

The Law Commission
Consultation Paper No 177

**A NEW HOMICIDE ACT FOR ENGLAND
AND WALES?**

A Consultation Paper

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.

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This consultation paper, completed on 28 November 2005, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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THE LAW COMMISSION
A NEW HOMICIDE ACT FOR ENGLAND AND WALES?
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PART 1

WHY IS A NEW HOMICIDE ACT NEEDED?

THE TERMS OF REFERENCE FOR THE REVIEW OF MURDER

- 1.1 In July 2005, the Government announced a review of the law of murder in England and Wales, with the following terms of reference:
- (1) To review the various elements of murder, including the defences and partial defences to it, and the relationship between the law of murder and the law relating to homicide (in particular manslaughter). The review will make recommendations that:
 - (a) take account of the continuing existence of the mandatory life sentence for murder;
 - (b) provide coherent and clear offences which protect individuals and society;
 - (c) enable those convicted to be appropriately punished; and
 - (d) be fair and non-discriminatory in accordance with the European Convention of Human Rights and the Human Rights Act 1998.
 - (2) The process used will be open, inclusive and evidence-based and will involve:
 - (a) a review structure that will look to include key stakeholders;
 - (b) consultation with the public, criminal justice practitioners, academics, those who work with victims' families, parliamentarians, faith groups;
 - (c) looking at evidence from research and from the experiences of other countries in reforming their law.
 - (3) The review structure will include consideration of areas such as culpability, intention, secondary participation etc inasmuch as they apply to murder. The review will only consider the areas of euthanasia and suicide inasmuch as they form part of the law of murder, not the more fundamental issues involved which would need separate debate. For the same reason abortion will not be part of the review.

How is the Law Commission taking forward these terms of reference?

- 1.2 We will not be reviewing every issue that could, in theory, be regarded as falling within the scope of the review. The areas of law that seem to us to give rise to real difficulty or anomalies have guided us in our focus. Even within those areas, we will not be addressing issues best left to a wider review of other areas of the law, issues that cannot be adequately considered and consulted on in the time available or issues that are too close to one falling outside the scope of the review (child destruction, for example, being too close to abortion).

1.3 Issues we will not be addressing include:

- (1) Justifications for killing: abortion, necessity and self-defence.
- (2) The prohibited conduct element: causation, the legal criteria governing when life begins and when life ends and child destruction (the offence of killing a child in the womb capable of being born alive).
- (3) The defences of insanity and intoxication.
- (4) Aggravating features of a murder, such as an especially evil motive or the fact that a child or law officer on duty was intentionally targeted. We have also left these out of consideration as we regard them as having been adequately addressed by Parliament through the guidance that it has recently given on sentencing in murder cases (see paragraphs 1.27-1.29 and 1.104-1.123 below).

THE EXISTING LAW AND THE PROBLEMS WITH IT: A BRIEF GUIDE

1.4 The law governing homicide in England and Wales is a rickety structure set upon shaky foundations. Some of its rules have been unaltered since the seventeenth century, even though it has long been acknowledged that they are in dire need of reform. Other rules are of uncertain content or have been constantly changed, so that the law cannot be stated with certainty or clarity. Certain reforms effected by Parliament that were valuable at the time are beginning to show their age or have been overtaken by other legal changes and yet left unreformed.

1.5 This state of affairs should not continue. The sentencing guidelines that Parliament has recently issued for cases where someone has been convicted of murder¹ presuppose that murder has a rational structure, a structure that properly reflects degrees of fault and provides defences of the right kind and with the right scope. Unfortunately, the law does not have, and never has had, such a structure. Putting that right is an essential task for criminal law reform.

1.6 We will propose that, for the first time, the general law of homicide be rationalised through legislation. Offences and defences must take their place within a readily comprehensible and fair legal structure. That structure must be set out with clarity, in a way that will promote certainty in the future and in a way that non-lawyers can understand and accept.

1.7 We will be going into these matters in much greater depth but, in brief, what is the existing law and what are its problems?

Offences

1.8 Two general offences of homicide, murder and manslaughter, are employed to accommodate the majority of ways in which someone might be at fault in killing. We say “the majority” because there are a number of specific homicide offences, for example, infanticide and causing death by dangerous driving.

¹ Criminal Justice Act 2003, s 269, sched 21.

- 1.9 Murder, which carries a mandatory life sentence, is committed when someone unlawfully kills another person ('V') with an intention to kill V or an intention to do V serious harm.
- 1.10 Manslaughter can be committed in one of four ways:
- (1) Conduct that the defendant knew involved a risk of killing, and did kill, is manslaughter ("reckless manslaughter");
 - (2) Conduct that was grossly negligent given the risk of killing, and did kill, is manslaughter ("gross negligence manslaughter");
 - (3) Conduct, taking the form of an unlawful act involving a danger of some harm, that killed, is manslaughter ("unlawful and dangerous act manslaughter");
 - (4) Killing with the intent for murder but where a partial defence applies.

The term "involuntary manslaughter" is used to describe a manslaughter falling within (1) – (3) while (4) is referred to as "voluntary manslaughter".

Problems with these offences

- 1.11 The current definitions of these offences are largely the product of judicial law making in individual cases over hundreds of years. They are not the products of legislation enacted after wide consultation and research into alternative possibilities. Moreover, from time to time the definitions have been altered by the courts,² each new case sometimes generating further case law to resolve ambiguities left behind by the last one.
- 1.12 The inclusion within murder of cases in which the defendant killed, but intended only harm that the jury regards as serious, is highly controversial.³ On this basis, even someone who positively believed both that no one would be killed by their conduct and that the harm they were inflicting was not serious, can find themselves bracketed with the "contract" or serial killer as a "murderer".
- 1.13 If murder can be too broad, so can manslaughter. It probably covers as large a range of forms of culpability as any crime in English law.
- 1.14 At the most serious end of the involuntary manslaughter spectrum, the law may be too generous to defendants who kill by reckless conduct. The worst kinds of reckless killer may deserve to be convicted of murder.⁴
- 1.15 At the less serious end of the involuntary manslaughter spectrum, the law may be too harsh on defendants who kill as a result of an unlawful and dangerous act. The risk of harshness arises when defendants do not realise that the act may cause harm:

² Eg, on murder see, *Woollin* [1999] 1 AC 82 (HL); and on manslaughter see, *Adomako* [1995] 1 AC 171 (HL); (*Morgan*) *Smith* [2001] 1 AC 290 (HL).

³ See Part 3.

⁴ See Part 3.

EXAMPLE 1: D is seeking to steal a large book from the fourth floor of a library whose windows face on to a busy street. Seeing the librarian coming towards him, D quickly drops the book out of the window. It lands on V's head as she walks underneath the window, killing her.

- 1.16 D's theft of the book should not be sufficient to convict D of the manslaughter of V even though, in the circumstances, there was an obvious risk of some harm arising from D's action. The need to narrow the crime of involuntary manslaughter has already been accepted by Government.⁵
- 1.17 In paragraphs 1.30-1.48, and in more detail in Part 2, we set out some possible solutions to these problems. These solutions include a distinction between "first degree murder" and "second degree murder" that, amongst other things reflects the distinction in degrees of fault between intending to kill and intending to do serious harm.
- 1.18 Further, we provisionally propose that the worst kinds of reckless killing become "second degree murder", thereby restricting the scope of involuntary manslaughter at the serious end. At the less serious end of involuntary manslaughter, we adopt, with some minor amendments, the Government's previous proposals to restrict the scope of unlawful and dangerous act manslaughter to cases where the defendant killed the victim through an criminal act intended to cause injury or involving recklessness as to causing injury.
- 1.19 These changes would provide a proper structure for the law of homicide, with offences on an ascending ladder of seriousness according to the degree of fault, from manslaughter through "second degree murder" to "first degree murder".

Partial defences

- 1.20 In this review, we are mainly concerned with partial defences, for example provocation, rather than with complete defences, for example self-defence. Currently, there are generally acknowledged to be three partial defences to murder: provocation, diminished responsibility and killing in pursuance of a suicide pact. If successfully pleaded, they do not result in a complete acquittal but in a conviction of manslaughter rather than murder.
- 1.21 However, there are also what might be called "concealed" partial defences, created by legislation as specific offences. Examples are the offences of infanticide (Infanticide Act 1938), when a mother whose mind is disturbed kills her baby who is less than 12 months old, and complicity in suicide (Suicide Act 1961) where someone assists or encourages another person to commit suicide.

⁵ Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000). Example 1 is not discussed in those proposals. It is based on *Franklin* (1883) 15 Cox CC 163.

Problems with these partial defences

- 1.22 The partial defence of provocation is a confusing mixture of judge-made law and legislative provision. The basic rule has been clear enough for a long time: it is manslaughter, not murder, if the defendant, having been provoked, lost his or her self-control and killed in circumstances in which a reasonable person might also have done so. However, the highest courts have disagreed with one another on a number of occasions about the scope of the defence. Consequently, not only has its scope been left unclear, but there is no end in sight to the disagreement. In 2004 we recommended reform of the partial defence of provocation and we set out how we thought the defence should be reformed.⁶ We return to this topic in Part 6.
- 1.23 The diminished responsibility defence was a welcome reform when it was introduced in 1957. However, medical science has moved on considerably since then and the definition is now badly outdated. The same is true of infanticide. Further, the statutory provision that makes the survivor of a suicide pact guilty of manslaughter was meant to reflect pity on those desperate enough to seek to take their own lives along with that of another person. Unfortunately, the relationship between manslaughter by virtue of killing pursuant to a suicide pact and the offence of complicity in suicide - created a few years later and in theory a less serious offence than manslaughter - was not fully thought through. Moreover, the scope of the partial defence, exclusively concerned with death occurring through suicide pacts, is unduly narrow.

Missing defences

- 1.24 Whereas there has recently been controversy over whether provocation should continue to be a partial defence to murder, other strong claims for mitigation of the offence of murder have failed to gain legal recognition. Judges have decided that they would prefer Parliament to decide whether there should be new defences to murder but Parliament has not had the time to consider the matter.
- 1.25 One such claim arises when the defendant, fearing serious violence from an aggressor, goes too far in deliberately killing the aggressor in order to repel the feared attack. We have already recommended that the defendant's fear of serious violence should be the basis for a partial defence to murder, through reform of the provocation defence.⁷
- 1.26 Another such claim is "duress". This is where the defendant becomes involved in the killing of an innocent person but only because the defendant is being threatened him or herself with death or with a life-threatening injury if he or she does not participate in the killing. At the very least, a claim of duress should reduce what would under our proposals otherwise be "first degree murder" to a lesser homicide offence.

⁶ Partial Defences to Murder (2004) Law Com No 290, para 3.168.

⁷ *Ibid.* See Part 6.

Sentencing and reform of the law of murder

- 1.27 All persons convicted of murder are sentenced to imprisonment for life. The sentence comprises three periods, one of which is the minimum term. This is the period that the offender must spend in prison before he or she is eligible for release. The length of the minimum term is set by the trial judge. In deciding upon the length, he or she must refer to guidelines that Parliament provided in the Criminal Justice Act 2003 (“the 2003 Act”). Under the guidelines, the length of the minimum term will depend on the gravity of the murder. For example, suppose the defendant takes part in a plan to murder two (or more) persons and then participates in their murders. If the defendant is aged 21 or over, that should ordinarily be met with a sentence indicating that the defendant must spend the rest of his or her life in prison.⁸ The setting down of such recommended minimum terms makes the argument for reform of the law of murder very strong.
- 1.28 For example, what if the defendant participated in the murders just mentioned (perhaps by providing no more than some minor act of assistance) only because he or she, or his or her family, had been threatened with death? The 2003 Act makes no mention that this is to be a factor mitigating the punishment. Arguably, the defendant should not be guilty of murder, in any event, but of a lesser offence of homicide. We consider this issue in Part 7.
- 1.29 The 2003 Act also says that if a killing comes about through an intention to do only serious harm, the fact that there was no intention to kill is a ‘mitigating factor’. That approach is necessary, given the law as it stands, but the important question is, should killings that come about only through an intention to do serious harm be governed by the 2003 Act at all? In other words, should the 2003 Act apply only when there was an intentional killing? Our provisional view is that the answer to this last question should be “yes”.

OUR PROVISIONAL PROPOSALS: AN OVERVIEW OF THE STRUCTURE

- 1.30 We propose that there should be a new Homicide Act for England and Wales. The new Act should replace the Homicide Act 1957 (“the 1957 Act”). The new Act should (for the first time) provide clear definitions of murder, and of the partial defences to murder. Ideally, the Act should also define manslaughter so that the general offences of homicide are largely dealt with within a single piece of legislation.
- 1.31 How do we propose that the new Homicide Act should define murder, manslaughter and partial defences to murder? We have been guided by a key principle. This is what can be called the “ladder” principle.
- 1.32 Individual offences of homicide, and partial defences to murder, should exist within a graduated system or hierarchy of offences. This system or hierarchy should reflect degrees of seriousness (of offence) and degrees of mitigation (in partial defences). Individual offences should not be so wide that they cover conduct varying very greatly in terms of its gravity. Individual partial defences should reduce the level of seriousness of a crime to the extent warranted by the degree of mitigation involved.

⁸ Criminal Justice Act 2003, s 269, sched 21, para 4(2)(a).

- 1.33 For example, we will be suggesting that murder should be divided into “first degree murder” (attracting the mandatory life sentence), and “second degree murder” (with a discretionary life sentence maximum).
- 1.34 We will also be asking the question whether manslaughter should continue to be such a broad crime. Should it really continue to cover not only what would be murder but for the effect of partial defences but also all culpable unlawful killing, from a trivial assault that unexpectedly causes death to killing through a very high degree of recklessness?
- 1.35 With regard to partial defences, we will be asking whether, for example, a successful plea of diminished responsibility should in all instances reduce “first degree murder” to “second degree murder”. Is there a case for providing that where, in addition, the victim consented to being killed, the combined effect of diminished responsibility and the victim’s consent should be to reduce the offence from “first degree murder” to manslaughter? We will also be asking whether duress should reduce “first degree murder” to “second degree murder” and whether it should be a complete defence to a charge of “second degree murder”.
- 1.36 The “ladder” principle also applies to punishments for offences. The mandatory life sentence for murder should be confined to the most serious kind of killing. A discretionary life sentence should be available for less serious (but still highly blameworthy) killings. A fixed term of years maximum should be sufficient to deal justly with those homicides where the offender’s degree of fault was lower or where there were quite exceptional mitigating circumstances.
- 1.37 We set out below a structure that we believe would, in accordance with the “ladder” principle, make the law of homicide more coherent and comprehensible. We invite comment on it. There are many alternatives and consultees should feel free to suggest their own preferences in that regard.
- 1.38 **“First degree murder”** (mandatory life penalty):
- (1) Intentional killing.
- 1.39 **“Second degree murder”** (discretionary life maximum penalty):
- (1) Killing where the offender did not intend to kill but did intend to do serious harm.
 - (2) Recklessly indifferent killing, where the offender realised that his or her conduct involved an unjustified risk of killing, but pressed on with that conduct without caring whether or not death would result.
 - (3) Cases in which there is a partial defence to what would otherwise be “first degree murder”.
- 1.40 **Manslaughter** (fixed term of years maximum penalty):
- (1) Killing through gross negligence;
 - (2) Killing through an intentional act intended to cause injury or involving recklessness as to causing injury.

- 1.41 Other offences:
- (1) Infanticide; complicity in suicide.
- 1.42 Defences reducing “first degree murder” to “second degree murder”:⁹
- (1) Provocation (gross provocation or fear of serious violence).
 - (2) Diminished responsibility.
 - (3) Duress (threat of death or of life-threatening injury).
- 1.43 We would also like to receive views on other questions, such as whether first degree murder should include some instances of killing through an intention to do serious harm, if the ‘serious harm’ that must be intended can be clearly restricted to very grave harms. These other questions can be found in Part 10.
- 1.44 We are also concerned with the question of how the terms used in this revised structure are to be defined. What is “recklessness”, for the purposes of a “second degree murder” conviction? How are provocation and diminished responsibility to be defined? What kinds of consensual killing are worthy of being treated as lesser offences of homicide? All of these questions are addressed in the Parts that follow.
- 1.45 We will also be concerned with other general principles that run alongside the “ladder” principle. One such is the “fair labelling” principle.¹⁰ Offenders should not be labelled as guilty of murder, or of manslaughter, unless their conduct is sufficiently blameworthy to deserve that label. For example, we will be raising the question whether someone who killed when they intended to do only what the law regards as serious harm, and did not intend to kill, is fairly labelled as a ‘murderer’. Is it right that such a person is regarded as a murderer, but someone provoked into killing intentionally by (say) his or her partner’s unfaithfulness can be convicted only of manslaughter?
- 1.46 People’s views on fair labelling questions will understandably differ very widely. Important though the fair labelling principle is, we would not want our analysis to become bogged down in questions concerning the appropriateness of particular labels for particular offences. It is more important that we set to rights the structure, or ladder, of offences.

⁹ For simplicity’s sake, we are provisionally of the view that the partial defences should all reduce “first degree murder” to the same lesser crime: either “second degree murder”, or manslaughter. Making a distinction between defences that reduce “first degree murder” to “second degree murder” and defences that reduce “first degree murder” to manslaughter would require the jury, in cases where more than one defence is pleaded, to agree which defence has been successfully pleaded. This is highly undesirable because a jury may agree that the crime should not be “first degree murder”, but may disagree on the reason (some jurors favouring, say, diminished responsibility, and other jurors favouring provocation). In such cases, the verdict should be the same whichever defence is successful, so that such disagreements do not result in an inability to reach a verdict. See Appendix H.

¹⁰ See A Ashworth, “The Elasticity of Mens Rea” in C Tapper (ed), *Crime, Proof and Punishment* (1981).

1.47 For now, what we have done is to set out the kind of structure that we regard as appropriate for a modern, fair and comprehensible law of homicide. It is our belief that the new structure respects the “ladder” principle in a way that those guided and governed by the law are entitled to expect.

1.48 We must now turn to the justifications for these changes.

WHY IS A NEW HOMICIDE ACT NEEDED?

The definition of murder is badly out-of-date

1.49 Few non-lawyers are likely to know that the starting point in any analysis of the law of murder is not an Act of Parliament. It is a definition of murder laid down by a judge, Lord Chief Justice Coke, in a book on criminal law that he completed in the early part of the seventeenth century.

1.50 Even though he successfully prosecuted the gunpowder plotters, Lord Coke’s knowledge of the criminal law was patchy and his account of murder contained some bad errors. One such error was the assertion that killing in the course of any unlawful act was murder.

1.51 Although they knew that this assertion was wrong, such was later judges’ high regard for Lord Coke that they did not use their powers to correct the error. Lord Coke’s word subsequently became law in the criminal codes of most states in the United States of America (USA), where it remains in a modified form to the present day. It was not finally erased from English law until 1957 when Parliament intervened.¹¹ Over the centuries, the error must have led to the execution of hundreds of people in England and Wales and across the USA who should really have been convicted of manslaughter.

1.52 This is how Lord Coke defined murder:

Murder is where a man of sound memory, and of the age of discretion, unlawfully killeth within any country of the realm any reasonable creature in *rerum natura* under the King’s peace, with malice aforethought, either expressed by the party or implied by law, so that the party wounded, or hurt, etc die of the wound or hurt, etc within a year and a day after the same.¹²

1.53 Of course, this wording is no longer used when, for example, judges direct juries on the law. Even now, however, his definition is still regarded as having what lawyers call great “persuasive” authority. That means judges still look to Lord Coke’s definition for guidance.

¹¹ Homicide Act 1957, s 1.

¹² 3 *Co Inst* 47.

- 1.54 They did this, for example, in the recent case in which the Court of Appeal ordered that conjoined twins could be separated to save the life of the stronger twin, even though that would mean the weaker twin died.¹³ The question was whether the weaker twin was a “reasonable creature”, protected by the law of murder, as defined by Lord Coke.
- 1.55 Even if it was broadly accurate at the time it was given, however, Lord Coke’s definition is now seriously misleading and out-of-date in a number of respects.¹⁴
- 1.56 The ancient distinction between express and implied malice, although (we suggest, wrongly) preserved by the 1957 Act, is obscure, liable to mislead even judges and performs no useful function. The jury decides what the defendant’s intention was by considering all the evidence. “Malice” is not now, even if it once was, “implied by law”.
- 1.57 Furthermore, the use of the term “malice aforethought” to express the culpability element in murder has come in for judicial criticism for more than 300 years.
- 1.58 First, it suggests a need for literal premeditation that, in fact, is unnecessary to secure a conviction for murder, and has been unnecessary for a long time.
- 1.59 Secondly, “malice” is in itself a term of very uncertain scope. Even as recently as the 1970s, judges disagreed over whether, for the purposes of the law of murder, it included causing death through some kinds of reckless conduct.¹⁵ Finally, in 1985 they agreed that it was confined to cases where the offender “intended” to do the relevant harm.¹⁶ Yet what was the relevant harm? The answer to this question turned on the meaning of “acting ‘maliciously’ in causing another’s death”. Surprisingly, the judges held that it was not confined to death or the risk of killing.
- 1.60 Instead, acting “maliciously”, in causing another’s death has been held to cover not only those who intend to kill, but also those who kill when only intending to do harm the jury regards as serious.¹⁷ This remains the law to the present day. So, in the following example D is guilty of murder because he acts “with malice aforethought”:

EXAMPLE 2: D and V have been arguing over access to a parking space. V blocks D’s way as D is trying to drive into the space in his large van. In order to get into the space, D drives over V’s foot knowing he will break it in so doing. Complications set in when V is being treated in hospital for his broken foot, leading to his death.

¹³ *Re A* [2001] Fam 147 (CA).

¹⁴ Eg, the rule that death from a wound must occur within a year and a day was abolished by the Law Reform (Year and a Day Rule) Act 1996.

¹⁵ *Hyam* [1975] AC 55 (HL).

¹⁶ *Moloney* [1985] AC 905 (HL).

¹⁷ For detailed consideration, see Part 3.

