change to section 2 of the Homicide Act 1957 for as long as the law of murder remains as it is, and conviction carries a mandatory sentence of life imprisonment.**

A signpost for the future

5.93 That said, we should not be shy about putting forward our thinking as to how a partial defence of diminished responsibility might be framed, were it to continue to be a defence under a reformed law of murder. We put forward our tentative suggestion as a "stalking horse" against which the wisdom of having any such defence may be judged. Our suggestion seeks to bring together elements suggested by our consultees. We set out below a number of issues and our tentative conclusions. Finally, we pull them together in a suggested formulation which is offered only as a spur to further debate in the event that we were asked to consider the reform of the law of murder.

5.94 First, the defence should continue to be a defence founded upon recognised mental conditions. Some of our consultees¹⁰¹ would like to see a demedicalised version of the defence. We would caution against such an approach. Where there are "deserving cases" or non-medical grounds such as "mercy killings", they need to be addressed honestly and openly rather than disguised as cases or issues of diminished responsibility.

5.95 Second, the current formulation can be improved by:

- deleting the reference to "substantial impairment of responsibility";
- defining what is meant by "abnormality of mind/mental functioning" along the lines of the New South Wales version (whether the defendant's capacity to understand, judge and control herself substantially impaired);
- substituting "underlying condition" (in the sense of a recognised mental condition) for the words in parenthesis ("whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury"); and
- introducing an explicit test whether the substantially impaired capacity to understand, etc. was a significant cause of the defendant's act in carrying out or taking part in the killing. We suggest "a significant cause" to make it clear

¹⁰⁰ JUSTICE.

¹⁰¹ In particular, Women's Groups.

that it need not be the sole cause but it must have had a real effect on the defendant's conduct.¹⁰²

- 5.96 A reformulation on these lines would remove the vexed question of the proper role of the psychiatrist in relation to what is presently the second limb of section 2.
- 5.97 Pulling these elements together we put forward, for further consideration were we to undertake a comprehensive review of murder, a possible reformulation of the partial defence of diminished responsibility:

A person, who would otherwise be guilty of murder, is not guilty of murder but of manslaughter if, at the time of the act or omission causing death,

- (1) that person's capacity to:
- (a) understand events; or
 - (b) judge whether his actions were right or wrong; or
 - (c) control himself,

was substantially impaired by an abnormality of mental functioning arising from an underlying condition and

- (2) the abnormality was a significant cause of the defendant's conduct in carrying out or taking part in the killing.

"Underlying condition" means a pre-existing mental or physiological condition other than of a transitory kind.

C. MERGER OF PROVOCATION AND DIMINISHED RESPONSIBILITY INTO A SINGLE DEFENCE

- 5.98 Among consultees there has been very little support for the Mitchell/Mackay suggestion of merging these partial defences (discussed in Consultation Paper No 173 paras 12.77 - 12.81). The great preponderance of those who addressed the issue opposed it.¹⁰³ The suggestion has stimulated a lively debate among academics in the pages of the *Criminal Law Review*.¹⁰⁴ We do not, however, recommend it and it would not fit with our proposed approach to provocation.

¹⁰² See *Dietschmann* [2003] 1 AC 1209, 1217, *per* Lord Hutton: "I think that in referring to substantial impairment of mental responsibility the subsection does not require the abnormality of mind to be the sole *cause* of the defendant's acts in doing the killing." (emphasis added)

¹⁰³ 44 out of 53 who addressed it.

¹⁰⁴ R Mackay & B Mitchell "Provoking Diminished Responsibility: Two Pleas Merging into One?" [2003] *Crim LR* 745, J Chalmers "Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism" [2004] *Crim LR* 198, J Gardner & T Macklem "No Provocation Without Responsibility: A Reply to Mackay and Mitchell" [2004] *Crim LR*

5.99 The preponderant view was that the two partial defences rest on entirely different moral bases and the fact that they may be run together on occasions is not a reason for merging them. The jury can understand the difference and apply them separately. The contrary view¹⁰⁵ focused on the complicated directions which have to be given when they are run in tandem, each supported by relevant psychiatric evidence but with a different burden of proof in each case.

5.100 The preponderant view was stated succinctly by one consultee:

The moral basis of each is different. The basis of provocation is the fact that the victim behaved outrageously towards the defendant, which makes the defendant's failure to control himself less bad than it would otherwise have been. It is not, and should not be, that the victim's behaviour has affected his mental state so as to reduce or remove his capacity for self-control.¹⁰⁶

5.101 **We agree and do not recommend a single partial defence merging the partial defences of provocation and diminished responsibility**

D. CHILDREN

5.102 We have consulted with two forensic psychiatrists who specialise in cases of children and young people, Dr Eileen Vizard and Professor Sue Bailey. Their responses show how deeply unsatisfactory the present law of murder is in relation to children, including the law relating to diminished responsibility. We consider that this area needs special attention. Dr Eileen Vizard has suggested that the definition of diminished responsibility is defective in relation to children and young people because it omits reference to developmental immaturity.

5.103 This view was also shared by NACRO which criticised Consultation Paper No 173 for failing sufficiently to recognise the distinctive needs of children between the ages of 10 and 17. It believes that the concepts and terminology currently to be found in section 2 of the 1957 Act are "entirely ill-suited to the defence of children". It makes the same criticism of the different formulations put forward for consideration in Consultation Paper No 173.

5.104 Mr Peter Glazebrook in his response drew attention specifically to the plight of the person whose blameworthiness for killing is substantially diminished by reason of his youth or immaturity.

5.105 Whilst we recognise that there is a case for proposing an amendment to section 2 in relation to children and young people, in our view it is far more desirable that there should be a wider examination of the law of murder as it applies to children

213, R Mackay & B Mitchell "Replacing Provocation: More on a Combined Plea" [2004] Crim LR 219.

¹⁰⁵ Articulated by the Bar of the Wales and Chester Circuit.

¹⁰⁶ See also, J Chalmers "Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism"[2004] Crim LR 198; J Gardner & T Macklem "No Provocation Without Responsibility: A Reply to Mackay and Mitchell" [2004] Crim LR 213.

and young people. This could form a discrete element in a comprehensive review of the law of murder.

(Signed) ROGER TOULSON, *Chairman*
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

STEVE HUMPHREYS, *Chief Executive*
2 August 2004