- 1.61 There is little or no doubt that a broken foot is “serious harm”, and it is that harm that, in the eye of the law, D intentionally inflicts on V.¹⁸ As V dies in consequence, D may be convicted of murder. If convicted, D will receive the mandatory life sentence. In our view, this is the wrong result. D should be guilty of, at most, what we will call “second degree murder”, and is probably better regarded as having committed manslaughter.¹⁹
- 1.62 Most lawyers agree that it is time to confine Lord Coke’s definition to the history books. England and Wales need and deserve a modern definition of murder, set down by Parliament.

Defences to murder lack coherence and are too wide or too narrow in scope

- 1.63 Given that conviction for murder carries with it a mandatory life sentence, it is hard to over-state the importance of a coherent and fair structure of defences to murder. Currently, however, defences to murder are little more than a hotchpotch of uncertain and ever-changing judge-made law, and ageing statutory provision. There is no overall sense of purpose in the design.

Provocation²⁰

- 1.64 Provocation provides an example of continuing uncertainty in the law. The partial defence of provocation can reduce murder to manslaughter, thereby setting the judge free to pass such sentence as seems appropriate. The essential ingredients of the defence were settled by the end of the seventeenth century. At the time of the killing, a defendant must have lost self-control following provocation and it must be possible to say that a reasonable person similarly provoked might also have lost self-control and killed.
- 1.65 However, the exact scope of the defence is still a matter of great controversy. Decisions of the two highest judicial bodies in England and Wales, the House of Lords and the Privy Council, are – not for the first time – currently in conflict over a key element of the defence.²¹ This is the question whether all, or only some, of a person’s individual characteristics should be taken into account in judging whether their reaction to the provocation might have been a reaction of a reasonable person. That a disagreement between these judicial bodies over the scope of the defence (a dispute that might seem arcane to many) still rumbles on after four centuries of legal development shows the law up in a poor light.

¹⁸ For a discussion of “intention”, see Part 4.

¹⁹ See the discussion in Part 2.

²⁰ See Partial Defences to Murder (2004) Law Com No 290, Part 3; and Part 6 below.

²¹ *A-G for Jersey v Holley* [2005] UKPC 23, 3 WLR 29; (*Morgan*) *Smith* [2001] 1 AC 146 (HL).

1.66 Moreover, a defendant can avail him or herself of the defence in wholly unmeritorious cases. Possibly as a result of Parliamentary oversight when the law was partially reformed in 1957, a judge became obliged to put the defence to the jury as one to be considered even when the evidence that the defendant had been provoked was unpersuasive, and the matter was not even raised by defence counsel. We have already recommended changes to these rules in our Report, *Partial Defences to Murder*.²²

Excessive force in self-defence²³

1.67 A lack of coherence in the overall design of defences to murder is illustrated by the law governing the use of defensive force intended to kill or cause serious harm. Self-defence is a complete defence to murder if the only realistic way of repelling a potentially lethal attack was to meet the attack with equally lethal force. If self-defence is successfully pleaded, the result is acquittal of both murder and manslaughter.

1.68 To be successful in the plea, however, the defendant must (amongst other things) have used no more than “reasonable force”. If the jury find that the force used was unreasonable, because it was excessive, the defence fails altogether. In that event, there is unlikely to be any other defence available and he or she will be convicted of murder.²⁴ In law, there is no legal “halfway house” for those who over-react, even when they are facing a threat of serious violence. There is, in other words, no legal basis for convicting of manslaughter in such cases.

1.69 The House of Lords has passed up opportunities to develop the law in that direction, preferring to call for Parliamentary intervention. So, at present, the jury faces a stark choice in such cases between convicting of murder and acquitting altogether. This shows up a lack of adequate design in the law governing defences to murder.

1.70 If a plea of provocation can reduce murder to manslaughter (the “half-way house”), then it should be possible to reach this result when a jury decides that there has been an excessive, but not greatly excessive, reaction to a threat of serious, unlawful force. This is what we recommended as part of our recommendations for reform of the provocation defence.²⁵

²² *Partial Defences to Murder* (2004) Law Com No 290, Part 3.

²³ *Ibid*, Part 4; and Part 6 below.

²⁴ *Clegg* [1995] 1 AC 482.

²⁵ *Partial Defences to Murder* (2004) Law Com No 290, Parts 3 and 4.

Duress²⁶

- 1.71 A similar problem manifests itself when one turns to the defence of duress. "Duress" involves cases in which someone is confronting a threat of death or serious harm which can only be avoided if that person harms another or their property. An example involving a threat from a human source would be where X threatens to break Y's legs unless Y steals something. An example involving a natural threat would be where Y trespasses on a military installation solely in order to escape from the path of an oncoming tidal wave. Other things being equal, Y will be acquitted of nearly any crime in these situations on the basis of duress.
- 1.72 The defence of duress does not, however, currently apply to murder or to attempted murder, even if the threat from which someone sought to escape was in fact one of imminent death (and not merely one of serious harm). This can give rise to unfairness in a number of situations and the younger the person threatened the greater the unfairness
- 1.73 A defendant's contribution to a murder or attempted murder may have been minimal, as when they helped someone else to commit a murder, rather than perpetrating it themselves, as in the following example:
- EXAMPLE 3: P threatens D with death unless D immediately drives P to a house that P wishes to burgle. D, knowing that P is capable of violence, realises that P may kill if P encounters a householder, V, during the burglary. D drives P to the house, and then speeds off. D kills V during the burglary.
- 1.74 In example 3, D's awareness, at the time of driving P to the scene, of what P might do during the burglary, means that D is complicit with P in the murder of V and has no defence of duress. D's complicity means that D will be convicted of murder and will receive the mandatory life sentence along with P. Given that duress is no defence to attempted murder, D would also have no defence of duress to complicity in that offence even if P only tried and failed to kill the householder.
- 1.75 The courts have resisted the application of a defence of duress to such cases on the grounds that, in some instances, a form of secondary participation in a crime can be more blameworthy than the actual killing.²⁷ This might be the case, say, where D (under threat of death from another) orders one of his or her sons to kill another person, which the son does. What the courts overlook is that, in such cases, the jury is not obliged to accept that the defence excuses D's involvement in his or her son's offence. The jury should be trusted to accept or reject the defence on the merits of the individual case.

²⁶ See Part 7.

²⁷ *Howe* [1987] AC 417 (HL).

- 1.76 It is a legal requirement that, for the defence to be successful, a person of ordinary courage and self-restraint might have done as the person acting under duress did.²⁸ The jury is perfectly entitled to take the view that the greater someone's involvement in murder, the less persuasive the case for permitting the defence to succeed.
- 1.77 This point should also defeat the courts' argument that duress should be no defence to attempted murder because some attempts to kill are as blameworthy as some actual killings. Perhaps they can be as blameworthy, but in such cases the jury can simply reject the defence on the grounds that a person of ordinary courage and self-restraint would not have done as the defendant did.
- 1.78 The lack of a defence of duress in murder cases is especially harsh when the person forced by threats to participate in a killing is a juvenile or young person. Criminal responsibility in England and Wales begins at 10 years of age. The assumption is that, at that age, children understand enough about the moral and legal significance of their crimes to make it fair to convict them. However, that does not mean that it can also be assumed that children will be as resistant to "commit-a-crime-or-else" threats as an older person should be. The younger a defendant, the less reasonable it may be to expect them to resist threats of death, even when escaping the threat entails becoming involved in committing the gravest of crimes.

EXAMPLE 4: A psychopathic father compels his eleven-year-old son through threats of death to participate in the murder of one of the father's rivals.

- 1.79 It seems to be nothing less than an affront to justice that the father may be convicted only of manslaughter, on the grounds of diminished responsibility (due to his psychopathic disorder), but his son must be convicted of murder if his participation involved knowingly taking part in the killing.
- 1.80 One reason the courts may have been resistant to permitting duress to be a defence to murder is that, once again, there seems to be a "design" problem with the application of the defence to murder. Historically, there has never been a "half-way house" possibility of conviction for a lesser homicide offence. The courts have refused to introduce this possibility themselves, saying that it is a matter for Parliament.
- 1.81 It is an anomaly that the defence must be denied in all murder cases, for fear of complete acquittals in some (undeserving) cases, when there is the possible option of conviction for manslaughter. The jury could simply be trusted to reject unmeritorious claims.

²⁸ *Graham* [1982] 1 WLR 294 (CA); *Howe* [1987] AC 417 (HL).

Suicide pacts and depressed carers who kill²⁹

1.82 Finally, an example of the narrowness of existing defences concerns the much debated case of killing by consent. “Euthanasia” is, in law, murder. Even so, if someone kills another person as part of a suicide pact, but then does not (for whatever reason) kill themselves, they are only guilty of manslaughter.³⁰ If they simply helped the other person to die they may be convicted of the lesser offence of “assisting suicide”, contrary to section 2 of the Suicide Act 1961.

1.83 In some instances, it is hard to see why there should be any mitigation of the offence just because the killing was in pursuance of a suicide pact:

EXAMPLE 5: D and V are terrorists trapped in a building during a shoot-out with the police. Seeing that their position is hopeless, D and V agree that D will blow them both up as the building is stormed, ‘to take some police with us’. D detonates the bomb as the building is stormed but it kills only V.

1.84 In fact, many suicide pacts are entered into by older couples both of whom are likely to be mentally and physically ill. Quite frequently, the burden that one partner has had to endure caring for the other leads to the couple agreeing to enter the pact. Any “mercy” being shown is perceived as being shown as much by the victim to the carer, in relieving him or her of caring duties and hence the cause of the continuing stress, as by the carer to the victim in killing him or her. For that reason, more generally, we will not be using the term “mercy” killings as a category of killing.

1.85 In killings of this general type, whether or not the killing was preceded by a suicide “pact” may be a matter of chance.

EXAMPLE 6: D agrees with V that he will kill V. D conceals from V his intention to kill himself immediately thereafter, because he knows V very much wants him to make a new life for himself when she is gone. D kills V, then tries to kill himself but fails.

1.86 D is guilty of murder in this example, whether or not the person who was killed consented. This is because there was no suicide “pact” preceding the killing. It is, though, hard to see that there is any substantial moral difference between such a case and one in which the killing is preceded by a suicide pact. In some circumstances, it should be a lesser offence of homicide on both sets of facts.

1.87 By focusing on the presence or absence of a suicide pact, it is arguable that the law is focusing on the wrong issue. It is cases where severe depression leads the defendant to accede to the victim’s request to die (perhaps insisting that this happens by the defendant’s hand alone), when the defendant would not otherwise agree to do this, that should be the focus in point of mitigation. The issues are:

- (1) Is the defence of diminished responsibility currently wide enough to capture cases where D is moved to act through depression?

²⁹ See Part 8.

³⁰ Homicide Act 1957, s 4.

- (2) Should the fact that the victim also consented in such cases be regarded as providing an element of double mitigation, so that the offence should now be lower down the ladder of offences than it would be if diminished responsibility was the only mitigating factor?

Why can't the judges be left to make the necessary changes?

1.88 Judges do not have the power to create entirely new criminal offences, although they have limited powers to interpret existing crimes in ways that expand their scope. In theory, judges may create new defences to crimes, but in practice they do not do this, confining themselves to making revisions to existing defences. Judges believe significant reform of the criminal law is a matter for Parliament. The House of Lords has set out the following restrictive principles for development of the criminal law by the judiciary:

- (1) If the solution is doubtful, the judges should beware of imposing their own remedy;
- (2) Caution should prevail if Parliament has rejected opportunities for clearing up a known difficulty, or has legislated leaving the difficulty untouched;
- (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems;
- (4) Fundamental legal doctrine should not lightly be set aside; and
- (5) Judges should not make a change unless they can achieve finality and certainty.³¹

1.89 There are good reasons for adopting this very cautious approach to law making in the courts. Judges have very limited opportunities to reform the criminal law. They can only do so when the particular case to be decided is one in which an important point of law arises. That may happen only very rarely, if at all, in some areas of law.

1.90 Even when a case does arise that provides an opportunity to reform the law, judges are limited in what reforms they can make. Judges cannot change any aspect of the law of murder, however much it is in need of reform, unless it is raised by the facts of the case before them. Even in those limited circumstances where judges may be able to make a change in the law, they cannot make any legally decisive consequential reforms that may be necessary or desirable.

1.91 Finally, the development of the criminal law raises many policy issues that require extensive consultation with interested groups and broad-ranging debate if they are to be properly addressed. Judges are not in a position to conduct such consultation exercises or to organise such debate on the back of an individual case.

³¹ *C v DPP* (1996) AC 1, 28, *per* Lord Lowry.

What has Parliament done up until now?

- 1.92 Parliament has, in fact, quite often changed particular aspects of the law of homicide. What it has never done, however, is provide a statutory definition of murder or set out a coherent structure of full and partial defences to murder. In this section, we provide some examples of how Parliament over the centuries has changed the law of homicide, including murder. What the changes show is that Parliament, when it has legislated in this area of the law, has tended to respond to particular pressures and has only relatively recently (from the mid twentieth century) begun to take an interest in rationalising the law of homicide.
- 1.93 In the fourteenth, fifteenth and sixteenth centuries, Parliament intervened to restrict the scope of the King's power to grant pardons for homicide. It sought to exclude that power when homicide was committed "of malice aforethought", the probable beginning of the association of that legal term with premeditated murder. In 1604, the so-called "Statute of Stabbing" was passed. It sought to prevent lenient treatment of killings by "stab or thrust" of someone unprepared for the attack. The measure seems to have been a response to fatal arguments then breaking out between English courtiers and newly-arrived Scottish courtiers.
- 1.94 In 1752, under pressure from anatomists, the Murder Act was passed "as an object of further terror for better preventing the horrid crime of murder". Replacing the wasteful practice of leaving the body of an executed murderer on the gibbet until decomposition had taken place, science would now benefit from a requirement that the body be subjected to dissection and anatomy. In 1828 Parliament altered the punishment for manslaughter, and abolished the higher category of murder known as "petty treason" (which was subject to different trial procedures and harsher punishment). A Homicide Bill that would have rationalised the definition of murder failed in 1873-74 and failed again in 1878-79 despite having reached a second reading.
- 1.95 In 1922, the Infanticide Act was passed. The Act created the offence/defence of infanticide which was committed by new mothers who, whilst the balance of their mind was disturbed due to the effects of giving birth, killed their newly born infant. The offence was punishable by a maximum term of life imprisonment.
- 1.96 In 1929, the Infant Life (Preservation) Act was passed. This Act created a specific offence, with a maximum penalty of imprisonment for life, of "child destruction", which means killing a foetus while it is still inside the womb (as by deliberately kicking a pregnant woman in the stomach).
- 1.97 The Road Traffic Act 1956 created the offence of causing death by reckless or dangerous driving. The offence was introduced because juries had proved unwilling to convict defendants of manslaughter when the killing took place through a driving offence. Until that point, the law had concentrated on penalising driving according to its manner rather than focusing on the result of bad driving.
- 1.98 In 1957, Parliament passed the Homicide Act. This Act made several important changes to the law of murder:
- (1) It substantially narrowed the scope of the death penalty in murder cases (the death penalty was abolished entirely for murder in 1965).

- (2) It abolished the arbitrary rule that someone is automatically guilty of murder whenever they kill – even accidentally – in the course of a “felony” (a more serious kind of criminal offence).
 - (3) It created the partial defences to murder of “diminished responsibility”, and of killing in the course of a suicide pact.
 - (4) It also broadened the defence of provocation to cover provocation by words (as well as by blows or the threat of violence).
- 1.99 As a response to public pressure, the Suicide Act 1961 abolished the rule making it, in theory, attempted self-murder to attempt suicide. The Act also created the offence of complicity in suicide. In 1996, the Law Reform (Year and a Day Rule) Act was passed. This Act rid the law of the requirement that death must occur within a year and a day of the mortal wound for the defendant to be liable to conviction for murder.
- 1.100 In 2003, Parliament passed the Criminal Justice Act. The Act sets out the principles governing how a judge should determine the length of the period that a convicted murderer must spend in prison before he or she is eligible for release on licence. It does so by providing three recommended “starting points” for particular kinds of cases, and then listing aggravating and mitigating features which may result in the starting point being adjusted either upwards or downwards. The aggravating features bear some resemblance to the cases for which the death penalty was preserved between 1957 and 1965.
- 1.101 The Domestic Violence, Crime and Victims Act 2004 created a new homicide offence of causing the non-accidental death of a child or vulnerable adult.
- 1.102 Having come about over a long period of time, as a response to what appeared to be pressing contemporary problems, these developments do not add up to a coherent law of homicide. There might, for example, have been no need for the creation of the offence of infanticide in 1922, had the partial defence of diminished responsibility – not introduced until 1957 – already existed as a basis for addressing the problems posed by mothers who kill their infant children. Had the crime of complicity in suicide already existed in 1957, rather than having to await creation in 1961, at least some killings in the course of a suicide pact might have been treated in law as assisted suicides, rather than as the much more serious offence of manslaughter.
- 1.103 The 2003 Act seeks to address some of these issues through its list of mitigating features (the mitigating features largely reflect current sentencing practice). The 2003 Act mentions, for example, that it is to count as a mitigating feature that the offender “suffered from mental disorder or disability which lowered his degree of culpability”, and that the offender acted on a “belief ... that the murder was an act of mercy”. In such cases, however, it can become hard intelligibly to relate the mitigating feature to the starting point that the Act would otherwise suggest is appropriate in such a case. We explain why in the next sub-section.

The Criminal Justice Act 2003 and the law of homicide

- 1.104 Section 269 of the 2003 Act is concerned with the determination of the minimum term that a convicted murderer must spend in prison before he or she is eligible for release on licence. It requires the trial judge to set a minimum term that reflects the seriousness of the murder or (where applicable) the seriousness of the murder and any other offences that the murderer has also committed. When the offender is over 21 years of age, the section confers a power on the trial judge to stipulate that the murder is so serious that the offender should never be considered for release on licence.
- 1.105 Section 269 further provides that the “seriousness” of the offence is to be determined by having regard to the principles set out in schedule 21. These principles are very important and receive detailed consideration here. The principles require the trial judge to adopt a two-stage approach. Guided by the principles, he or she first identifies what the “starting point” of the minimum term should be. Having identified the starting point, the judge, again guided by the principles, identifies any aggravating and mitigating features of the murder. Finally, the judge decides whether, and how much, to depart from the starting point.
- 1.106 According to the schedule, some cases of murder are ones in which the trial judge should recommend that the offender serve at least thirty years in prison or even the whole of the rest of his or her life (“whole life” minimum term). Broadly speaking, these cases encompass those that would still have attracted the death penalty after the 1957 Act until 1965 when the death penalty was finally abolished.
- 1.107 Amongst the cases identified for “whole life” minimum terms are the murder of two or more people (if this involved premeditation, abduction, or sadistic or sexual conduct) or the murder of a child (if this involved abduction, or sexual or sadistic motivation). Amongst the cases that should attract a recommended minimum term of at least 30 years’ imprisonment, are the murder of a police or prison officer acting in the course of his or her duty, murder involving a firearm or explosive and murder committed for gain. In other cases of murder, the offender should serve at least 15 years in prison subject to adjustment for any aggravating or mitigating features of the case.
- 1.108 For example, the starting point for a murder involving a firearm is 30 years’ imprisonment. A significant degree of planning is mentioned as an aggravating factor that would warrant moving above this starting point. The fact that the offender was suffering from a mental disorder or was provoked, albeit not having a partial defence on these grounds, are mentioned as mitigating features that would warrant dropping below this starting point.

- 1.109 The approach adopted in schedule 21 has advantages over comparable provisions in the USA. Like schedule 21, it is common in states in the USA to identify for especially severe treatment “worst case” murders, such as the murder of a child, a judge or a police or prison officer. However, many states in the USA do this by dividing murder into a number of categories defined by law as separate offences for the purpose of justifying especially severe (or, indeed, lenient) treatment.³² In contrast, the categories in schedule 21 only apply to sentencing.
- 1.110 The use of different categories of offences in some states in the USA can too often lead to a situation in which an answer to the question whether an offender is eligible for the severe treatment reserved for a particular category of murder depends on legal niceties.
- 1.111 The 2003 Act avoids the prospect that eligibility for particular (severe) sentences will become dependent on legal niceties by avoiding the proliferation of legally defined categories of “worst case” murder. Instead, the 2003 Act adopts a more flexible approach. As indicated above, it simply has different starting points for fixing the minimum custodial element which can then be adjusted according to any aggravating and mitigating features that are present.
- 1.112 As we noted in paragraph 1.3, we will not be giving further consideration to ‘aggravating’ features of murder. There are, though, some serious drawbacks to the way the guidelines of the 2003 Act relate starting points to mitigating factors. Without reform of the law of murder, it will be almost impossible to rid the law of these drawbacks. The problem is that the suggested starting points sit very uncomfortably alongside the mitigating features. Here are some examples.
- 1.113 The Act provides for a 30-year starting point for murders where firearms are used. The lawful ownership of shotguns is not unusual amongst farmers. So, if a farmer were to kill his terminally ill wife, with her consent, by shooting her, the starting point for sentencing would be 30 years’ imprisonment, subject to the mitigating feature that the farmer believed the killing to be an act of mercy. Indeed, if there was planning or premeditation (which there almost certainly will have been) that is, according to the Act, an aggravating feature that should raise the starting point to a “whole life” sentence.
- 1.114 Yet, had the farmer killed his wife as part of a suicide pact, his crime would have been manslaughter and he could have expected a sentence ranging from a non-custodial penalty to, perhaps, three years’ imprisonment. The problem in such a case, then, is that under the 2003 Act this kind of murder – deliberate and with a firearm – has a starting point of 30 years’ minimum imprisonment or more. On these kinds of facts, however, the mitigating feature – that the farmer and his wife believed the killing to be one of mercy – is liable to bring the recommended minimum down by something like 80% if normal sentencing practice is maintained. This being the case, we ought to look hard at whether such a mitigating feature should take the crime outside the scope of murder altogether and into manslaughter instead.

³² A summary of Professor Claire Finkelstein’s analysis of American law is in Appendix D. We intend to publish the full analysis on our website shortly, together with other comparative law papers.

- 1.115 A similar point could be made about cases close to but not covered by the crime of infanticide. A mother who kills her infant when the infant is under one-year old need show only that, when she did so, the balance of her mind was disturbed. She does not have to go as far as to show that she was suffering from a “mental disorder or mental disability” (as the 2003 Act puts it). Infanticide cases are normally dealt with through non-custodial sentences.
- 1.116 Under the 2003 Act, however, the starting point for the killing of a child is fifteen years’ imprisonment, and the fact that the child was in the killer’s care is listed as an aggravating factor. Suppose a mother suffering from post-natal depression kills her infant when the infant is just over one-year old. This starting point (and the aggravating factor) will govern the killing, unless she can show that the depression substantially diminished her mental responsibility, and hence come within the partial defence of diminished responsibility that will reduce her offence to manslaughter.
- 1.117 Once again, the problem is that the starting point of the minimum term in such a case (perhaps, 20 years’ imprisonment) is, under normal sentencing practice, liable to something like a 90% discount in the light of the mitigating feature (that the offender killed her infant whilst suffering from post-natal depression). So, again, it makes sense to consider whether such cases should be taken outside the scope of murder altogether by reforming the offence of infanticide.
- 1.118 A further point needs to be made about the way in which the 2003 Act relates to the law of homicide. It does not adequately address the most controversial of the remaining judge-made aspects of the law of murder. For example, the 2003 Act does not seek to change the definition of “murder”, even though, for certain types of murder, it introduces such high starting points for fixing the minimum term of the life sentence. At common law, however, murder is committed not only when there was an intention to kill but also when there was an intention to do only serious harm to the victim.³³ It is inappropriate to treat someone who did not intend to kill, say, a child or a police officer in the same way as someone who did intend to kill such a person when deciding how long they should spend in prison before being eligible for release. This is so even if a very serious crime is committed in both cases. Consequently, the 2003 Act treats the fact that there was only an intention to do serious harm as a “mitigating factor” which can justify setting a lower minimum term.

³³ As indicated when discussing Lord Coke’s definition of murder, in paras 1.49-1.62.

- 1.119 Yet, it seems that it was only a misunderstanding between Parliament and the judiciary, prior to the passing of the 1957 Act, that resulted in an intention to do serious harm (“grievous bodily harm”, as it is sometimes known) remaining an element of culpability sufficient to convict of murder when death resulted. The Royal Commission on Capital Punishment 1949-1953 (“the Royal Commission”), whose recommendations in 1953 formed the basis for the reforms in the 1957 Act, was strongly influenced by evidence about the fault element of murder that it received from the then Lord Chief Justice. The Lord Chief Justice told the Royal Commission that to be guilty of murder in law, “a person who wittingly inflicts grievous bodily harm must know that he is endangering life” (our emphasis). He assured the Royal Commission he would direct a jury to that effect.³⁴
- 1.120 Accordingly, the Royal Commission explicitly declined to make any recommendation for change to the mental element in murder, believing it to be satisfactory. However, shortly after the passing of the 1957 Act, the Lord Chief Justice himself gave the leading judgment in a case, *Vickers*,³⁵ which was at odds with what he had told the Royal Commission. The judgment in that case authoritatively established that murder is committed when a defendant who has killed intended to inflict serious harm, even in the absence of knowledge or belief that the victim’s life would be endangered by his or her actions.
- 1.121 Within a month of the judgment in *Vickers*, there was further debate on the issue in Parliament, some of it acrimonious. The opposition claimed to have been misled in Parliament by the Attorney-General into thinking that murder was restricted to instances where there was at least foresight on the defendant’s part that life would be endangered by his or her action.
- 1.122 As in Lord Coke’s day, then, a highly controversial piece of judicial law making was causing problems within the law of murder. Subsequently, judges fully acknowledged that there was a discrepancy between what the Lord Chief Justice had told the Royal Commission the fault element in murder was and what he had said it was in *Vickers*. However, as with Lord Coke’s fatal error, later judges did not change the law to make it consonant with what had been the Royal Commission’s and Parliament’s understanding, even when the opportunity to do so arose.³⁶
- 1.123 Had the misunderstanding between the Royal Commission and the Lord Chief Justice not occurred, a conviction for manslaughter would have been the result when there had been an intention to do no more than serious harm. In consequence, cases in which a killing was the result of such an intention would not have fallen within the reach of the 2003 Act at all. They would have been dealt with as bad cases of manslaughter, doubtless warranting a long custodial sentence, but not as cases of murder. We are provisionally proposing recommending that they are treated as instances of “second-degree murder” and, therefore, outside the scope of Schedule 21 of the 2003 Act.

³⁴ Royal Commission on Capital Punishment, *Royal Commission on Capital Punishment 1949-1954: Report* (1953) Cmnd 8932, paras 106/472.

³⁵ [1957] 2 QB 664.

³⁶ *Hyam v DPP* [1975] AC 55; *Cunningham* [1982] AC 566.

OUR PHILOSOPHY: PROMOTING COHERENCE IN THE LAW

- 1.124 A key theme of our reform proposals will be the need to provide solid foundations for the main legislative pillar of the law of homicide, and for its other supporting structures. The main pillar is the 2003 Act whilst supporting structures include the Infanticide Act 1938 and the Suicide Act 1961. In essence, our view is that the earlier twentieth century Acts need thorough modernisation or refurbishment if they are to continue to stand effectively alongside the 2003 Act. More generally, the foundations we seek to provide will consist of a replacement for the 1957 Act, in the form of a new legal structure – a new Homicide Act – on the lines set out above.
- 1.125 At the time the 1957 Act was enacted, it was the most significant reform of the law of murder ever undertaken by Parliament. The 1957 Act confined the sentence of death to the more serious instances of murder. It also made some important changes both to the definition of murder, and to the partial defences for murder (defences that reduce the crime to the lesser offence of manslaughter).
- 1.126 The 2003 Act is one of the most important pieces of legislation in the history of criminal justice reform. The Act made many radical and far-reaching changes to the law of criminal evidence and procedure; but it also made perhaps the most important legislative changes to the law of murder since the final abolition of the death penalty in 1965. It brought in a new sentencing regime for murder, as discussed in paragraphs 1.104-1.123.
- 1.127 The radical reforms effected by 2003 Act presuppose clear and coherent definitions of murder and of the partial defences to murder. According to the 2003 Act, only those who have committed “murder” will be eligible for the severe sentences the Act recommends for the worst cases. For example, the manslaughter of a police officer, although a serious offence, is not governed by the 2003 Act and would not necessarily be approached in the same way for the purposes of sentencing.
- 1.128 Unfortunately, although twentieth century legislation on murder brought in many valuable reforms, the definitions of murder and of the partial defences remain misleading, out-of-date, or both. They are, quite simply, not up to the task of providing the kind of robust legal support on which the viability of the 2003 Act depends.
- 1.129 It is worth noting that the problems we discuss were identified by a Parliamentary Select Committee as long ago as 1874. The Committee said:

If there is any case in which the law should speak plainly, without sophism or evasion, it is where life is at stake; and it is on this very occasion that the law is most evasive and most sophistical.³⁷

³⁷ *Special Report from the Committee on Homicide Law Amendment Bill (1874)* 314.

- 1.130 A few years later, former Prime Minister W E Gladstone indicated his willingness to promote the enactment of a Homicide Act, based on what the Criminal Law Commissioners had proposed, to rationalise the law; but nothing was done.³⁸ That led one criminal lawyer to remark, at the beginning of the twentieth century, that a belief that a criminal code would be passed in the House of Commons was as naïve as “expecting to find milk in a male tiger”.³⁹
- 1.131 We hope that, at the beginning of the twenty-first century, an expectation that the law of homicide should be rationalised by statute is not quite that naïve.

³⁸ See K J M Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (1998) 149.

³⁹ *Ibid.*

PART 2

CHANGING THE STRUCTURE OF THE LAW OF HOMICIDE

QUESTIONS AND PROVISIONAL PROPOSALS

2.1 We ask:

- (1) Should “first degree murder” (and the mandatory life sentence) be confined to intentional killing?

[paragraph 2.12]

- (2) If your answer to (1) is “yes”, should the law go on to draw a distinction between “first degree murder” and “second degree murder”?

[paragraphs 2.51-2.54]

- (3) Should “second degree murder” become the verdict when partial defence pleas, like diminished responsibility and provocation, are successful?

[paragraph 2.55]

- (4) Should some or all partial defences be abolished, with the effect that they become simply mitigating circumstances affecting the recommended minimum period of the life sentence that the offender must spend in custody for murder?

[paragraphs 2.73-2.96]

- (5) If your answer to (2) above is “yes”, should killing with an intention to do serious harm become “second degree murder”?

[paragraph 2.55]

- (6) If your answer to (2) above is “yes”, should “second degree murder” also cover what we define as killing by reckless indifference?

[paragraph 2.55]

- (7) If “second degree murder” should be introduced, should it have a discretionary life maximum penalty?

[paragraph 2.65]

- (8) Should the law regard some partial defence pleas, like killing under diminished responsibility when the victim consented to be killed, as involving such limited culpability that they ought to reduce “first degree murder” to manslaughter (and not simply to “second degree murder”)?

[paragraphs 2.69-2.72]

- (9) Should the maximum sentence for manslaughter have a lower maximum sentence (such as 14 years' imprisonment) to reflect the difference between such an offence and "first degree murder" or "second degree murder"?

[paragraph 2.7(3)]

2.2 We provisionally propose that:

- (1) The law draws a distinction between "first degree" and "second degree murder".
- (2) "First degree murder" (and the mandatory life sentence) should be confined to intentional killing.
- (3) "Second degree murder" should become the verdict when partial defence pleas, like diminished responsibility and provocation, are successful.
- (4) Killing with an intention to do serious harm should be "second degree murder".
- (5) "Second degree murder" should also cover what we define as killing by reckless indifference.
- (6) If "second degree murder" is introduced, it should have a discretionary life maximum penalty.
- (7) The maximum sentence for manslaughter should have a lower maximum sentence (such as 14 years' imprisonment) to reflect the difference between such an offence and "first degree murder" or "second degree murder".

OUR PROVISIONAL VIEW OF HOW THE LAW OF HOMICIDE SHOULD BE RESTRUCTURED

2.3 As we indicated in Part 1, the law of homicide should respect the "ladder" principle. Wrongdoing in homicide – unlawful killing – is wrongdoing in respect of which culpability varies in both kind (intention, as against gross negligence) and degree (reckless as to causing some harm, as against recklessness as to causing death). The "ladder" principle requires that the law of homicide reflect this variety through a range of offences, ordered in terms of relative gravity. No offence should be required to encompass too great a range of forms of culpable killing before one reaches the next 'step' up or down, in point of gravity.

2.4 One of the many problems with the present law is that it does not respect the "ladder" principle. Manslaughter, for example, encompasses far too great a range of conduct causing death. At the lower end of the scale, it covers cases in which the defendant simply pushes someone in (say) a dispute over priority in a queue, and the victim falls over, hits his or her head, and dies.¹ At the other end of the scale, it must cover cases such as one in which (say) the defendant deliberately pushes a huge lump of concrete from a road bridge as a car is passing

¹ *Mitchell* [1983] QB 741.

underneath, killing an occupant of the car;² times a bomb to go off an hour after a warning has been given that it will explode, killing the bomb disposal expert; or puts one bullet in a revolver, spins the barrel and fires the gun at someone's head, killing them when the gun goes off.³

2.5 The 'step' from the lower reaches of manslaughter to murder, which requires nothing less than an intention to kill or to cause serious harm, is thus far too large. As we indicated in Part 1, this, in turn, creates a 'labelling' problem. Morally significant labels, such as "manslaughter" or "murder", should not be used to cover such a broad range of conduct that, as it were, their currency becomes debased, and the label becomes unfair or lacking in proper meaning.

2.6 We believe that the "ladder" principle can be best respected by introducing a new category of homicide, "second degree murder", fitted between what would become "first degree murder", and manslaughter. We believe that the introduction of only one such further category of murder would not create a labelling problem. To be sure, great care must be taken over who is to be labelled, in law, a "murderer". It is possible to take such care whilst having more ways to become guilty of murder than currently exist, especially if that means (as it would, on our view) reducing the excessively wide scope of manslaughter.

2.7 In that regard, our provisionally preferred structure of homicide offences looks like this:

- (1) "First degree murder" (mandatory life sentence):
 - (a) Intentional killing.
- (2) "Second degree murder" (discretionary life sentence):
 - (a) Killing with intention to do serious harm;
 - (b) Killing through reckless indifference to causing death;
 - (c) Partial defences to intentional killing, such as diminished responsibility.
- (3) Manslaughter (fixed term of years maximum sentence):
 - (a) Killing through gross negligence as to causing death; or
 - (b) Killing through a criminal act which the offender intended to cause some injury or realised might cause some injury;⁴
- (4) Other Offences:
 - (a) Infanticide (as amended); complicity in suicide etc.

² *Hancock and Shankland* [1986] AC 455.

³ For a case close to this, see *Commonwealth v Malone* [1946] (Pennsylvania) 354 Pa 180, 47 A 2nd 445, discussed in Part 3.

⁴ This proposal is drawn from, and is meant to reflect, the Home Office Paper *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000).

- 2.8 This basic structure constructs a ladder of offences by making the degree of harm intended or knowingly risked the pivotal element. If *some* harm is intended or risked, and death is caused, that is manslaughter. If *serious* harm is intended, or death is knowingly risked, that is “second degree murder”. If *death* is intended, that is “first degree murder”.
- 2.9 The effect of defences to intentional killing must of course be added to this picture. Some partial defences, such as provocation, may be reformed so that they reduce “first degree murder” to “second degree murder”.
- 2.10 It may be helpful to set out various alternatives to our provisionally preferred option.
- (1) “First degree murder”:
 - (a) Intentional killing;
 - (b) Killing with intention to do serious harm, where ‘serious’ harm is restricted to the most severe injuries.
 - (2) “Second degree murder”:
 - (a) Selected partial defences to murder⁵ only;
or
 - (b) Killing with intention to do serious harm; and
 - (c) Killing through reckless indifference; and
 - (d) Selected partial defences to murder.
 - (3) Manslaughter:
 - (a) Killing with the intention to do serious harm;
 - (b) Killing through recklessness, gross negligence or an unlawful and dangerous act;⁶ or
 - (c) Possibly some partial defences to intentional killing where the mitigating circumstances were exceptionally strong. An example is diminished responsibility coupled with the victim’s consent to be killed. **[Question 8]**

SHOULD MURDER REMAIN A SEPARATE OFFENCE, OR OFFENCES?

- 2.11 We are provisionally proposing the creation of two degrees, or tiers, of murder: “first degree murder” and “second degree murder”. **[Question 2]**

⁵ We say “partial defences”, rather than referring to provocation, diminished responsibility and duress, because we appreciate that some consultees will wish to see a different selection of partial defences (possibly wider or possibly narrower) within second degree murder.

⁶ This replicates the present law.

- 2.12 Our first provisional proposal is that “first degree murder” should be committed only when there has been an intentional killing. It is this category of murder alone that should attract the mandatory life penalty. **[Question 1]**

Some advantages of confining “first degree murder” to intent-to-kill cases

- 2.13 We believe that confining “first degree murder” (and the mandatory life sentence) to intentional killing will bring the law of murder more into line with public opinion. The public opinion survey carried out by Professor Barry Mitchell⁷ shows a very high level of agreement that an intent to kill is (subject to considerations of excusable motive) an indication that the crime was especially serious.
- 2.14 Furthermore, from a legal point of view, confining “first degree murder” to intent-to-kill cases would bring a number of welcome clarifications and simplifications. It would, for example, bring the law of murder into line with the law of attempted murder, which requires proof of an intention to kill. In that regard, it is worth noting that there are 80-90 convictions annually for attempted murder. This suggests that there may not be insurmountable problems in proving the fault element in “first degree murder”, if it is confined to an intention to kill. This point is pursued further in Part 3.
- 2.15 At a stroke, it would also consign to history a persistent problem that has arisen in the law governing the liability of accomplices to murder. At present, an accomplice can be guilty of murder (and will receive the mandatory life sentence) even when he or she was at cross-purposes with the actual perpetrator of murder. This can happen when the accomplice gives the perpetrator help, believing that the perpetrator will or may inflict only what the law regards as serious harm, but the latter secretly intends to and does kill. In this example the accomplice had the fault element for murder (an awareness that the perpetrator might act on an intention to do serious harm), just like the perpetrator, even though their intentions were different.⁸ Under our provisional proposals, to be convicted of “first degree murder”, the accomplice would have to have been aware that the perpetrator might kill intentionally.

Keeping the offence of “murder”: the proposals of the CLRC

- 2.16 We are investing a great deal in the continued existence and utility of the legal category of murder. It is appropriate, then, to explain why there should be not only an offence, but also possibly more than one offence, of murder.
- 2.17 In 1976, the Criminal Law Revision Committee expressed the view that murder should in law remain separate from other offences of homicide. The Committee rejected Lord Kilbrandon’s well-known view that:

⁷ Contained in Appendix A.

⁸ See *Powell & Daniels; English* [1999] 1 AC 1. The House of Lords attempted to ameliorate the problem by saying that if there is a “fundamental difference” between what the perpetrator intended to do, and what the accomplice thought he or she might do, the latter is not complicit in the perpetrator’s murder. Unfortunately, the concept of “fundamental difference” has not proved to be an easy one to apply. Further, the House of Lords has made it clear that, in cases where there is a fundamental difference between what the perpetrator and the accomplice intended, the accomplice is guilty of neither murder nor manslaughter. This seems to us too generous to the accomplice: see Part 5.

There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment.⁹

- 2.18 Instead, the Committee gave two explanations for retaining murder as a separate offence. First, it took the view that:

In modern English usage the word “murderer” expresses the revulsion which ordinary people feel for anyone who deliberately kills another human being. The phrase “the sanctity of life” is not a cliché. For many it has its foundations in religion – and not only in the Christian religion. The present is not, in our opinion, a time for change in this respect.¹⁰

- 2.19 Secondly, the Committee went on to say that:

If we were to propose the abolition of the separate crime of murder and its incorporation in a wider offence of unlawful homicide, many people ... would be likely to think that the law no longer regarded the intentional taking of another’s life as being especially grave.¹¹

The “sanctity of life” argument

- 2.20 The notion of “sanctity of life” can be given a religious basis. As Professor John Kleinig puts it:

For some, the appeal to life’s sanctity is intended to mark it out as something set apart for or consecrated to God. It is seen as God’s special possession, as something over which God has jurisdiction.¹²

- 2.21 Closely associated with, although distinct from, this account of the sanctity of life is an account more consistent with a secular outlook, which is the view, quite simply, that, as Kleinig puts it, “life is ... morally secured against (certain kinds of) interference.”¹³ We take no stand on which of these understandings of the “sanctity of life” is to be preferred to the other, if any preference is appropriate.

- 2.22 Against what kinds of interference is life morally secured? The answer to this question is much disputed, inevitably taking in a range of difficult ethical issues, such as the proper limits of genetic engineering. These kinds of questions are well beyond the scope of this Review.

⁹ *Hyam v DPP* [1975] AC 55, 98.

¹⁰ Criminal Law Revision Committee, *Offences Against the Person* (1976) Report 14, para 15.

¹¹ *Ibid.*

¹² J Kleinig, *Valuing Life* (1991) 18.

¹³ *Ibid.*, 19.

2.23 What does seem clear is that even those who attribute very great significance to the moral or religious significance of the sanctity of life draw a distinction between, on the one hand, accidental or careless killing and, on the other hand, intentional killing.

2.24 Respect for life certainly entails a duty to minimise, or to prevent, accidental or careless loss of life. Were there no such duties, then, as Professor John Finnis expresses it, it would be hard to explain such diverse practices as:

the teamwork of surgeons and the whole network of supporting staff, ancillary services, medical schools etc.; road safety laws and programmes; famine relief expeditions; farming and rearing and fishing; food marketing; the resuscitation of suicides; watching out as one steps off the curb.¹⁴

2.25 Nonetheless, the question as to whether a society does enough to prevent or minimise accidental or careless loss of life is one of degree, on which there may legitimately be different understandings of the right approach. Further, and in consequence, it may not be inappropriate, in some instances, to ‘trade off’ the negative value of an increase in the risk of accidental or careless deaths being caused, against the positive value of some other goal.

2.26 Many fewer accidental or careless deaths would be the result of a strictly enforced universal ban on the private ownership of cars. It has, though, seemed to governments world-wide that the ensuing drastic restriction on individual freedom of movement and of individual choice in the timing and method of transport, would be too high a price to pay for such a reduction.

2.27 By way of contrast, for adherents of the view that life is sacrosanct, there is something that amounts to or is close to an absolute prohibition on the *intentional* taking of (innocent) life. On this view, as it is near absolute, respect for the prohibition cannot legitimately be a matter of degree. Consequently, an individual instance of, and still less a practice of, deliberate killing cannot be ‘traded off’ against the value of achieving a supposedly higher purpose, except perhaps in the most exceptional of circumstances not relevant here.

2.28 Although they are not giving an interpretation of the phrase “sanctity of life”, as such, Professors John Finnis, Joseph Boyle and Germain Grisez express the view that we believe most people would associate with that phrase:

The norm excluding intentional killing of the innocent is the core of one of the Ten Commandments: ‘Do no murder’ [Exod. 20:2-17 at v.13]. In the Jewish and Christian scriptures, and the common morality of our civilisation, this ban did not mean ‘Do not kill unless killing is necessary to secure some great(er) good.’ Rather, it meant that the killing of human beings is excluded save where divinely authorised ... while the precept also condemns some forms of

¹⁴ J Finnis, *Natural Law and Natural Rights* (1980) 86.

reckless homicide, its core is the more specific norm: It is always wrong *deliberately* to kill the innocent.¹⁵ [Emphasis added.]

- 2.29 It is, then, the prohibition on intentional or deliberate killing that best expresses the ideal of the sanctity of life, the idea that life must be, to recall Kleinig's discussion of the secular understanding, "morally *secured against* (certain kinds of) interference" [emphasis added].¹⁶
- 2.30 Murder is a crime centred on intentional or deliberate killing (although it has hitherto never been confined to it). It is, then, a crime whose central definition connects it with the core ideal at the heart of the view that life is sacrosanct. Sustaining that connection within the law of murder will inform this review at a number of points, not least in relation to recommendations for change to the culpability element. Indeed, our provisional view is that the connection between the law of murder and the view that life is sacrosanct is best expressed through the creation of the crime of "first degree murder".
- 2.31 In the present context, though, the relevance of the connection is to reinforce the Criminal Law Revision Committee's interpretation of how the abolition of a separate crime of murder, and of the mandatory life sentence, would be perceived. It would very likely be seen as a signal that the law did not regard murder as a specially or uniquely grave crime. It is wrong to give out such a signal. The separate status of the crime of murder, and the uniqueness of the mandatory life sentence that attaches to it, reflect the "sanctity of life" ideal, as interpreted above.

The argument of Sir Louis Blom-Cooper and Professor Terence Morris

- 2.32 Sir Louis Blom-Cooper and Professor Terence Morris have recently argued in favour of the abolition of the crime of murder.¹⁷ The importance of their argument, and the influence that it has had, warrants special attention here. In their view, there should be a single offence of "criminal homicide". Matters such as provocation, diminished responsibility, and other mitigating factors, should be dealt with through the nature and degree of severity of the sentence given, not through a rigid structure of grades of offence and discrete (partial) defences, with all their complex restricting conditions.
- 2.33 There is powerful force in this argument. An argument for a single offence of unlawful homicide is also put forward by Victim Support.¹⁸ They see virtue in ridding the law of the adversarial dimension to trials generated by the natural desire of defendants to see their crime reduced from murder to manslaughter. This, says Victim Support, often entails blaming the victim as part of the defence to the murder charge, a feature of trials they would like to reduce or eliminate. It

¹⁵ J Finnis, J Boyle, and G Grisez, *Nuclear Deterrence, Morality and Realism* (1986) 78.

¹⁶ J Kleinig, *Valuing Life* (1991) 19. As Finnis, Boyle and Grisez suggest, this more specific norm is not a belief confined to the Judeo-Christian tradition. It is a belief much more widely held than that.

¹⁷ L Blom-Cooper and T Morris, *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (2004).

¹⁸ Response to Partial Defences to Murder (2003) Consultation Paper No 173.

may be, however, that reform of the doctrine of provocation as a partial defence to murder will address these concerns to some degree.¹⁹

- 2.34 Even if it were within our terms of reference to consider it, however, we do not agree that it is the right course to recommend the creation of a single offence of unlawful killing. If, for Blom-Cooper and Morris, fault is merely a factor to reflect in sentence, then that could logically be said to be true of the outcome (the victim's death) as well. Why single out unlawful *killing* for separate treatment, when it may purely have been chance that the victim died, and the result could have been more or less serious bodily harm done?²⁰ Let us consider this point further.
- 2.35 Professor Paul Robinson, has argued that causing death can, like the more culpable of the mental elements (intention/recklessness), be regarded as simply a matter of grading.²¹ On his account, the rule one violates in homicide cases can be said to be a rule prohibiting unjustifiably harming someone *simpliciter*. On this view, the fact that one caused death is simply an aggravating factor, a possible ground for increasing the sentence.²² It is not the basis for a separate offence.
- 2.36 We take it that Blom-Cooper and Morris would *not* wish to endorse this line of argument, if it led to the conclusion that there should be no separate offence focused on the fact that the defendant has committed "homicide".²³ In our view, though, if the fact that death has been caused can provide sufficient justification for the creation of a distinct offence worthy of special categorisation, so can the mental element with which it was caused.
- 2.37 All Consultation Papers must have some fixed points, if consultation is to be focused and meaningful. Virtually all jurisdictions have a special category of homicide approximating to murder, whether or not they impose the mandatory life sentence for that offence. Accordingly, it is not proposed that such a category should cease to be a part of the law of England and Wales.
- 2.38 Further, our provisional proposal is that to maintain a firm and clear connection between the sanctity of life and the structure of the law of homicide, intentional killing should be made into a unique offence: "first degree murder". Intended killing is rightly regarded as specially grave species of wrong, because it involves a successful attack on the most basic of values, life, through the deliberate destruction of human being born alive. **[Question 1]**

¹⁹ See Partial Defences to Murder (2004) Law Com No 290; see also Part 6.

²⁰ This point seems especially pertinent in the light of the fact that in Blom-Cooper and Morris's definition of "criminal homicide" a distinction is drawn between simply causing serious physical harm to another person, to which the various fault elements – such as intention and recklessness – are relevant, and the crucial fatal result, to which they are not: L Blom-Cooper and T Morris, *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (2004) 175.

²¹ See P Robinson, "Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?" in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (1993) 211.

²² See, in the driving context, *Boswell* (1984) 6 Cr App R (S) 257.

²³ It should be noted that this is not Robinson's conclusion: P Robinson, "Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?" in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (1993) 211.

Should “first degree murder”, and the mandatory penalty, be further restricted?

2.39 We have given serious consideration to the question of whether “first degree murder”, and the mandatory life penalty, should be further restricted in one or both of two ways:

- (1) “First degree murder” could be confined to premeditated killings, as in France and in the criminal codes of some American states.
- (2) Alternatively, it could be confined to the killing of a restricted range of victims, such as children, law enforcement personnel on duty, and so on.
- (3) Finally, murder could be restricted by reference to the way in which it was done, by shooting, setting off an explosion, torturing someone to death, or the like.

2.40 We have not found any of these possible further ways of restricting murder attractive. To begin with, Parliament has already recently indicated how such factors are to influence the amount of time that an offender is to spend in custody for murder.²⁴ The great advantage of this ‘guideline’ approach is that it avoids too much pure ‘legalism’ creeping in to the question of whether someone is guilty of murder.

2.41 For example, it avoids having to decide whether the offender killed a “child” if the victim was under-age when mortally wounded but did not actually die until days or weeks later, when he or she had passed the age of majority. Similar problems could occur if a decision had to be made in law whether a police officer was “on duty” when murdered.

Premeditation

2.42 So far as premeditation is concerned, we note that Professor Mitchell’s public opinion research indicates that premeditation may often be equated in people’s minds with an intention to kill.²⁵ To that extent, our first proposal already accommodates the idea of premeditation.

2.43 It may be, however, that some people would support a distinction between literal premeditation – involving some element of planning beforehand – and a spontaneously formed intention to kill, as the legal basis for distinguishing “first degree murder” from “second degree murder”.²⁶ We believe that this change would introduce intractable problems of proof, and would not create a fairer system.

²⁴ Criminal Justice Act 2003, s 269, sched 21.

²⁵ See Appendix A.

²⁶ For an academic discussion, see M Kremnitzer, “On Premeditation” (1998) 1 Buffalo Criminal Law Review 627.

2.44 Some killings may be premeditated only because the offender (an abused woman, say) rightly fears what the victim of the killing (the violent abuser) will do to her by way of revenge if he is in a position to repel the attack. It is not at all clear that the element of premeditation in such a case, motivated by fear, aggravates the offence. Similarly, the killing of a terminally ill spouse by a depressed carer is also likely to be to some degree premeditated, but should surely not for that reason be regarded as unworthy of mitigation. By way of contrast, it could not be proved that Ian Huntley premeditated the killing of Holly Wells and Jessica Chapman.²⁷ Yet we believe almost everybody would find it wholly unacceptable that he should not be found guilty of “first degree murder” for that reason.

2.45 Sir James Stephen, gave cogent reasons over 100 years ago why murder should not be confined to premeditated killing:

As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. ... A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor’s brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural, as ‘aforethought’ in ‘malice aforethought’ but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.²⁸

Should “first degree murder” extend beyond intent-to-kill cases?

2.46 It is clear that prosecutors prefer the law as it stands, with conviction for murder extending beyond intent-to-kill cases, to cases in which someone has intended to do serious harm, and killed.²⁹ That preference is entirely understandable. It would be right to say, however, that the present law has a continuing potential to work injustice, because the notion of “serious harm” is vague. As one High Court Judge indicated to us:

Although inflicting grievous bodily harm with intent is often (or usually) serious, on occasion it can be committed in circumstances where death was highly unlikely, in the sense that the injury was not obviously life-threatening. Murder, in these circumstances, as the charge, is inappropriate.³⁰

2.47 Is it right, for example, that if the defendant intentionally breaks the victim’s hand or arm following an argument, and then the victim unexpectedly dies when complications in relation to his or her treatment set in, that the defendant should be guilty of “first degree murder”? In such a case, a conviction for manslaughter, or at most, for “second degree murder”, is more appropriate.

²⁷ See Issue 36 Criminal Law Week (2005) 10.

²⁸ Sir J F Stephen, *A History of the Criminal Law of England: Vol iii* (1883) 94.

²⁹ See Appendix B.

- 2.48 One problem with extending “first degree murder” beyond intent-to-kill cases is that one must confront the difficult question as to how much further should the law be extended? There is little or no agreement on this.
- 2.49 Our provisional proposal is that “first degree murder” should not encompass killing with intent to do serious harm, but if there turns out to be widespread disagreement with this, the definition of “serious harm” must be tightened up.³¹
- 2.50 In the past we have sought to address this problem by recommending that, other than in cases where there was an intention to kill, someone should not be convicted of murder unless they intended to do serious harm while being aware of a risk of causing death.³² This option was overwhelmingly rejected by prosecutors.³³ They thought that such awareness would be unnecessarily difficult to prove in practice, and added little to the already existing need to prove an intention to do serious harm. We are not proposing it now, for reasons given in Part 3.

Should there be a further category of murder? “Second degree murder”

- 2.51 By the beginning of the seventeenth century the law already distinguished between murder and manslaughter, but, at common law, the development of grades of homicide stopped there. Consequently, there has always been a tension between the wish to confine “murder” to cases appropriate for society’s most severe penalty (excluding the older penalties for treason), and the wish not to have a category of manslaughter so wide that it becomes an almost meaningless label. Whilst the mandatory penalty for murder remains, the tension cannot be resolved without the creation of one or more further categories of homicide, which will accommodate killings too blameworthy to be labelled as manslaughter but not attract the mandatory life sentence.
- 2.52 To reduce this tension, our provisional proposal is that murder should be divided into “first degree murder” and “second degree murder”. These crimes would take their place in a hierarchy of general crimes of homicide, above the existing crime of manslaughter:³⁴

- (1) “First degree murder” (mandatory life sentence)
- (2) “Second degree murder” (discretionary life sentence)
- (3) Manslaughter (fixed term of years maximum penalty)

³⁰ See Appendix C.

³¹ A possible way of doing this is discussed in Part 3.

³² Draft Criminal Code, cl 54(1), appended to Criminal Law: A Criminal Code for England and Wales (1989) Law Com 177.

³³ See Appendix B.

³⁴ We note, in addition, that some other jurisdictions follow this kind of pattern in grading homicide. See the summary of the papers from Professors Finkelstein (USA) and Holland (Canada) and from A Pedain (Germany) in Appendix D. See also V Krey, *German Criminal Law: Vol ii* (2003) paras 343-344.

- 2.53 Perhaps some would prefer to see a greater number of general categories of homicide. In our view, however, the need to label different kinds of homicide in the “right” way must be balanced against the need to keep the options before the jury simple, especially as murder cases may well involve a number of defendants all making different, and perhaps inter-dependent or conflicting, claims in the alternative. **[Question 2]**
- 2.54 In addition, it must be kept in mind that, as well as the general categories of homicide (murder; manslaughter), there are also much more specific offences of homicide, such as infanticide, complicity in suicide, causing death by dangerous driving, causing the non-accidental death of a child or vulnerable adult, and so on. There could be a case for adding to this list, rather than creating further general categories.
- 2.55 What would “second degree murder” cover? We are provisionally proposing that it cover three kinds of case:
- (1) the defendant had the intent to do serious harm to the victim; **[Question 5]**
 - (2) the defendant killed the victim through reckless indifference to causing death; **[Question 6]**
 - (3) the defendant killed the victim intentionally but has a partial defence. **[Question 3]**
- 2.56 The fault element for “second degree murder” (intention to do serious harm; reckless indifference) is discussed in detail in Part 3. In that Part, the fault elements in (1) and (2) above are explained in an attempt to dispel doubts about whether they are sufficiently clear or certain so as to provide a secure basis for a category of crime so serious as “second degree murder”. In particular, reckless indifference is given a definition that we expect to avoid the difficulties that dogged judicial attempts to define that term during the twentieth century.
- 2.57 One consequence of this new structure will be that some partial defences will only be available on a charge of “first degree murder”.
- 2.58 The thinking behind this suggestion is that if, as we provisionally propose, “second degree murder” has a discretionary life maximum penalty there is no need for all the highly complex rules governing the partial defences of provocation and diminished responsibility to apply to it. Matters such as provocation and mental disorder can be taken into account in sentencing for “second degree murder”, as they are for other crimes of homicide such as manslaughter. We return to the subject of partial defences in paragraphs 2.73-2.96.
- 2.59 Some may argue that it is wrong to give “intent only to cause serious harm” claims, if successful, the same offence label as successful claims of provocation, diminished responsibility, or of some other partial defence in which an intention to kill may have been admitted. In the latter case, the same “wrong” (intentional killing) may have been done as when “first degree murder” has been committed. It is just that the compelling nature of the mitigating circumstances dictate that a verdict of guilty to some lesser crime is appropriate.

- 2.60 We see some force in this argument. It would entail, perhaps, that all successful “intent only to cause serious harm” claims should result in verdicts of manslaughter (or of some other new offence), whereas only successful partial defence claims should end in “second degree murder” verdicts. Even so, we are not minded to propose this option as the right course for reform.
- 2.61 One problem with this argument is that in many cases the defendant will argue both an intent only to cause serious harm and a partial defence. Further, the two claims may be inextricably linked. Here is an example, based on provocation. The defendant says “the provoked loss of self-control led me not to appreciate the possible consequences of lashing out at the victim in such a rage, and hence I lacked the intent to kill; but I was also the victim of gross provocation.”
- 2.62 In this case jurors may agree that the defendant should not be guilty of “first degree murder”, but may be divided over the basis for convicting of a lesser offence, with some supporting the “intent only to cause serious harm” claim, and others supporting the plea of provocation as a partial defence. Putting aside the possibility that the defendant says he or she has sufficient fault only for a manslaughter conviction, it would simplify the jury’s task in such cases if a claim of “intent only to cause serious harm” *and* a plea of provocation ended in the same verdict: “second degree murder”. This is also an argument for a structure in which all partial defences that may be pleaded together reduce the verdict to that of the same, lesser offence.
- 2.63 A second problem that would arise if “intent only to cause serious harm” cases were to be treated as manslaughter is that a very wide a range of such cases would remain within manslaughter. Manslaughter would then cover cases ranging from ones in which the defendant pushes the victim during an argument, and the victim falls, hits his or her head and dies, through to cases in which the defendant cuts off the victim’s fingers “to teach him a lesson”, but the victim unexpectedly (at least from the defendant’s point of view) bleeds to death. We have provisionally concluded that this is too broad a range of cases to be covered by a single crime, manslaughter, that is already far too broad.
- 2.64 There is a strong countervailing argument that someone who intentionally inflicts really serious injury, and thereby kills, should be convicted of murder in some degree, even if they had not thought of the possible consequences. The hypothetical case given at the end of the previous paragraph provides an example.
- 2.65 The creation of a crime of “second degree murder” should not be seen as the creation of a “soft” option. We are provisionally proposing that it should have a discretionary life maximum penalty, as it is meant to cover cases in which the defendant was seriously at fault in killing. The Sentencing Guidelines Council would issue sentencing guidelines for “second degree murder”, so as to create a transparent as well as fair system for setting recommended terms of custody upon conviction for “second degree murder”. We fully expect that those terms would be no less than those currently set for convicted murderers when they have killed in circumstances that, under our proposals, would make them guilty of “second degree murder”. **[Question 7]**

- 2.66 As we have indicated, our provisional view is that “second degree murder” should be the result of a successful plea of provocation, diminished responsibility or duress.
- 2.67 Often, when a defendant has intentionally killed the victim³⁵ it has proved understandably difficult for prosecutors to explain to the victim’s family that the offender’s diminished responsibility means that he or she is not guilty of murder. This creates a sense of injustice, especially where the defence of provocation – which mostly involves ‘blaming’ the victim – is run alongside the diminished responsibility defence.
- 2.68 It is partly for these reasons that we are provisionally proposing that partial defences should have the effect in homicide cases of reducing “first degree murder” only to “second degree murder”. We are also provisionally proposing that partial defences such as diminished responsibility would not be available in a prima facie case of “second degree murder” (that is, where the defendant killed with an intention to do serious harm or through reckless indifference). Rather, the relevant circumstances would be determined at a hearing to decide on sentence, in the way that Victim Support, for example, would prefer.³⁶
- 2.69 Of course, not all actual or potential partial defences are equally mitigating. In principle, at least, some circumstances give rise to more compelling mitigation than provocation or diminished responsibility. There is an argument that such cases should not end in convictions for “second degree murder”. Infanticide, the killing of an infant by his or her mother whilst the balance of the mother’s mind was disturbed, provides an existing example.³⁷ Infanticide is a specific, lesser offence of homicide. Conviction for infanticide is usually followed by a non-custodial sentence. That contrasts with conviction for manslaughter by reason of provocation or diminished responsibility, when prison sentences of seven years and upwards are common.
- 2.70 In that regard, we can see a case for saying that when someone suffering from diminished responsibility killed with the victim’s consent, this should result in conviction for, at most, manslaughter.³⁸ We believe that, as in the case of infanticide, the circumstances of mitigation are, at least in principle, more compelling than in provocation or diminished responsibility cases. As in infanticide cases, what makes the circumstances of mitigation in consensual ‘mercy’ killing cases more compelling, at least in principle, is that there is a special relationship or bond between offender and victim that is at the root of the offence (mother-child; killer-victim who has requested to be killed by the killer), as well as evidence of mental disturbance. That is not necessarily so in provocation, diminished responsibility or duress cases, where the victim may just have unluckily been in the wrong place at the wrong time.

³⁵ See eg the facts of *Byrne* [1960] 2 QB 396, a diminished responsibility case.

³⁶ We are asking separately whether duress should be a matter only for sentence in “second degree murder” cases or should entail a complete acquittal: see Part 7.

³⁷ See the Infanticide Act 1938, which makes infanticide both an offence and a partial defence. Infanticide is discussed in Part 9.

³⁸ See the discussion in Part 8.

- 2.71 Having said that, we are not minded to provisionally propose that partial defences be split into those that reduce “first degree murder” to “second degree murder”, and those that reduce “first degree murder” and “second degree murder” to manslaughter (or become specific lesser offences). Some partial defences are already commonly run together, like provocation and diminished responsibility, and that is likely to be true of, say, duress and diminished responsibility. The issues at stake with each defence may be inextricably linked. We believe it may prove unacceptable that two closely linked pleas should have different legal effects, requiring the jury to decide which is decisive, when that question may have no clear answer. There might be split jury decisions, possibly necessitating retrial, when in fact the jury was agreed that, on either view, the defendant was not guilty of “first degree murder”.
- 2.72 It is true that infanticide and diminished responsibility involve similar issues and that they may be run together, even though they end in different verdicts if successful; and that there has been no clamour for reform on this point. However, infanticide cases are few and far between, and the prosecution usually accepts the plea when it is backed by medical evidence. We cannot confidently predict that there would similarly be no problems in practice with split juries in contested cases if, for example, pleas of provocation and of diminished responsibility ended in different verdicts. If half the jury thinks the former plea succeeds, and the other half disagrees but thinks that the latter plea succeeds, the result should be same verdict (probably, “second degree murder”). **[Questions 3 and 8]**

A RADICAL ALTERNATIVE: ABOLISH ALL PARTIAL DEFENCES

There is no coherence to the way defences and partial defences interrelate

- 2.73 In the twentieth century, both complete and partial defences became ever more encrusted with a great number of complex and sometimes conflicting legal rules, devised to guide juries to verdicts that are defensible both factually and morally. Moreover, there has been needless inconsistency, both in the status of defences as full or partial, and in the way they apply (or not) to particular crimes or to crimes generally. For example, duress is no defence to murder or attempted murder at all, even though it arguably provides stronger mitigation than provocation. As far as other crimes are concerned, however, duress leads to a complete acquittal. This can lead to significant anomalies. Consider this example:

A threatens B that he will kill B unless B takes part with him in a burglary at V’s house. B complies through fear although, knowing what A is like, he realises that A might kill V if V resists the burglary. They both enter V’s house as trespassers and, whilst B looks for something worth stealing downstairs, A goes upstairs. Unseen and unheard by B, A kills V in a fit of temper in V’s upstairs bedroom, when V seeks to eject him.

- 2.74 B can plead duress as a defence to his involvement in the attempted robbery. B must, however, be convicted of the murder of V, because duress is no defence to murder.³⁹

³⁹ We provisionally propose that duress should reduce “first degree murder” to “second degree murder”. See Part 7.

- 2.75 This is an odd result: in relation to the same act (knowing entry as a trespasser), B can plead duress as a complete defence to the crime in which he was actually a perpetrator (burglary), but he cannot plead it, even as a partial defence, to the crime in which he was only complicit and not an actual perpetrator (murder).⁴⁰
- 2.76 What is also odd about the conclusion is that there *is*, in theory at any rate, a partial defence of provocation available to A, even though he was the actual perpetrator of the murder. The fact that V may in law have been entitled to eject A from the house does not change the fact that A can plead provocation taking the form of V's resistance.⁴¹
- 2.77 Finally, consider this variation on the facts. As is well-known, if V were deliberately to kill A or B, candidly admitting that this was because A or B had entered the house as a trespasser, V would almost certainly have no defence to murder. Rather V's conduct would most probably be regarded as falling outside the scope of what it was reasonable to do in prevention of crime, even in the heat of the moment. By way of contrast, if V claimed to have been provoked to kill A or B because V was incensed by the presence of an intruder, the defence of provocation would be available, and there would be a very good prospect of success. There is obviously a sound moral distinction, in theory, between these two claims that V might make. The first involves a mistake of law as to the limits of a justification (permissible force in prevention of crime), whereas the second involves a largely excusatory claim (anger at a violation of property). However, the absence of any partial excuse of excessive-force-in-defence gives V an incentive to lie about his motives for acting. This threatens to bring the criminal justice system into disrepute.⁴² There is, moreover, no burden of proof on V to show that his claim lies in provocation rather than prevention of crime. Once raised, provocation must be disproved beyond reasonable doubt by the prosecution.

Defence rules have become over-complex and are applied inconsistently

- 2.78 Success or failure in a provocation plea, and hence whether or not the defendant receives the mandatory life sentence, may often turn on one or more of a whole range of finely-judged matters.⁴³ These include whether the defendant's reaction was influenced wholly or partly by self-induced intoxication; whether a characteristic affected the defendant's level of self-control as well as the gravity of the provocation; and (possibly) whether there were reasonable grounds for thinking the victim had made a remark in a particularly provocative way.

⁴⁰ B is complicit in the murder of V because, by his intentional participation in the burglary, knowing of what A might do, he lends implicit 'moral support' to A when A kills V. See Part 5.

⁴¹ For a striking example of such 'self-induced' provocation resulting in acquittal of murder and conviction for manslaughter only, see *Naylor* (1987) 9 Cr App R (S) 302. Our proposals for reform of the doctrine of provocation would remove this anomaly: see *Partial Defences to Murder* (2004) Law Com No 290.

⁴² For that reason, we recommended in *Partial Defences to Murder* (2004) Law Com No 290 that fear of serious violence should sit alongside gross provocation as a basis for partially excusing a killing. In the example in the text, V would have to show that he killed A or B either because he feared serious violence might be done to him, or because he was incensed by the gross provocation constituted by the property violation.

⁴³ See Appendix E.

- 2.79 This is also true of duress cases, where the requirements that the defendant must meet to plead the defence, even in principle, have become ever more complex. These requirements, too, have been the subject of numerous appeals, leading to decisions that remain in conflict.⁴⁴ The availability of the defence of duress can turn on such finely judged questions as whether an opportunity to escape the threat was not reasonably perceived or whether it was unreasonably spurned, or on whether a non-existent threat was reasonably believed to exist.
- 2.80 As in provocation cases, there are complex rules for duress concerning the relevance of an individual's characteristics to the question of whether a reasonable person in his or her situation might have reacted in a similar way.⁴⁵ It remains hard to say to what extent, if at all, there can or should be consistency in the way that these rules are devised, as between provocation, duress and, for that matter, self-defence. The Court in *Graham* (a duress case)⁴⁶ thought there was an analogy with the provocation defence, and that the rules in each defence should run on parallel lines. It has proved impossible for the courts to ensure that this happens. That is likely to prove a considerable embarrassment, should the defence of duress be extended in any form to murder.
- 2.81 Further, if provocation is run alongside self-defence, yet more subtle differences between the applicable rules will arise. On the one hand, in self-defence cases, a threat need only honestly be believed to exist.⁴⁷ On the other hand, in duress, and probably by analogy in provocation cases, a belief that a threat or provocation has been made or given must be based on reasonable grounds.⁴⁸ So, an unreasonable belief that a threat has been made will suffice to ground a plea of self-defence, although it would be insufficient to ground a provocation plea in the very same case.
- 2.82 By way of contrast, whereas evidence of mental instability in relation to the subjective condition can be given in provocation cases to show that the defendant had in fact lost his or her self-control upon provocation,⁴⁹ it seems that such evidence will be of much more restricted relevance in self-defence cases. Such evidence is relevant to whether or not the defendant perceived a threat, but not to be taken into account in assessing the degree of danger thought to be posed by the threat.⁵⁰
- 2.83 Problems with the complexity of legal rules designed to help juries reach morally defensible verdicts may be found even in simpler cases, such as excessive-force-in-defence. We have recommended that it should be a lesser offence of homicide when the defendant, in killing through an over-reaction, was reacting to a fear of

⁴⁴ Contrast *Graham* [1982] 1 WLR 294 with *Martin (David Paul)* [2000] 2 Cr App R 42.

⁴⁵ See *Emery* (1993) 14 Cr App R 394; *Bowen* [1997] 1 W LR 372.

⁴⁶ [1982] 1 WLR 294.

⁴⁷ *Williams (Gladstone)* [1987] 3 All ER 411.

⁴⁸ *Graham* [1982] 1 WLR 294; but see the somewhat dubious authority, on provocation, of *Letenock* (1917) 12 Cr App R 221.

⁴⁹ *Lynch* (1832) 5 C & P 324.

⁵⁰ *Martin (Anthony)* [2001] EWCA Crim 2245, [2003] QB 1.

serious violence.⁵¹ Even in such cases, there would inevitably be considerable variation over the seriousness of the threatened violence that juries regarded as justifying a verdict of “second degree murder”, when the defendant had killed intentionally in response to it.

- 2.84 In *Smith (Morgan)*,⁵² an attempt was made by the House of Lords to make inroads on the complexity of the rules, in so far as they govern provocation cases. The House of Lords sought to give the jury the power to decide when it would be just to take the defendant’s individual characteristics into account, in assessing the level of self-control to be expected, rather than relying on legal rules to decide that question. The decision has, however, been condemned in academic literature, and rejected by the Privy Council.⁵³ It seems unlikely that such an attempt will succeed again.
- 2.85 An important question must be asked, then, of provocation, excessive-force-in-defence, and duress, as they bear on murder cases. Would it not be better to make any provocation received, duress applied, or threat responded to, relevant only to the length of the recommended custodial part of sentencing under the aegis of the mandatory sentence? This would in effect dispense with a whole body of complex legal rules whose main function is to guide a jury to a morally defensible verdict when a defence has been pleaded.⁵⁴ **[Question 4]**
- 2.86 What about the position of diminished responsibility? The introduction of this partial defence was designed specifically to avoid convicting of murder those who were not fully responsible for their actions. Its wider application was not really considered. So, in relation to other crimes (however serious) where the defendant lacks full responsibility for the same reasons of mental disorder, there is no complete or partial defence based on this lack of full responsibility. There can thus be arbitrariness in whether the defence is or is not available.
- 2.87 The rigidity of English law, in this respect, contrasts with the position in French law. In French law, in respect of *any* crime, where the defendant’s understanding or control of his or her actions is impeded by a mental disorder, the action remains punishable but “the court shall take this [the mental disorder] into account when it decides the penalty and determines its regime.”⁵⁵ In German law, someone who commits homicide but is found to be suffering from diminished responsibility must be sentenced to a term of imprisonment of no less than three years.⁵⁶
- 2.88 There may be other benefits to the abolition of the diminished responsibility defence. Although the rules governing its application are nowhere near as complex as those governing provocation and duress, abstruse questions still have to be resolved in some cases so that the jury will avoid the “wrong” answer. An example is the distinction between the effect of alcohol in activating a latent

⁵¹ Partial Defences to Murder (2004) Law Com No 290, para 3.168.

⁵² [2001] 1 AC 146.

⁵³ *A-G for Jersey v Holley* [2005] UKPC 23, [2005] 3 WLR 29.

⁵⁴ This solution is considered in paras 2.89-2.96.

⁵⁵ Article 122.1 of the French Penal Code.

⁵⁶ See Appendix D.

mental disorder; the effect of alcohol itself on the defendant's capacity; and the effect of alcoholism as a kind of mental disorder in its own right. Abolishing the defence obviates the need to express the principles at stake in a rule-like form that can be applied by juries. With the benefit of a full medical report, the task of the judge is simply to weigh the effect of the different factors in reaching a decision on the minimum term of custody, where appropriate. **[Question 4]**

Schedule 21 to section 269 of the Criminal Justice Act 2003

- 2.89 The approach taken to “aggravated” murder, in schedule 21 of section 269 of the Criminal Justice Act 2003 provides one alternative way to address these problems. Schedule 21 deals with the custodial part of the sentence for what might be called “aggravated” murder. It provides sentencing guidelines – in the form of recommended minimum periods of custody – for judges in certain kinds of murder case. Examples are the murder of a police officer or the murder of a child involving abduction of the child or sexual or sadistic motivation. A judge is free to vary the sentence if mitigating features, also listed in the schedule, are present.
- 2.90 It would be possible to create a ‘mirror’ schedule dealing with recommended minimum periods for the custodial part of the sentence in cases of “mitigated” murder. So, it could be made clear that, for example, evidence of gross provocation warranted a seven year starting point; evidence of substantial duress or threat of violent attack warranted a three year starting point, or that evidence of the circumstances of what is now infanticide warranted a starting assumption that the appropriate order is a non-custodial psychiatric order. The evidence in question would be given at a suitably modified post-trial *Newton*⁵⁷ hearing, where the factual basis for sentencing is established.
- 2.91 In cases where there is great sympathy for the defendant, there is a risk that the jury might use its power to find facts to bring in perverse verdicts of manslaughter, even though it is clear – or even admitted – that the defendant intended to kill. One should perhaps not overstate this risk. It is likely to crop up in only a small number of cases, especially if the jury is aware that the judge is likely to pass a low sentence.
- 2.92 This risk is associated with a more general objection to this approach, namely an objection to the diminution in the role and power of the jury that it involves. The jury would no longer be able to reflect the defendant's culpability in the grade of offence, except in cases where he or she lacked the mental element for murder itself. The strength of this objection can, perhaps, be over-stated.
- 2.93 The jury will always have a crucial role in murder trials. Their main role has always been to decide whether the defendant committed the offence of murder *in fact*. That role that may test to the full their ability to judge, for example, the credibility of witnesses; the relevance and cogency of expert evidence; and the strength of inferences about mental states that can be drawn from actions. That role continues under this approach.

⁵⁷ *Newton* (1983) 77 Cr App R 13.

- 2.94 Even so, under this approach, the emphasis clearly switches to the role of the judge in setting the minimum custodial element to the life sentence. That may be seen by some to represent an undesirable shift of power from the ordinary person (as represented by the jury) to officialdom (as represented by the judge). We doubt that this would be acceptable to consultees.
- 2.95 Further, there would be a serious drawback about this radical approach, so far as the consequences for sentencing are concerned. A small proportion of those sentenced to murder are released from the custodial part of the sentence within a ten year period. When we examined a recent sample of these cases, we found that there was almost always some evidence of provocation or mental disorder, or an element of self-defence.⁵⁸ These offenders, who were sometimes relatively young at the time of the offence, stood to spend perhaps 30 to 40 more years out on licence, liable to be recalled to prison.
- 2.96 If provocation and mental disorder were to cease to be a basis for reducing murder to a lesser offence of homicide, even when a major factor explaining the defendant's action, the number of murder convictions would increase very substantially. Ever-increasingly large numbers of offenders would spend the overwhelming majority of their mandatory 'life' sentence out on licence rather than in custody. That would produce a topsy-turvy sentencing system for murder. To avoid this consequence, commonly recurring factors that substantially mitigate the offence, like mental disorder or provocation, should continue to operate as partial defences, even if they should, in the interests of justice, be restricted in their scope. **[Question 4]**

FAULT ELEMENTS AND THE STRUCTURE OF THE LAW OF HOMICIDE

- 2.97 The current distinction between murder and manslaughter is in part founded on the understanding that, other things being equal, intending to kill (murder) is more blameworthy, in principle, than killing by gross negligence or recklessness (manslaughter). Moreover, within manslaughter, killing recklessly is recognised to be more blameworthy than killing by gross negligence because recklessness implies an awareness at the relevant time that there was a risk of death whereas negligence need not involve such awareness. This understanding is reflected in the order in which fault terms appear in the general fault provision of the Model Penal Code of the United States. This says that no-one is to be convicted of a criminal offence unless "he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offence".⁵⁹

⁵⁸ Appendix E.

⁵⁹ Model Penal Code § 2.02.

- 2.98 These are not the only fault elements that might be considered appropriate for a crime of homicide. Some jurisdictions, for example, employ the notion of “indifference” to a risk of death in their criminal codes.⁶⁰ “Indifference” – a “couldn’t care less attitude” – was also used by English courts as a term for the fault element in rape before the reforms effected by the Sexual Offences Act 2003.⁶¹ So, the courts are to some extent used to directing juries on it. We provisionally propose that it is employed as one way of proving fault in “second degree murder”.
- 2.99 No doubt will be cast on the understanding of the relative blameworthiness of the different fault elements (intention, recklessness and negligence) here. We are provisionally proposing to move the worst cases of reckless killing – through the notion of indifference – out of manslaughter and up into “second degree murder”. However, the very fact that the proposal relates to “second degree murder” rather than to “first degree murder” underscores the importance of the understanding.
- 2.100 There has, however, always been a puzzle about how to relate, on the one hand, the intention to do *serious harm* (but not to kill), and on the other hand, recklessness or gross negligence as to *causing death*. Is the former more blameworthy, and hence rightly regarded as sufficient to justify a murder conviction where death results, because the serious injury was done intentionally? Or, is the latter more blameworthy because the gross negligence or recklessness must relate to a risk of causing death, gross negligence or recklessness as to the risk of causing serious harm being insufficient?⁶²
- 2.101 In shedding some light on the answers to these questions, it is helpful to set out two principles linked to the use of fault terms in the criminal law. Following common practice we will refer to the first of these as the “correspondence principle”, and to the second as the “subjectivity principle”.⁶³
- (1) Correspondence principle: the fault element should relate to the harm done for which someone is being held liable (killing);
 - (2) Subjectivity principle: the fault element should be concerned with the defendant’s state of mind at the time of his or her actions.
- 2.102 These principles are far from absolute, but they are a useful reference point in analysing the nature and use of fault terms within the criminal law. They tend to influence, rather than determine, the character of criminal offences with fault elements. For example, the American Model Penal Code provision⁶⁴ on criminal fault requirements respects the correspondence principle, but not the subjectivity principle. That is because, whilst it insists that fault must relate to all material elements of the offence (the correspondence principle), it permits use of a non-subjective kind of criminal fault, negligence, in breach of the subjectivity principle.

⁶⁰ See Appendix D.

⁶¹ See eg *Satnam and Kewal Singh* (1983) 78 Cr App R 149.

⁶² See *Adomako* [1995] 1 AC 171.

⁶³ See A Ashworth, *Principles of Criminal Law* (4th ed 2003) 89, 162-3.

⁶⁴ See para 2.97.

- 2.103 How are the principles relevant to the law of homicide? They help to construct the “ladder” of offences within homicide, so that there is an ascending order of gravity of a clear and just kind. In general, the more serious the crime, the more important it is, and the more one is likely to find, that one or both of the principles is respected in the definition of the fault element. Respect for one or both of the principles can also be put alongside use of the more culpable of the fault elements (intention, recklessness and gross negligence) to differentiate more serious crimes from less serious crimes within the law of homicide.
- 2.104 So, for example, our proposal that “first degree murder” be confined to intentional killing is meant to reflect the fact, other things being equal, this kind of killing is the most serious. Its seriousness can be gauged by the fact that:
- (1) “first degree murder” is confined to intentional killing, intention being the most blameworthy fault element;
 - (2) intention in “first degree murder” must relate to the most important external element of the offence (causing death); and
 - (3) intention is a subjective fault element. (1) and (2) are clearly reflections of the two principles just set out.
- 2.105 By way of contrast, the rule that someone may be guilty of murder if he or she intends to do serious harm respects the subjectivity principle in that it requires that the defendant’s conduct embody a criminal intention. It does not, however, fully respect the correspondence principle, because the intention does not relate to the causing of death, even though it does relate to causing serious harm. Even so, the rule is confined to the most blameworthy of the fault elements: intention. That fact goes a long way to explaining why proof of such an intention has long been regarded as sufficient to convict someone of murder.
- 2.106 In Part 3, we explain and define reckless indifference as foreseeing an unjustified risk of causing death by one’s conduct, but going ahead with a “couldn’t care less” attitude to that risk. In judging whether the defendant “couldn’t care less” about the risk, the jury is entitled to take into consideration the defendant’s own belief as to the justifiability, in the circumstances, of taking the risk. This definition is meant fully to respect both the correspondence principle (recklessness must relate to an unjustified and substantial risk of causing death), and the subjectivity principle (the defendant must know of the risk).
- 2.107 The fact that this fault element fully respects these two principles explains our view that it is blameworthy enough to provide a basis for a murder conviction. Recklessness in one’s conduct as to a risk of causing death is not, though, as blameworthy as intentionally causing death. So, reckless indifference is sufficient for a conviction for “second degree murder” only.
- 2.108 Finally, manslaughter by gross negligence (including reckless stupidity⁶⁵) is a lesser degree of homicide than “first degree murder” or “second degree murder”

⁶⁵ Reckless stupidity is where the defendant foresees a risk of death from his or her conduct, but goes ahead thinking that the risk is justified to take or, even if unjustified, so unlikely to turn into reality that there is no need to change his or her course of action. This decision making process is what distinguishes it from reckless indifference: see Part 3.

because it permits conviction even when the defendant did not realise he or she might be posing an unjustified risk of death by his or her conduct. This is a breach of the subjectivity principle. Moreover negligence is the lowest rung of the fault “ladder” in homicide, a rung it shares with unlawfully and knowingly posing a risk of some harm and thereby causing death.

2.109 It should now be plain how we have come to our view of how “first degree murder”, “second degree murder”, and manslaughter are ranked in the hierarchy of homicide offences. Somewhat crude though this may be as a way of looking at the matter, it can be expressed in this way:

- (1) “First degree murder” (intention to kill):
 - Correspondence principle: YES
 - Subjectivity principle: YES
 - Blameworthiness of fault element: HIGHEST
- (2) “Second degree murder” (intention to do serious harm):
 - Correspondence principle: NO
 - Subjectivity principle: YES
 - Blameworthiness of fault element: HIGHEST
- (3) “Second degree murder” (reckless indifference):
 - Correspondence principle: YES
 - Subjectivity principle: YES
 - Blameworthiness of fault element: MIDDLE-HIGH
- (4) Manslaughter by gross negligence:
 - Correspondence principle: YES
 - Subjectivity principle: NO
 - Blameworthiness of fault element: MIDDLE-LOW
- (5) Manslaughter by unlawful and violent act:
 - Correspondence principle: NO
 - Subjectivity principle: YES
 - Blameworthiness of fault element: MIDDLE-LOW

The issue of fault in murder is considered further in Part 3.

PART 3

THE FAULT ELEMENT IN MURDER

QUESTIONS AND PROVISIONAL PROPOSALS

3.1 We ask:

- (1) Is the conduct of those who kill whilst intending only to cause serious bodily harm sufficiently culpable to deserve to come within the definition of “first degree murder”?
- (2) If the answer to (1) is “no”, is the conduct of those who kill whilst intending only to cause serious bodily harm more appropriately placed within the definition of “second degree murder”?
- (3) Is the fault element of “an intention to do serious bodily harm” too uncertain a basis for categorisation within the law of murder?
- (4) If it is too uncertain, should the intention to do serious bodily harm be restricted in the following way: “serious harm” is confined to harm of such a nature as to endanger life, or to cause, or to be likely to cause, permanent or long-term damage to a significant aspect of physical integrity or mental functioning?
- (5) If “serious harm” is restricted in this way, is killing with an intention to cause such harm sufficiently blameworthy to deserve conviction for “first degree murder”, or should an intention to cause serious harm (however defined) remain part of the law of “second degree murder”?
- (6) Suppose that a category of “second degree murder” is introduced. Should it encompass killing by reckless indifference: a “couldn’t care less” attitude to causing death?
- (7) We understand “reckless indifference” as follows:
 - (a) D is recklessly indifferent when he or she realises that there is an unjustified risk of death being caused by his or her conduct but goes ahead with that conduct, causing the death; however
 - (b) D’s own assessment of the justifiability of taking the risk, in the circumstances, is to be considered, along with all the other evidence, in deciding whether D was recklessly indifferent and had a “couldn’t care less” attitude about causing death.

Is that a sound definition?

- (8) If it is to amount to “second degree murder”, should killing through reckless indifference be further restricted by being confined to reckless indifference where the death arose from the commission of a serious criminal offence?

- (9) Should manslaughter, as a substantive crime, be restricted to either or both of:
 - (a) cases in which D was grossly negligent as to causing death (where gross negligence includes recklessness insufficiently culpable to justify a conviction for “second degree murder”); and
 - (b) killing through a criminal act intended to cause, or involving recklessness as to causing some injury?

3.2 We provisionally propose that:

- (1) intentionally killing should be “first degree murder”;

[paragraphs 3.3-3.9]

- (2) killing through an intention to do serious harm should be “second degree murder”;

[paragraphs 3.144-3.147]

- (3) killing through reckless indifference as to causing death should be “second degree murder”; and

[paragraphs 3.150-3.151]

- (4) killing through gross negligence as to causing death, or through a criminal act intended to cause injury, or where there was recklessness as to causing injury should be manslaughter.

[paragraphs 3.183-3.192]

AN OVERVIEW OF THE ISSUES AND OUR PROVISIONAL PROPOSALS

“First degree murder” and the intention to kill

3.3 In English law, the defendant may be convicted of murder when he or she has caused death if either of two fault elements are proved beyond reasonable doubt:

- (1) an intention to kill; or
- (2) an intention to do serious (grievous) bodily harm.¹

3.4 **Our provisional proposal** is that when someone kills intentionally – (1) above – that person should in principle stand to be convicted of “first degree murder”.
[Provisional proposal 1]

3.5 Intentional killing will not be analysed in great detail here. An examination of the concept of intention is provided elsewhere.² One important point should be made

¹ We will refer to “serious harm”, as that is the more modern way of expressing the law, but it may be contextually necessary to refer to “grievous bodily harm” instead. In Part 4 we discuss the meaning of “intention” in the fault element. In Part 2 we discussed how these fault elements, or various alternatives to them, might be fitted within a revised law of murder and homicide.

about it, however, as a “stand-alone” fault element in “first degree murder”. A criticism of our proposal to confine “first degree murder” to intent-to-kill cases is that it will often prove too difficult to prove that the defendant intended to kill. The argument is that some lesser form of fault element within “first degree murder” is necessary to ensure that cases which are very close to intent-to-kill, but where it cannot be proved definitively that there was in fact an intent to kill, remain cases in which a “first degree murder” conviction can be obtained.

- 3.6 We understand the concerns that give rise to this criticism but we do not accept that it weakens the case for confining “first degree murder” to cases where the defendant intended to kill. There is strong public support,³ as well as compelling moral justification,⁴ for regarding the worst homicide cases, those deserving of the mandatory penalty, as those in which there was indeed an intent to kill. The fact that, in some cases, there may be difficulties in proving that the defendant intended to kill is not, in our opinion, a sufficiently weighty factor to overcome these arguments in favour of confining “first degree murder” to an intention to kill.
- 3.7 We also question whether, in practice, the difficulties will turn out to be all that severe. Firstly, we cannot be sure what percentage of those convicted of murder were convicted following a finding of an intention to kill and what percentage were found merely to have intended serious harm. So, we cannot know to what extent there would be a problem in convicting of “first degree murder” if intent-to-kill had to be proven.
- 3.8 Further, there are around 80-90 convictions each year for attempted murder.⁵ In cases of attempted murder the prosecution must prove beyond reasonable doubt that the defendant acted upon an intention to kill. So, an offence requiring the proof of such an intention is clearly viable in practice. There are, moreover, other crimes in which a very specific intent must be proven, where no calls for reform have followed from difficulties with proof.
- 3.9 Therefore, we believe that the strength of public support and the moral arguments in favour of an offence of “first degree” murder focused on the intention to kill should prevail over possible difficulties that may be encountered in proving such an intention in particular cases. In those cases, the jury can still bring in a verdict of “second degree murder” that will justify a long sentence of imprisonment.

“Second degree murder” and the intention to do serious harm

- 3.10 Our main concern in this Part will be with the “serious harm” rule.⁶
- 3.11 We are concerned at the potential breadth and lack of clarity in the notion of “serious harm” which is unacceptable when conviction for murder entails a mandatory life sentence. If the defendant (D) shoots another person (V) and is

² See Part 4.

³ See Appendix A.

⁴ See Part 2.

⁵ See Appendix G.

convicted of murder, current sentencing guidelines suggest that D should serve at least 30 years in prison, as part of the life sentence.⁷ If D intended to kill V, that may be appropriate. What if, in shooting V, D intended not to kill V but only to do harm that the jury at D's trial regarded as serious? The guidelines say this is to be a "mitigating factor" that *may* warrant reducing the custodial element of the sentence. This may be wholly insufficient to ensure that justice is done in many such cases. Had the intention been only to do some harm, D would have been guilty (at most) of manslaughter, and would probably have received a sentence closer to 5 years' imprisonment. A simple difference of degree in the seriousness of the harm intentionally done cannot justify such a huge difference not only in the nature of the crime committed but also in the period appropriately spent in custody.

- 3.12 There are two ways of addressing this specific concern. "Serious harm" could be defined in a sharply restricted way. The law could try to ensure that, for the purposes of conviction for "first degree murder", there is no significant moral difference between the intentional killer and the person who intentionally inflicts serious harm. Alternatively, the open-ended understanding of serious harm with which the law currently operates⁸ could be retained, but someone who has killed with the intention to do serious harm could be guilty of a lesser homicide offence, such as "second degree murder".
- 3.13 **Our provisional proposal** is that an act intended to do serious harm that in fact kills, should render D liable for "second degree murder" but not for "first degree murder". **[Provisional proposal 2]** So, we have provisionally opted for the second, alternative solution in the preceding paragraph. However, it is still possible to clarify and restrict the legal conception of "serious" harm for the purposes of conviction for "second degree murder".⁹

"Second degree murder" and reckless indifference

- 3.14 We have another concern about the "serious harm" rule. The rule can be understood as the law's answer to the key question: "other than in cases where a killing was intentional, when is someone to be regarded as deservedly convicted of murder?" Seen in that light, the rule provides an unsatisfactory answer. The rule could be understood as providing for just one example of highly culpable killing worthy of being regarded as, in law, murder. Other equally highly culpable kinds of killing fall outside its scope and can only be captured by the idea of reckless killing.
- 3.15 In our view the key question should be answered in a way that takes some account of two principles of fault in the criminal law, which we referred to in Part 2. They are that:

⁶ See para 3.3(2).

⁷ Criminal Justice Act 2003, s 269, sched 21.

⁸ See paras 3.60-3.146.

⁹ Such restrictions are discussed in paras 3.29-3.59.

- (1) the fault element should relate to the harm done for which someone is being held liable (killing). Following common practice, we are calling this the “correspondence” principle.
- (2) the fault element should be concerned with the defendant’s state of mind at the time of the offence. It should not turn in whole, or so far as possible even in part, on a later moral judgement at trial of the defendant’s behaviour. We are calling this the “subjectivity” principle.

3.16 As we indicated in Part 2, these principles are not overriding or absolute and need not be slavishly observed in the construction of every criminal offence. Instead, along with discriminating use of common kinds of fault element – intention, recklessness, negligence – the principles can provide a way of structuring a group of closely related crimes, such as crimes involving homicide, in a way that pays close attention to the relative seriousness of the individual offences. In our account, for example, “first degree murder” is defined so as to ensure:

- (1) that the offence only involves the most blameworthy of the fault elements: intention; and
- (2) the intention must have been to bring about the harm done for which D is being found liable: killing.

The latter feature reflects the correspondence principle.

3.17 Adherence to the principles can entail recommending restrictions on the scope of liability in general or on the scope of liability for more serious offences in particular. The “serious harm” rule respects the subjectivity principle because it requires an intention to do serious harm. The rule does not, however, respect the correspondence principle, because, in inflicting the harm intended, the defendant need not realise – perhaps quite reasonably – that his or her conduct poses a risk of the harm actually done (killing). As the rule does not respect the correspondence principle, we believe it ought to be regarded as outside the scope of “first degree murder”, the most serious homicide offence. Even so, the fact that, in killing, the defendant did serious harm to the victim *intentionally* (the most blameworthy fault element) means that a conviction for “second degree murder” is not inappropriate.

3.18 Adherence to the principles can, however, involve recommending the *expansion* of liability in general or of the reach of more serious offences in particular. In that regard, it may be wrong that all kinds of reckless killing fall outside the scope of murder. Doing wrong recklessly may not be so blameworthy as doing wrong intentionally; but even so, the fault element of recklessness may be understood in such a way that it satisfies both the correspondence and subjectivity principles.¹⁰

3.19 Accordingly, **our provisional proposal** is that the “serious harm” rule should be supplemented, within the law of murder, by a provision making it “second degree

¹⁰ See para 3.15.

murder” to kill through reckless indifference to causing death.¹¹ **[Provisional proposal 3]**

- 3.20 England and Wales is not the only jurisdiction that confines or has confined the fault element in murder to proof of either an intention (however defined) to kill, or an intention to do grievous (serious) bodily harm.¹² It is, however, very much in a minority in so defining the fault element. The majority of jurisdictions influenced by common law thinking include some form of reckless killing within the scope of murder, whether “first degree murder” or “second degree murder”. Moreover, it cannot be said that the current legal position in England and Wales is the product of a rational preference over alternatives. As we will see, reckless indifference respects both the correspondence and subjectivity principles of fault.¹³ So, there is a strong case for regarding it as a fault element sufficiently grave to justify conviction for murder.
- 3.21 Reckless killing in any form, however reckless the conduct that caused death, is currently regarded as manslaughter. We believe that it is possible to distinguish between more and less blameworthy kinds of recklessness.¹⁴ The more blameworthy kind – “reckless indifference” – should fall within “second degree murder”, with the less blameworthy kind – “simple” recklessness or “reckless stupidity” – being regarded as a form of gross negligence, within gross negligence manslaughter.
- 3.22 For the purposes of “second degree murder”, it would first have to be shown that D foresaw an unjustified risk of death being caused by his or her conduct but went ahead with that conduct and thus caused death. So far, this reflects the law’s standard definition of recklessness.¹⁵ However, in deciding whether such “reckless” conduct amounted to reckless indifference – a “couldn’t care less” attitude¹⁶ – the jury would be instructed to have regard to the defendant’s own assessment of the justifiability of taking the risk, in the circumstances. The defendant is not recklessly indifferent unless he goes ahead with the risky conduct, knowing the true nature and level of the risk involved. This is not currently a requirement for proving “simple” recklessness. A case in point is *Chief Constable of Avon and Somerset Constabulary v Shimmen*.¹⁷

¹¹ A proposal something like this was first recommended in the Seventh Report of Her Majesty’s Law Commissioners (1843), 448, XIX, 25.

¹² See eg Criminal Justice Act 1964 (ROI), s 4. The Law Reform Commission of Ireland has recommended significant changes to the 1964 Act: Irish Law Reform Commission, *Consultation Paper on Homicide: The Mental element in Murder* (LRC-CP 17-2001).

¹³ See para 3.15.

¹⁴ This claim draws on, but is not identical too, distinctions set out by Professor Norrie: see A Norrie, “Subjectivism, Objectivism, and the Limits of Criminal Recklessness” (1992) 12 OJLS 45.

¹⁵ See *G & R* [2003] UKHL 50, [2004] 1 AC 1034.

¹⁶ The language of “couldn’t care less” was well-established under the law of reckless rape, as an understanding of recklessness: see *DPP v Morgan* [1976] AC 182, 215 *per* Lord Hailsham; *Satnam and Kewal Singh* (1984) 78 Cr App R 149; *Taylor* (1984) 80 Cr App R 327, even though foresight of the risk was not always required as a basis for proving indifference: *Pigg* [1982] 2 All ER 591.

¹⁷ (1987) 84 Cr App R 7.

- 3.23 In *Shimmen*, the defendant, a martial arts “expert”, tried to demonstrate his skill to his friends by executing a kick as close to a window as possible without breaking it. He broke the window. He was charged with criminal damage, a crime that can be committed recklessly. He said in evidence that he had tried to eliminate “as much risk as possible”. He was convicted, however, because this was an admission that he had seen what was, in fact, an unjustified risk that his conduct would lead to the breaking of the window and had nonetheless pressed on with his conduct. The fact that he himself thought that there was little or no risk was held to be irrelevant to the question of whether Shimmen damaged the window “recklessly”.
- 3.24 In our view, *Shimmen* is really a case of reckless stupidity. It is thus closer to (gross) negligence than to reckless indifference. What marks the distinction between reckless stupidity and reckless indifference is the ability to take into account the defendant’s own assessment of the justifiability of taking the risk, in the circumstances. Foolishly, Shimmen thought that he had left a sufficiently large margin for error so as to make the taking of the risk justifiable. Such foolishness cannot affect a judgement that someone is grossly negligent, because that is an almost wholly objective judgement made by the jury after the fact. Misjudging the chance that a risk will turn into a reality is just one way of manifesting negligence of a more or less gross kind
- 3.25 In our view, however, evidence of such miscalculation by the defendant at the time of the offence can negate an inference that the defendant had a “couldn’t care less” attitude (although it will not always do so). In such cases, the mere fact that the defendant adverts to a risk that it is in fact unjustified to take does not necessarily, in itself, show that he or she was recklessly indifferent, having a “couldn’t care less” attitude. If the jury concludes that the defendant may well have desisted in his conduct had he realised the true nature and level of the risk they ought not to find that he was recklessly indifferent to, and “couldn’t care less” about, that risk.
- 3.26 We note, in this regard, that the Government has in the recent past approved of the strategy of distinguishing between crimes of homicide on the basis of whether the fault element in question was (gross) negligence or recklessness.¹⁸ The Government said: “We accept that an offence resulting from a failure to appreciate the consequences of an action is less culpable than acting in full knowledge of a risk.”¹⁹ This statement was made whilst discussing the Law Commission’s proposed distinction between reckless killing and killing by gross negligence (manslaughter).²⁰ As indicated in Part 2, now that we have had the chance to review these proposals in the context of a review of murder, our provisional preference is to use the distinction to divide “second degree murder” from manslaughter. It is appropriate that a fault element in the crime of murder should turn on what the Government calls “full knowledge” of the risk. It is equally appropriate that manslaughter should turn on whether the degree of negligence

¹⁸ Home Office, *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals* (2000).

¹⁹ *Ibid*, at para 2.5.

²⁰ *Involuntary Manslaughter* (1996) Law Com No 237.

shown in causing death, including the degree of someone's reckless stupidity, was such as to amount to gross negligence as to causing death.

- 3.27 Drawing the distinction between murder and manslaughter in this way respects the correspondence²¹ and ladder principles.²² What we are seeking to do, in refining the distinction between recklessness and gross negligence, is to ensure that "reckless indifference" covers only the most culpable kinds of recklessness – the kinds that manifest a "couldn't care less" attitude – for the purpose of defining "second degree murder". To do that, it is essential that D's own evaluation of the justifiability of taking the risk, on the facts, is made relevant to the jury's overall judgement of his or her conduct.

Summary

- 3.28 These changes, if accepted, would yield the following structure for the law of homicide:

- (1) Top Tier:

"First degree murder": intention to kill.

- (2) Intermediate Tier:

"Second degree murder": intention to cause serious harm; or reckless indifference to causing death.

- (3) Lower Tier:

"Manslaughter": gross negligence as to causing death; or causing death through a criminal act intended to cause injury, or where there was recklessness as to causing injury.

THE "SERIOUS HARM" RULE AND LIABILITY FOR RECKLESS MURDER: A FIRST LOOK

The "serious harm" rule

- 3.29 From the Victorian period onwards, serious thought began to be given to reform of the law of murder. The difficult question has always been, "given that it covers, and should cover, intentional killing, how much further should the law of murder be extended?" It must be kept in mind that, in the past, this question has usually been asked against a legal background in which there is a single crime of murder and a single penalty upon conviction for murder. Our provisional view that murder should be divided into "first degree murder", to which the mandatory penalty attaches, and "second degree murder", with a discretionary maximum sentence of life, means that we do not need to take that background for granted.
- 3.30 It is worth pointing out that the intention to do serious harm can be proven even in a case where the defendant did not set out to do serious harm through a direct attack on the victim, as such. It can still be proven when the jury is satisfied that

²¹ See para 3.15.

²² See Part 1.

the defendant realised that his or her conduct was virtually certain to cause serious harm. In such a case, the jury is entitled to find that the defendant has an intention to do serious harm.²³

EXAMPLE 1: D deliberately leaves chemicals (a by-product of his or her work), knowing that they will cause severe burns on contact with skin, on a site where, as D knows, children constantly play as soon as D has left the site. D is under a strict duty to remove the chemicals but leaves them there because D cannot be bothered with the expense of removing them.

- 3.31 If a child dies from burns caused by contact with the chemicals, the question for the jury will be whether they are sure D intended to do serious harm. In that regard, if the jury are satisfied that D realised, in breaking “his” or “her” duty to remove the chemicals, that serious injury to a child (or to any other person) was virtually certain to occur, they may find that D intended to do serious harm to V.²⁴
- 3.32 Three points of criticism may be made about this species of fault element within the law of murder.
- 3.33 The first is that there has been a lack of clarity in the way that “grievous” (serious) bodily harm has been understood in the case law.²⁵
- 3.34 The second is that, as indicated in Part 1, this species of fault element may well only have been allowed to persist, alongside the intention to kill, due to the apparently misleading picture of the state of the law that the then Lord Chief Justice gave to the Royal Commission on Capital Punishment in 1953. The Lord Chief Justice told the Commission that to be guilty of murder in law, “a person who wittingly inflicts grievous bodily harm *must know that he is endangering life* [emphasis added]”. Accordingly, the Royal Commission, believing the mental element in murder to be satisfactory, made no recommendation for change.
- 3.35 Shortly after the passing of the 1957 Act, however, the Lord Chief Justice himself gave the leading judgment in a case, *Vickers*,²⁶ which was at odds with what he had told the Royal Commission. In his judgment he authoritatively established that murder is committed when a defendant kills intending to inflict serious harm, even in the absence of knowledge or belief that the victim’s life would be endangered by his or her actions. The case is discussed further below.²⁷ Had the misunderstanding between the Royal Commission and the Lord Chief Justice not occurred, a conviction for manslaughter (doubtless, accompanied by a long custodial sentence) would have been the result when there had only been an intention to do serious harm.

²³ *Woollin* [1999] 1 AC 82.

²⁴ *Moloney* [1985] AC 905.

²⁵ See paras 3.60-3.146.

²⁶ *Vickers* [1957] 2 QB 664.

²⁷ See paras 3.68-3.72.

- 3.36 Thirdly, and finally, as indicated above,²⁸ the “serious harm” rule can (and should) be understood as the law’s answer to the crucial question, “other than in cases where a killing was intentional, *when is someone to be regarded as deservedly convicted of murder?*” Seen in that light, the rule provides an unsatisfactory answer.
- 3.37 On the one hand, what must be intended – only serious harm – does not necessarily connect the defendant’s state of mind with the causing of death itself. In that sense, the rule is in breach of the correspondence principle.²⁹ An intention to break someone’s arm is an intention to do serious harm; but if death unexpectedly occurs in such a case, the killing itself cannot necessarily be described as “recklessly” brought about. The defendant D may not have realised, possibly quite reasonably, that the victim’s death might come about.
- 3.38 On the other hand, the defendant must at the very least foresee that grievous bodily harm was *virtually certain* to occur. It is not enough that he or she foresaw that grievous bodily harm might occur, even if it was thought highly likely to occur. This aspect of the rule makes the law of murder generous to the defendant. This is not because murder should encompass those killers who foresaw only the chance of serious harm resulting from their conduct: that would run up against the objection that the definition of murder can be severe on the defendant. It is because the rule is not apt to capture cases in which the defendant foresaw an unjustified risk of *death* from his or her conduct – even one thought very likely to eventuate – but pressed on with that conduct anyway.
- 3.39 The “serious harm” rule is thus not able to provide a fully satisfactory answer to the question posed above: “other than in cases where a killing was intentional, when is someone to be regarded as deservedly convicted of murder?”

Murder by reckless indifference

- 3.40 Until the decision of the House of Lords in *Moloney*,³⁰ it was still possible to argue that the defendant who realised death was highly likely to result from his or her action, but proceeded with that action nonetheless, was guilty of murder. The argument was that such an action manifested “malice aforethought” – the fault element in murder – even if did not manifest an intention to kill or to cause serious harm.³¹ As long ago as 1883, Sir James Stephen said that malice aforethought included the “[k]nowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person”.³² Lord Diplock put the matter this way, in *Hyam*:

I agree with those of your Lordships who take the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of

²⁸ See para 3.14.

²⁹ See para 3.15.

³⁰ [1985] AC 905.

³¹ *Hyam* [1975] AC 55 (HL).

³² Sir J F Stephen, *History of the Criminal Law of England: Vol iii* (1883) 80.

mind of one who does the act knowing full well that is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act. What is common to both these states of mind is willingness to produce the particular evil consequence: and this, in my view, is the mens rea needed to satisfy a requirement ... [the accused] ... must have acted with 'intent' ... or ... with malice aforethought.³³

3.41 In *Moloney*, however, the House of Lords banished the terminology of “malice aforethought” from the law of murder, insisting that the fault element was “intention” (to kill or to cause serious harm). The passage just cited from Lord Diplock’s speech in *Hyam* was expressly disapproved.³⁴ In effect, the House of Lords in *Moloney* thus narrowed the definition of murder. The kind of high degree of recklessness that had long amounted to “malice aforethought”, and hence been sufficient to convict of murder, would no longer be sufficient.

3.42 The narrowing of the definition of the fault element in *Moloney*, confining it to intention (to kill or to cause serious harm), may well seem to have been justified at that time. There is currently only one category of murder, attracting a mandatory sentence of life imprisonment. Further, the average length of the custodial element of that sentence has steadily increased since the final abolition of the death penalty in 1965, meaning that the stakes have become higher, in determining where the border between murder and manslaughter lies.

3.43 We believe that our provisional suggestion that murder should be divided into “first degree murder” and “second degree murder” has considerable potential to lower the stakes. It becomes possible to consider different kinds of fault element for murder (such as recklessness), without allowing thinking to be dominated by the penalty that attaches to conviction. As the world’s leading authority on comparative aspects of the law of murder, Professor Yeo, has argued (an argument endorsed by the Irish Law Reform Commission):

This is a more responsible response than one which dismisses recklessness out of hand on the ground that to recognise it would erode the murder/manslaughter distinction. Such a dismissal fails to account for the fact that there are different levels of recklessness and that the type of recklessness selected for murder can be adequately distinguished from the type required for manslaughter.³⁵

3.44 Two examples, drawn from previous case law, illustrate the force of Professor Yeo’s argument:

EXAMPLE 2: In the small hours of the morning, D, knowing that a dwelling house is occupied by a rival in love, pours petrol through the

³³ *Hyam* [1975] AC 55, 86.

³⁴ *Moloney* [1985] 1 AC 905, 925-926 per Lord Bridge.

³⁵ S Yeo, *Fault in Homicide* (1997) 39.

letter box and sets light to it. The house burns down killing one or more of the sleeping occupants.³⁶

EXAMPLE 3: D lifts a large piece of concrete on to the parapet of a bridge over a busy road. He or she waits until a car is just about pass underneath the bridge and then pushes the piece of concrete off the parapet. It crushes to death one of the occupants of the car.³⁷

- 3.45 Suppose that, in both of these examples, the defendant says that his or her intention was simply to give the victims a severe fright but also admits that he or she went ahead despite knowing that it was likely that someone would be killed as a result of his or her action. The defendant says that he or she was not sure this would be the result, however, because (in example 1) the defendant knew the property had an exit at the back and (in example 2) the defendant thought the concrete might miss the car.
- 3.46 In both examples the defendant's admission is an admission of an exceptionally high degree of fault. At present, if the prosecution wishes to convict the defendant of murder they must at the very least show that the defendant foresaw death as the virtually certain consequence of his or her action. Even then, this only provides the basis for a possible inference by the jury that the defendant intended to kill or to do serious harm. Yet if one puts on one side this process of inference, there may sometimes be no significant moral difference between foresight of virtual certainty and foresight of high probability as such. So, justice is not served by putting the prosecution to this extra burden of proof. For centuries before the decision in *Moloney*, the defendant would have been guilty of murder in both examples.
- 3.47 The defendant will, of course, be guilty of manslaughter in these examples and the sentence can reflect the high degree of fault. That could also be said, however, of cases in which the defendant intended to do serious harm, and killed, when the defendant will be guilty of murder (as the law currently stands). If, however, both such instances of killing with an exceptionally high degree of fault became only manslaughter, the already broad crime of manslaughter would become even broader. Manslaughter would stem from cases such as these, down to cases in which the defendant frightens and chases after the victim following an argument and the victim falls over, hits his head and dies.
- 3.48 We would not, however, recommend the straightforward adoption of Lord Diplock's statement of the mental element for murder in *Hyam*.³⁸ Well-founded though it may have been historically, it is prone to arbitrariness. As the fault element of "intention to do serious harm" currently stands it could treat the defendant excessively generously or excessively harshly.
- 3.49 If, for the purposes of understanding "malice aforethought", foresight of a probability included foresight of a probability of *serious harm*, that still left the defendant open to conviction for murder when he or she believed that there was

³⁶ See *Hyam* [1975] AC 55.

³⁷ See *Hancock and Shankland* [1986] AC 455.

³⁸ [1975] AC 55. See para 3.40.

no risk of death.³⁹ Such an understanding of malice aforethought would be harsh on the defendant and breach the correspondence principle.⁴⁰ However, even if confined to foresight of a probability of death,⁴¹ this understanding could be too generous to the defendant, because the distinction between foresight of a probability and foresight of a possibility is frequently morally insignificant.

- 3.50 An important example illustrating this point is provided by the American case of *Commonwealth v Malone*.⁴² In this case the defendant pointed a revolver at the victim, knowing that there was a bullet in one of the five chambers. The defendant pulled the trigger three times, and it went off, killing the victim. The court found that the 33% chance of the gun going off when the trigger was pulled for the third time was sufficient to convict the defendant of murder. Naturally, if the court had found that there was a continuing intention to pull the trigger until the gun went off, that intention would, in itself, have sufficed. The issue was whether in the absence of such a continuing intention the defendant could be convicted.
- 3.51 There is an argument that the *degree* of probability that the gun would go off should not matter, one way or the other. In other words, had the gun gone off on the first pull of the trigger (even if such a thing could be proven), when the chance of the victim being killed was only 20%, this should not have affected the crime for which the defendant stood to be convicted. The remarks of the Irish Law Reform Commission on such cases seem highly pertinent:

Taking an approach based purely on degree of risk, cases identical in every respect, save for a lesser degree of risk, would fall to be treated as manslaughter instead of murder. Terrorist A, who times a bomb to explode at 4.00 p.m. on a city street, would be guilty of murder; terrorist B, whose motives and attitudes are identical to A's, but who times the bomb to explode at 4.00 a.m., would be guilty of manslaughter. A distinction may admittedly be made between the two defendants on the basis that the second has exposed the public to a much lower degree of risk, and so is less culpable than the first. However, both defendants foresee a risk of death resulting from their actions, yet both are prepared to run this risk as a necessary price of achieving their objectives. Both are willing to kill in pursuit of their objectives, and so the two killings may be said to be *morally* indistinguishable from one another.⁴³

³⁹ This interpretation was, in fact, rejected by Lord Diplock in *Hyam* [1975] AC 55, 86-95.

⁴⁰ See para 3.15.

⁴¹ Lord Diplock's favoured understanding of malice aforethought: *Hyam* [1975] AC 55, 86-95.

⁴² [1946] (Pennsylvania) 354 Pa 180, 47 A 2nd 445, discussed by the Irish Law Reform Commission, *Consultation Paper on Homicide: The Mental Element in Murder* (LRC-CP 17-2001), 55.

⁴³ Irish Law Reform Commission, *Consultation Paper on Homicide: The Mental element in Murder* (LRC-CP 17-2001) 55-56 (emphasis in original, footnote omitted). The Commission is relying on the argument of Michaels, "Defining Unintended Murder" (1985) 85(4) Col LR 786.

- 3.52 This point has been taken by the High Court of Australia, in *Boughey v The Queen*.⁴⁴ The Court held that, in the law of murder under the Tasmanian Criminal Code, “likely [to cause death]” does not mean “more likely than not”. Instead, it means “probable”, meaning only that there must be “a substantial – a real and not remote – chance” of death occurring.⁴⁵ We agree with that understanding, and it informs our understanding of reckless indifference.⁴⁶
- 3.53 It has been argued that what distinguishes cases such as *Commonwealth v Malone* from mere recklessness is that they involve a direct intention or desire to expose another person to a risk of death (or serious injury).⁴⁷ We see the force of that view, in relation to the facts of that particular case but we are not persuaded that, more generally, it represents a better way of reshaping the mental element in murder. It may lead to the need to draw distinctions that are excessively fine in the context of a jury trial.⁴⁸
- 3.54 Suppose, then, that no distinction within the law of murder should be drawn, in point of culpability, between the person who foresees death as a probable result of their conduct and the person who foresees the same as a mere possibility. That would, in effect, create a category of murder by recklessness. Does that mean that *any* kind of recklessness, hitherto a fault element sufficient only to convict someone of manslaughter, should become the fault element for “second degree murder”?
- 3.55 We will argue⁴⁹ that reckless indifference – that is recklessness manifesting a “couldn’t care less” attitude – can be distinguished from “simple” recklessness – that is reckless stupidity which is really just a kind of gross negligence. The latter can justify no more than a conviction for manslaughter, whilst the former can legitimately justify a conviction for “second degree murder”. In other words, the defendant may be found recklessly indifferent, and may hence be guilty of “second degree murder” when he or she realises that there is an unjustified risk of death being caused by his or her conduct, but goes ahead with that conduct, causing the death. However, the defendant’s own assessment of the justifiability of taking the risk, in the circumstances, is to be considered, along with all the other evidence, in deciding whether the defendant was recklessly indifferent and “couldn’t care less”.
- 3.56 As a fault element, reckless indifference respects both the correspondence and the subjectivity principles,⁵⁰ as it relates to the cause of death and is fully subjective. By way of contrast, for the purposes of the law of manslaughter, reckless stupidity respects only the correspondence principle, in that it relates to the causing of death. Reckless stupidity does not fully respect the subjectivity principle. It can, for example, be manifested by taking a risk of causing death that

⁴⁴ *Boughey v The Queen* (1986) 161 CLR 10.

⁴⁵ *Ibid*, at 21.

⁴⁶ See para 3.25.

⁴⁷ See eg A Pedain, “Intention and the Terrorist Example” [2003] Crim LR 579.

⁴⁸ See paras 3.60-3.146.

⁴⁹ See paras 3.149-3.181.

⁵⁰ See para 3.15.

the defendant crassly mistakenly believes to be justified when it is not or by an action that the defendant idiotically regards as posing no more than a remote and insignificant risk of causing death. In that respect, reckless stupidity is not a fully subjective principle of liability. In the homicide context, it is, for labelling purposes, appropriately regarded as justifying nothing higher than a conviction for manslaughter.⁵¹

The two kinds of fault element in “second degree murder”

- 3.57 Reckless indifference could take the place of the “serious harm” rule, as the fault element justifying a “second degree murder” conviction or it could stand alongside that rule as one of two alternative fault elements. **Our provisional proposal** is that the two stand alongside one another. **[Proposals 2 and 3]** There can be circumstances in which a “second degree murder” conviction (even if not a “first degree murder” conviction) is justified, in spite of the fact that the defendant did not realise he or she might cause death, because the defendant intended to cause such serious harm and consequently killed.⁵²
- 3.58 The two species of fault element are really rather different. The “serious harm” rule concentrates on the fact that the defendant acted with the most blameworthy kind of fault (intention), even though that fault may not as such relate to death being caused. Liability based on reckless indifference is justified by the defendant’s attitude to the risk of the relevant harm occurring (death). So, the defendant’s assessment of the risk that death may be caused by his or her conduct is necessarily relevant to the latter fault element in a way it is not to the former.
- 3.59 We recognise, however, that some may regard the argument in favour of murder by aggravated recklessness as pushing the boundaries of murder, even “second degree murder”, too wide. So, we seek to explain and modify the “serious harm” rule in such a way that some of the above criticisms are met.⁵³ In particular, we must be sure that the rule does not involve a serious breach of the correspondence principle, thus treating defendants too harshly. We will turn to this particular task first.

THE SERIOUS (“GRIEVOUS BODILY”) HARM RULE

- 3.60 There are a variety of ways in which the “serious harm” rule has been, and could be, expressed. Most jurisdictions, including England and Wales, have adopted one of three interpretations of the rule to be discussed in this section: the “wide” view, the “ordinary meaning” view, and the “potentially lethal harm” view. English law currently wavers between the adoption of the “wide” view, and the “ordinary meaning” view, although it is in theory committed to the latter. A fourth view, the “fully subjective” view, has previously been endorsed by the Law Commission and by the House of Lords Select Committee on Murder and Life Imprisonment.

⁵¹ See para 3.26.

⁵² See the view of the Irish Law Reform Commission, discussed at paras 3.138-3.142.

⁵³ See paras 3.143-3.146.

Background considerations

- 3.61 If the defendant does an act intended to cause serious harm to the victim, and by that act causes the victim's death, the defendant is guilty of murder (the "serious harm" rule). It would be right to give some indication of this rule's width by pointing out that harm intentionally inflicted need not itself be the main cause of death (as where the defendant stabs the victim and the victim then bleeds to death). All that matters is that the harm intentionally inflicted is a substantial cause of death. It will suffice that the defendant (say) stabbed the victim intending to do serious harm, but the victim consequently fell backwards into a river and drowned, or was subsequently killed by negligent medical treatment.⁵⁴ Traditionally the "serious harm" rule was known as the "grievous bodily harm" rule. "Grievous" bodily harm was given its ordinary and natural meaning, "really serious" harm.⁵⁵ Although it has been said that "bodily" harm needs no explanation,⁵⁶ it has recently been extended to psychiatric injury.⁵⁷ That is the reason for using the phrase "serious harm" instead of grievous bodily harm.
- 3.62 The older phrase "grievous bodily harm" may well owe its existence to an Act of 1803 (known as "Lord Ellenborough's Act").⁵⁸ Partly replacing earlier legislation, this Act made it a capital offence to "maliciously and unlawfully stab or cut any of his Majesty's subjects ... with intent to murder or rob or to maim, *or with intent to do some other grievous bodily harm* ... [unless] such acts of cutting or stabbing were committed under such circumstances as that if death had ensued therefrom the same would not have amounted to the crime of murder [emphasis added]." The Act was an embryonic development of a law of attempted crime. It was, however, understood to mean that an intention to do a minor harm, even when the risk of death was objectively obvious, was insufficient as a mental element for murder.
- 3.63 It seems unlikely that the 1803 Act was meant to have, or had, any substantive impact on the scope of the law of murder.⁵⁹ Nonetheless, it did thereafter become more common to use the phrase "grievous bodily harm" when referring to the intention with which – short of an intention to kill – an accused person must act if he or she was to be convicted of murder.⁶⁰ So, towards the end of the century, after a detailed review of previous authority, Sir James Stephen concluded that the core or basic meaning of malice aforethought was "an intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not ...".⁶¹

⁵⁴ This principle has been expressed and applied in different ways in different circumstances but it was, in one way or another, at issue in *Church* [1966] 1 QB 59; *Le Brun* [1992] QB 61; *Cheshire* [1991] 1 WLR 844.

⁵⁵ *Smith* [1961] AC 290 (HL), 334 *per* Viscount Kilmuir LC.

⁵⁶ *Ibid.*

⁵⁷ *Ireland; Burstow* [1998] AC 147.

⁵⁸ This was the view of Lord Diplock in *Hyam* [1975] AC 55, 87.

⁵⁹ See the speech of Lord Hailsham in *Cunningham* [1982] AC 566, 577-578.

⁶⁰ See eg *Bubb* (1850) 4 Cox CC 457; *Porter* (1873) 12 Cox CC 444; *Doherty* (1887) 16 Cox CC 306 *per* Stephen J.

⁶¹ Sir J F Stephen, *History of the Criminal Law of England: Vol iii* (1883) 80 (art 228).

- 3.64 What did this phrase mean, from the time of its first introduction? There are a variety of opinions and no decisive view emerges from the authorities.⁶² That is, in part, because several views of what the phrase should mean or entail in the law of murder were not clearly distinguished.

The “wide” view of grievous bodily harm

- 3.65 At one end of the spectrum is the view expressed in *Ashman* (not itself a murder case),⁶³ that “it is not necessary that such harm [grievous bodily harm] ... should be either permanent or dangerous, if it be such as seriously to interfere with comfort or health, it is sufficient.”⁶⁴ This is quite similar to Foster J’s opinion, of a century before, that:

If an action unlawful in itself be done deliberately and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately ... and death ensue against or beside the original intention of the party it will be murder.⁶⁵

- 3.66 The very broad and uncertain “*Ashman*” view – apparently including serious interference with “comfort” as well as health – was later said by Lord Hailsham in *Cunningham*⁶⁶ to have been reversed by the House of Lords in *DPP v Smith*.⁶⁷ Lord Hailsham criticised *Ashman* for having created a doctrine of “murder by pinprick”.⁶⁸ We return to that possibility below. Certainly, the case is no longer an authority (if it ever really was one) for the view that an intention to seriously interfere with the “comfort or health”, *simpliciter*, of the victim is enough to amount to an intention to inflict grievous bodily harm.
- 3.67 However, *Ashman* was not overruled, or even explicitly criticised, in *DPP v Smith*. In fact, it had only just in substance, if not by name, been approved by a five-judge Court of Appeal in *Vickers*,⁶⁹ a case regarded as entirely correct in *Cunningham*.
- 3.68 In *Vickers*, D broke into a shop in order to steal. D knew that a 72-year-old woman (V) was living over the shop, but thought that he would not be disturbed because she was deaf. Unexpectedly, she came downstairs. D tried to hide but she saw him and approached him. He struck her a large number of times. There was evidence – disputed by D – that D had kicked V in the face. The medical evidence indicated that only a moderate degree of violence had been used, but V died. D was convicted of murder.

⁶² See the speech of Lord Hailsham in *Cunningham* [1982] AC 566, 575-578.

⁶³ (1858) 1 F & F 88.

⁶⁴ *Ibid*, at 88-89.

⁶⁵ Sir M Foster, *Crown Law* (1762) 261.

⁶⁶ [1982] AC 566.

⁶⁷ [1961] AC 290.

⁶⁸ [1982] AC 566, 577.

⁶⁹ [1957] 2 QB 664. Lord Goddard CJ, Hilbery, Byrne, Slade and Devlin JJ.

3.69 Prior to the passing of section 1 of the Homicide Act 1957,⁷⁰ D would have been guilty of murder by constructive malice, having killed in the course or furtherance of a felony (burglary). D's argument on appeal involved a much-discussed "restrictive construction of section 1."⁷¹

3.70 More importantly, it was held that the mental element in murder was fulfilled either by the intention to kill or by the intention to cause grievous bodily harm. In a brief judgment, Lord Goddard CJ said:

[T]he court is now able to give this decision which will be a guidance to courts in the future ...

... If he [D] intends to inflict grievous bodily harm and that person [V] dies, that has always been held in English law ... sufficient to imply the malice aforethought which is a necessary constituent of murder.⁷²

3.71 Lord Goddard CJ did not himself elaborate on the meaning of grievous bodily harm. He did, however, regard as "quite impeccable" the direction given by the trial judge (Hinchcliffe J) to the jury in *Vickers*, in the course of which the latter said:

The grievous bodily harm need not be permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to interfere with the health or comfort of the victim ...⁷³

3.72 This is clearly the wide, *Ashman* view of the meaning of grievous bodily harm. Even now, *Ashman* remains cited in *Archbold* as authority for the view that bodily harm can be serious even though it is neither dangerous, nor such as to require medical treatment, nor involving more than soft tissue damage.⁷⁴

3.73 In *Bollom*,⁷⁵ the Court of Appeal affirmed this view of the meaning of "grievous bodily" harm for the purposes of the Offences Against the Person Act 1861. Were *Bollom* to be applied without further elaboration in a murder case, it might well effect the reintroduction of the doctrine of "murder by pinprick".

3.74 In *Bollom*, the defendant was charged with causing grievous bodily harm with intent to do grievous bodily harm to his step-daughter, who was then 17 months old. The child had sustained numerous bruises on different parts of her body, some of which were the result of being jabbed with a hollow cylindrical object (probably part of a pen). There was no evidence, however, that the injuries had

⁷⁰ Homicide Act 1957, s 1;

(1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

⁷¹ Devlin J, "Criminal Responsibility and Punishment: Functions of Judge and Jury" [1954] Crim LR 661. That construction is not of crucial relevance here.

⁷² [1957] 2 QB 664, 669-670.

⁷³ *Ibid*, 672.

⁷⁴ *Archbold: Criminal Pleading, Evidence and Practice* (2005) para 19.206.

⁷⁵ [2003] EWCA Crim 2846, [2004] 2 Cr App R 6.

been inflicted in the course of a single attack. None of the injuries needed any form of treatment.

- 3.75 The appellant's conviction for causing grievous bodily harm with intent to do grievous bodily harm⁷⁶ was quashed. The trial judge had not made it clear that the injuries inflicted on the victim would have to have been inflicted during a single course of conduct or attack if they concluded that the harm was only grievous by virtue of its cumulative effects.
- 3.76 The Court, however, endorsed the opinion (considered below) of the House of Lords in *DPP v Smith*⁷⁷ that grievous bodily harm should be given its "ordinary and natural" meaning, that is "really serious harm". There are, though, at least two possible ordinary and natural meanings of really serious harm.
- 3.77 On one interpretation, the issue is whether the harm would naturally or ordinarily be regarded as serious, were it inflicted on a healthy adult (the "person-neutral" interpretation). Alternatively, the issue could be whether the harm would naturally or ordinarily be regarded as serious, given the age and state of health of the particular individual on whom it was inflicted (the "person-specific" view). That issue was not resolved in *DPP v Smith* itself.
- 3.78 The Court in *Bollom* took the latter interpretation, regarding the question of whether bodily harm was "grievous" as a contextual question. Fulford J, giving the judgment for the Court, said:⁷⁸

To use this case as an example, these injuries on a 6 foot adult in the fullness of health would be less serious than on, for instance, an elderly or unwell person, on someone who was physically or psychiatrically vulnerable or, as here, on a very young child. In deciding whether injuries are grievous, an assessment has to be made of, amongst other things, the effect of the harm on the particular individual.

...

The prosecution do not have to prove that the harm was life-threatening, dangerous or permanent: *R v Ashman* ... Moreover there is no requirement in law that the victim should require treatment or that the harm should extend beyond soft tissue damage.⁷⁹

- 3.79 The attack on the child in *Bollom*, like the attack on the vulnerable elderly woman in *Vickers*, was certainly callous and cowardly. The sentence in *Bollom* of twelve months' imprisonment for assault occasioning actual bodily harm (contrary to section 47 of the Offences Against the Person Act 1861) seems to have been richly merited. However, the implication of this decision for murder cases, were it to be relied on, is that there can indeed still be "murder by pinprick".

⁷⁶ See the Offences Against the Person Act 1861, s 18.

⁷⁷ [1961] AC 290, 334 *per* Viscount Kilmuir LC.

⁷⁸ [2003] EWCA Crim 2846.

⁷⁹ [2003] EWCA Crim 2846, [52]-[53].

3.80 This is, in part, because the Court does not insist that, when deciding whether serious bodily harm was intentionally inflicted, the jury must satisfy itself that the defendant knew of the age, illness, weakness or vulnerability of the victim. Even in the eighteenth century it was not clear that there could be a conviction for murder without such knowledge. Today, a conviction for murder without such knowledge should not be acceptable.

3.81 The “murder by pinprick” problems that may arise can best be illustrated by an application of *Bollom* to a hypothetical case involving the doctrine of transferred intent (a doctrine by virtue of which, if X shoots at Y *intending to kill* Y, but the bullet misses Y and by mischance hits Z, X is guilty of murdering Z).

EXAMPLE 4: D aims a hard jab with a pen at a young child being held by its mother, with the intention of causing a nasty bruise on the child. The jab with the pen misses the child and accidentally goes into the mother’s eye when she moves suddenly, killing her (for whatever reason).

3.82 At the moment when the defendant aims the jab at the child, the defendant will seemingly satisfy the *Bollom* test and thus fulfil the mental element under section 18 of the Offences Against the Person Act 1861. D can be found to have had the intention to cause serious harm.

3.83 As things turn out, in relation to the stabbing to death of the mother, it seems that the defendant can be found guilty of murder. His intention was to cause harm that can be regarded as serious if it had been inflicted on a young child as the defendant intended. So, the fact that it would definitely not have been so regarded, had his aim been to jab the mother with the pen and cause a bruise, is irrelevant. This follows from the “person-specific” view of grievous bodily harm endorsed in *Bollom*.

3.84 These weaknesses also affect the “ordinary meaning” view of serious harm.

The “ordinary meaning” view of serious harm

3.85 On the ordinary meaning view of “serious (“grievous” bodily) harm”, the phrase is left largely undefined. An individual jury using its common sense can find that the accused intended to inflict it, or not, in any given case, depending on the facts. The ordinary meaning view differs from the wide view in that it probably rules out a simple direction that an intention to interfere, albeit in a serious way, with the victim’s “comfort” or “health” (without more) is an intention to do serious harm.

3.86 This was the view presented to juries in many mid to late nineteenth century cases. It is probably also the view expounded by Sir James Stephen when he said:

if a man stabs another with intent to do him grievous bodily harm, and in fact kills him, he is guilty of murder. If he intentionally strikes him a blow with his fist or with a small stick with no intention to inflict

any great harm, and happens to kill him, he is guilty of manslaughter.⁸⁰

3.87 The House of Lords adopted the “ordinary meaning” view in *DPP v Smith*. In *Smith* the defendant was stopped by the police and an officer (V), who knew him, came up to the window of the defendant’s car to speak to him. The defendant accelerated away but V clung onto the defendant’s car. Witnesses suggested that the car was then travelling at between 30 and 60 miles an hour. The car zig-zagged in such a way that V was thrown off the car after it had travelled about 130 yards. V was thrown under the wheels of a car coming in the opposite direction and was killed. The defendant denied intending to kill V.

3.88 The trial judge (Donovan J) directed the jury that serious harm:

does not mean ... some harm which is permanent or even dangerous. It simply means some harm which is sufficient seriously to interfere with the victim's health or comfort ... If the accused intended to do the officer some harm which would seriously interfere at least for a time with his health and comfort ... that would be murder ...⁸¹

3.89 This is the *Ashman* direction and, as in *Vickers*, the vagueness and width of the definition was not regarded as grounds for quashing the murder conviction. Giving the only speech, Viscount Kilmuir LC approved that direction and upheld D’s conviction. He did so, however, only because the trial judge had referred the jury to the need for them to find that D intended “serious hurt”, or “serious harm” in other parts of his direction.⁸²

3.90 In the most often cited part of his speech, Viscount Kilmuir LC said:

I can find no warrant for giving the words “grievous bodily harm” a meaning other than that which the words convey in their ordinary and natural meaning ... “grievous” means no more and no less than “really serious”.⁸³

3.91 As indicated in the discussion of the wide view of serious harm, the problem here is that there are at least two possible interpretations of the ordinary and natural

⁸⁰ Sir J F Stephen, *History of the Criminal Law of England: Vol iii* (1883) 56. See also Sir J F Stephen, *Digest of the Criminal Law*, art 264, 211-213. It is perhaps worth noting that towards the end of its life, the felony-murder rule had been narrowed by judicial development to the point where it had begun to resemble the “ordinary meaning” view. Charges of felony-murder tended to be confined to deaths caused in the course or furtherance of felonies that in themselves posed risks of great bodily harm (or death), such as arson: see *Horsley* (1862) 3 F & F 287, or rape: *DPP v Beard* [1920] AC 479; *Stone* (1930) 53 TLR 1046. This restrictive development was strongly advocated by Stephen: see the discussion in K J M Smith, *Lawyers, Legislators and Theorists* (1998) 182-188; Homicide Bill 1879, cl 25. See further, R A Duff, “Implied and Constructive Malice in Murder” (1979) 95 LQR 418.

⁸¹ [1961] AC 290, 334-334.

⁸² [1961] AC 290, 335. Reliance was placed, in that regard, on the Victorian Supreme Court decision in *Miller* [1951] VLR 346, in which an *Ashman*-style direction was disapproved in favour of one that emphasised that grievous bodily harm was a phrase to be given its “ordinary and natural meaning” (*per* Martin J, at 357).

⁸³ [1961] AC 290, 334.

meaning of really serious harm: one “person-neutral” and the other “person-specific”. In cases where malice is transferred from a physically or mentally weak or fragile person to a strong one, the “person-specific” ordinary meaning view preserves the possibility of murder by pinprick.

- 3.92 In that regard, the “ordinary meaning” view has been adopted in the small number of common law jurisdictions in Australia⁸⁴ but not without some inconsistency in the results thereby produced in murder cases.⁸⁵ The “ordinary meaning” view has also been rejected by a number Law Reform bodies across the world that have considered it.⁸⁶
- 3.93 In a minority of jurisdictions reform bodies have recommended retention of a version of the serious harm in something like its present form. Where they have done so, however, serious harm has been given a statutory definition. That possibility is considered below.⁸⁷
- 3.94 Our provisional position is that the “ordinary meaning” view can, in the interests of simplicity, be retained, but we would like consultees’ views on whether “serious harm” should be defined in a relatively restricted way [Questions 3 and 4].

The “potentially lethal harm” view of serious harm

- 3.95 Proponents of the “potentially lethal harm” view of the “serious harm” rule believe that the only kind of lethally inflicted serious harm that can justify a conviction of murder if intentionally inflicted is life-threatening harm. On this view, the defendant need not have *intended* the harm to be life-threatening. What matters is (a) that the harm done was potentially life-threatening at the time of its infliction, and (b) that the defendant intended to inflict the injury in question.
- 3.96 For example, one commentator, writing shortly after the passing of the 1803 Act,⁸⁸ suggested that to justify a murder conviction there would have to have been an intention to do a kind of injury that involved “a possibility of death ensuing, namely by the cutting of an artery, or the loss of blood ...”⁸⁹ East, likewise, writing in 1803 suggested that, “he who wilfully and deliberately does an act which apparently endangers another’s life, and thereby occasions his death, shall ... be adjudged to kill him of malice prepense.”⁹⁰

⁸⁴ *Rhodes* (1984) 14 A Crim R 124; *Hunter and Dabblers* (1989) 44 A Crim R 93.

⁸⁵ *Weeding* (1959) VR 298.

⁸⁶ Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Fatal Offences Against the Person* (1998) Discussion Paper 51.

⁸⁷ See paras 3.143-3.146.

⁸⁸ See para 3.62.

⁸⁹ See the commentary accompanying *Akenhead* (1816) Holt 469, 471.

⁹⁰ East, *Pleas of the Crown: Vol i* (1803) 225. In the prefatory remarks on homicide in their Fourth Report in 1839 (168) xix, the Criminal Law Commissioners suggested that “neither is their any difference between the direct intention to kill and the intention to do some great bodily harm short of death ... as no one can wilfully do great bodily harm without putting life in jeopardy”. This appears to endorse this “potentially lethal harm” view.

3.97 It is perhaps surprising that this view, with its combination of a subjective requirement of an intention to do the injury in question and an objective requirement that that injury be by its nature life-threatening, has not attracted greater support in case law and commentary. In *DPP v Smith*, judicial directions that the harm intended must have been “obviously dangerous to life” or “likely to kill” were regarded as no more than indications that bodily harm must be really serious. Viscount Kilmuir LC went out of his way to criticise such directions, by saying:

it is unnecessary, and I would add inadvisable, to add anything to the expression “grievous bodily harm” in its ordinary and natural meaning.⁹¹

3.98 Viscount Kilmuir LC does not go on to explain why it is not only unnecessary but also inadvisable to give a direction that serious harm must be potentially lethal harm. Reasoned support for Viscount Kilmuir’s stance is to be found, however, in the speech of Lord Hailsham LC in *Cunningham*.⁹²

3.99 In *Cunningham*, “motivated by jealousy”,⁹³ the defendant fractured the victim’s skull in an unprovoked attack. He inflicted repeated blows with a chair, or part thereof, some of these blows being inflicted whilst the victim was lying prone. The trial judge (Lawson J) directed the jury that they could convict of murder if they found that the defendant intended to do the victim “really serious harm”. The defendant was convicted of murder.

3.100 On appeal, Lord Hailsham rejected the view that the jury should have been directed that, in the absence of an intention to kill, only an intention to endanger life would suffice as the mental element in murder. Approving the decisions in *Vickers* and *Smith*, he went on to say:

Nor am I persuaded that a reformulation of the law of murder so as to confine the mens rea to an intention to endanger life instead of an intention to do really serious bodily harm would either improve the clarity of the law or facilitate the task of juries in finding the facts. On the contrary, in cases where death has ensued as the result of the infliction of really serious injuries I can see endless opportunity for fruitless and interminable discussion of the question whether the accused intended to endanger life and thus expose the victim to a probable danger of death, or whether he simply intended to inflict really serious injury.⁹⁴

3.101 A number of criticisms can be made of this justification for the status quo. First, if there is “endless opportunity for fruitless and interminable discussion” over whether the defendant intended to endanger life as opposed merely to intending really serious harm then there must also be endless opportunity for fruitless and interminable discussion over whether harm is, or is not, “really serious”. Yet, Lord

⁹¹ [1961] AC 290, 335.

⁹² [1982] AC 566 (HL).

⁹³ [1982] AC 566, 573 *per* Lord Hailsham.

⁹⁴ [1982] AC 566, 579.

Hailsham does not object to the long-standing distinction between “really serious” and “actual” bodily harm on that ground.

- 3.102 Secondly, if it is possible for the jury, using its common sense, to decide whether the harm intended can be objectively judged to have been really serious then it is possible for the jury to similarly decide whether the harm intentionally done was objectively life-threatening. Lord Hailsham’s criticisms do not rule out the “potentially lethal harm” view of serious harm.
- 3.103 Thirdly, Lord Hailsham does not consider the different ways in which the supposedly ordinary or natural meaning of “serious” harm can be understood. So, he does not address the ambiguity inherent in the way the fault murder is currently defined.
- 3.104 An argument designed to meet Lord Hailsham’s criticisms of a more restricted approach to the fault element in murder has recently been given by Lord Steyn in *Powell & Daniels; English*⁹⁵.

There is an argument that, given the unpredictability whether a serious injury will result in death, an offender who intended to cause serious bodily injury cannot complain of a conviction for murder in the event of death. But this argument is outweighed by the practical consideration that immediately below murder there is the crime of manslaughter for which the court may impose a discretionary life sentence or a very long period of imprisonment. Accepting the need for a mandatory life sentence for murder, the problem is one of classification. The present definition of the mental element of murder results in defendants being classified as murderers who are not in truth murderers.⁹⁶

- 3.105 Although the “potentially lethal harm” view of grievous bodily harm has garnered little support in England, it has been central for 150 years to the Indian Penal Code. Section 300 reads as follows (it is worth citing the entire section):

[C]ulpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, *or thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death*, or fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid [emphasis added].

- 3.106 It may be that the “potentially lethal harm” version of the “serious harm” rule meets Lord Hailsham’s criticisms, whilst avoiding the excessive ambiguity of the

⁹⁵ [1999] 1 AC 1.

⁹⁶ *Ibid*, at 15.

“wide” and “ordinary meaning” versions. This view still means, however, that someone can be convicted of murder even though he or she neither intended to kill nor even realised that the death of the victim was a possible consequence of his or her conduct. This would be a breach of the correspondence principle. An example might be where the defendant loses his or her temper with the victim and lashes out at the victim with a knife, cutting a jugular vein in the victim’s throat when the victim suddenly and unexpectedly moves closer to the defendant.⁹⁷

- 3.107 There is a further respect, however, in which section 300 of the Indian Penal Code may cast the net too wide, in breach of the correspondence principle. Some kinds of harm or bodily interference may well be sufficient in the ordinary course of nature to cause death but if the defendant is (say) of low intelligence he or she may not realise this. It would be unfair in some such instances to convict him or her of murder even if section 300 is satisfied. Examples might be where the defendant, being of low intelligence, puts a pillow firmly over a very young victim’s face to stop the victim screaming, or kicks the victim once, hard in the head.
- 3.108 An example is provided by the American case of *People v Causey*.⁹⁸ In this case, the defendant intentionally struck the victim on the side of the head with a jar of pennies. The blow caused a blood clot to form in the victim’s brain and the victim consequently died. A conviction for murder was affirmed. Reasonable people might disagree about whether the injury done was inherently life-threatening. Under section 300 of the Indian Penal Code, if the injury is found, on an objective judgement, to be by its nature life-threatening, the defendant is guilty of murder. That may seem to cast the net too wide, although much clearly depends on the manner in which the defendant intentionally struck the victim. The problems that may arise are not, in that sense, necessarily irresolvable.
- 3.109 If the “potentially lethal harm” view is to deal with such cases fairly, any new version of section 300 would have to include a provision stipulating that the defendant be proven to have intended by his or her action to do *very serious* injury. Only if they find that intention proven, will it be for the jury to decide whether such an injury was also, objectively speaking, life-threatening at the time of infliction and thus potentially a case of murder.
- 3.110 Even with that safeguard in place, however, the “potentially lethal harm” view is left reliant on a finding that the defendant intended really serious harm and that reliance imports the ambiguities associated with that notion. The “*Bollom*” problem,⁹⁹ for example, may still arise in a case involving transferred intent.

EXAMPLE 5: D loses his temper with a crying baby and aims a hard blow at the baby’s head with an open hand. The blow misses the baby but strikes the baby’s mother (V) as she is holding the baby. V consequently loses her balance, falls, hits her head, and dies of the head wound.

⁹⁷ See further Lord Goff, “The Mental Element in the Crime of Murder” (1988) 104 LQR 30.

⁹⁸ [1978] 66 Ill App 3d 12 (Illinois), 383 NE 2nd 234.

⁹⁹ See paras 3.73-3.84.

- 3.111 On the ‘potentially lethal harm’ view, the defendant may be found guilty of murdering the victim, if (a) the jury finds that the defendant intended the baby to suffer really serious harm, and (b) the harm done would have been inherently life-threatening *to the baby*. The key is that, on the “potentially lethal” view the defendant possesses the mental element for murder as far as the intended victim, the baby, is concerned. The fact that this is what would ordinarily be regarded as a ‘one-punch manslaughter’ case, so far as the victim’s death is concerned, is irrelevant.
- 3.112 The Law Commission has itself expressed doubts about whether the “potentially lethal harm” view of the “serious harm” rule provides a workable alternative to the present law.¹⁰⁰ In 1967 the Commission expressed the view that it would be difficult for a jury to determine whether there was a likelihood that life would be endangered by an injury (although this point was not central to its Report). The Commission thought the difficulty arose because answering the question depends not only on the inherent seriousness of the injury, but also on the surrounding circumstances, such as whether medical aid was readily accessible.¹⁰¹ These doubts are shared by current-day Crown Prosecutors whom we have surveyed.¹⁰²
- 3.113 Further, the objective element to the test involves asking a hypothetical question of doubtful value: was the injury potentially life-threatening at the time of its infliction? In many cases, as the injury caused death, the jury is likely to conclude “of course it was!” So, the test may add little or nothing, other than extra complexity, to the present law.¹⁰³
- 3.114 A variation on this “potentially lethal harm” view seeks to give more specific definition to the notion of “serious harm” thus avoiding the objections just raised.

Defining serious harm

- 3.115 Grievous bodily harm is defined in the Queensland and Western Australian Criminal Codes, amongst others.¹⁰⁴ In most of those states, its definition is “bodily injury of such a nature as to endanger or be likely to endanger life, or cause, or be likely to cause, permanent injury to health”.¹⁰⁵ The Irish Law Reform Commission has also adopted this definition.¹⁰⁶ The definition is clear enough to

¹⁰⁰ Law Commission for England and Wales, *Imputed Criminal Intent: DPP v Smith* (1967).

¹⁰¹ *Ibid*, at para 18(b).

¹⁰² See Appendix B.

¹⁰³ Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976) 33.

¹⁰⁴ Crime Act 1900 (NSW), s 18(1)(a); Western Australian Criminal Code s 279(1) and (3); Queensland Criminal Code s 302(1) and (3); Tasmanian Criminal Code s 156(2)(a) and s 157(1)(b) and (d). See the discussion in Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Fatal Offences Against the Person* (1998) Discussion Paper, chap 5, 49. See also the Criminal Justice Act 1964 (ROI), s 4.

¹⁰⁵ See Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Fatal Offences Against the Person* (1998) Discussion Paper 51

¹⁰⁶ Irish Law Reform Commission, *Homicide: The Mental element in Murder* (LRC-CP 17-2001) Consultation Paper, para 5.41.

be free of the interpretative ambiguity that affects the wide and the “ordinary meaning” views of serious harm. It is hence much more likely to avoid murder by pinprick.

- 3.116 A drawback about the definitional approach can be that the provision of detail means the creation of bright lines, gaps and hence, perhaps, a degree of arbitrariness or anomaly.¹⁰⁷ Under Irish law, for example, serious harm is defined as follows:

[I]njury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ.¹⁰⁸

- 3.117 Should it, though, really count as an intention to do serious harm, for the purposes of the law of murder, that I intend to deprive you substantially of the loss of the full use of your little toe (“any particular bodily member”)? It would be hard to deny that such an intention falls under the definition as stated.

- 3.118 To pass muster in the law of murder, then, satisfying definitions, such as that in Irish law, need to be regarded as a necessary but not as a sufficient step in establishing whether the defendant intended to do “really serious” harm. The jury should have the right to say that, notwithstanding the technical satisfaction of the definition, there was no intention to do “really serious” injury or harm.

- 3.119 A suggestion for reform of the “serious harm” rule on which we invite views, involves a definition of serious harm, as follows:

Harm is not to be regarded as serious unless it is harm of such a nature as to endanger life, or to cause, or to be likely to cause, permanent or long-term damage to a significant aspect of physical integrity or mental functioning.

- 3.120 If this definition, or one like it, is appealing, then a further question arises on which we invite views. Is an intention to cause harm in this sense a sufficiently blameworthy fault element to justify conviction for “first degree murder”, or should the intention to do serious harm (howsoever defined) remain within “second degree murder”? **[Questions 3 and 4]**

Previous recommendations: the “fully subjective” approach

- 3.121 In the past, the Law Commission has recommended that, as well as when there was a intention to kill, a killing should be regarded as done intentionally – and hence as murder – when “at the time when he takes the action in fact resulting in death, he is *willing* by that action to kill in accomplishing some purpose other than killing [emphasis added].”¹⁰⁹ The notion of “willingness” to kill reflects Lord

¹⁰⁷ J Gardner, “Legal Positivism: Five and a Half Myths” (2001) 46 *The American J of Law and Jurisprudence* 199, 212.

¹⁰⁸ *Offences Against the Person Act 1997*, s 1(1).

¹⁰⁹ Law Commission for England and Wales, *Imputed Criminal Intent: DPP v Smith* (1967), para 22(c).

Diplock's understanding of the proper limits of malice aforethought in the law of murder, considered above.¹¹⁰

- 3.122 The idea has a resonance in jurisdictions that have the fault element of "*dolus eventualis*", like Germany and South Africa. This is a state of mind in which one foresees that an event (unlawful killing here) may occur in the course of one's conduct and one "accepts" that result as just "one of those things", even if one does not necessarily positively welcome or wish for it.¹¹¹ The distinction between *dolus eventualis* and subjective recklessness, where an unjustified outcome is likewise seen as a possible incident of one's conduct, is the positive element of acceptance of, or being reconciled to, or willing to tolerate, the outcome.
- 3.123 In 1976, the Criminal Law Revision Committee disagreed with such an approach. In its working paper on offences against the person, the Committee expressed the view that being "willing" by an action to kill was "uncertain and ambiguous and ... likely to be too difficult and subtle for a jury to understand."¹¹² That problem is acknowledged in jurisdictions that employ the concept of *dolus eventualis*.¹¹³ Our suggestion that "reckless indifference" become one of the fault elements for "second degree murder" involves a further look at this problem, in an attempt, in so far as possible, to avoid the problems of ambiguity and uncertainty.¹¹⁴
- 3.124 In 1976, in its discussion of murder, under the heading "intent to cause serious injury", the Criminal Law Revision Committee expressed a preference for a fault element, alongside intention to kill, defined in terms of intending to cause serious harm, coupled with knowledge that the act involves a risk of death. The Committee took the robust view that the jury could be trusted to consider whether, in all the circumstances, serious injury was intentionally inflicted and whether the defendant realised the victim's life might be endangered by his or her act at the time of the infliction of the injury.¹¹⁵ This can be called the "fully subjective" approach.
- 3.125 The argument in favour of this "fully subjective" approach is simplicity, a great virtue in murder cases. The jury would be concerned only with the defendant's subjective state of mind, with his or her intention and with his or her foresight of the possibly fatal consequences, thereby respecting the correspondence and subjectivity principles.¹¹⁶ Unlike the "potentially lethal harm" view, the "fully subjective" view allows the jury to concern itself solely with the defendant's state of mind; the jury are spared having to make an objective assessment of the injury's risky character.

¹¹⁰ See para 3.40.

¹¹¹ See V Krey, *German Criminal Law: Vol ii* (2003) para 348; A Pedain, "Intention and the Terrorist Example" [2003] Crim LR 579.

¹¹² Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976) para 32.

¹¹³ V Krey, *German Criminal Law: Vol ii* (2003), 349-364.

¹¹⁴ See paras 3.149-3.181.

¹¹⁵ Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976) paras 33-34.

¹¹⁶ See para 3.15.

- 3.126 The Committee itself was, however, divided. Some members accepted the “potentially lethal harm” version of the grievous bodily harm rule, with its combination of a subjective element (intent to do serious harm) and an objective element (harm done that the jury judges to be life-threatening at the time).¹¹⁷ Proponents of this view fear it would be too easy for the defendant to escape conviction for murder in numerous cases in which he or she had intentionally inflicted very serious injury in a fit of temper, in a panic, or under the influence of drink or drugs. It would be too easy to claim that the temper, panic or intoxication meant there was a reasonable doubt as to whether the defendant was aware of the threat to life posed by his or her actions.
- 3.127 The Criminal Law Revision Committee revisited the issue in 1980.¹¹⁸ This time the Committee came down decisively in favour of a subjective version of the “serious harm” rule. Putting aside cases in which there was an intention to kill, the Committee took the view that it should be murder only when “the killer intended unlawfully to cause serious bodily injury and knew there was a risk of causing death.”¹¹⁹ The change of heart came from a growing commitment to the view that subjective principles of criminal liability should reign throughout the criminal law and that the law of murder should be reformed in the light of such principles.¹²⁰
- 3.128 This view was reflected in at least some of the older case law.¹²¹ It was also, broadly speaking, the view at which Stephen arrived when drafting his own criminal code. Stephen defined the mental element in murder as an intention “to cause ... any bodily injury which is *known to the offender* to be likely to cause death ...[emphasis added]”.¹²² This is very similar to the definition in the current Draft Criminal Code.¹²³ It also received some support in cases involving serious harm that did not result in death.¹²⁴

¹¹⁷ Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976) para 33.

¹¹⁸ Criminal Law Revision Committee, *Offences Against the Person* (1980) Report 14, Cmnd 7844.

¹¹⁹ *Ibid*, para 28.

¹²⁰ *Ibid*, para 21.

¹²¹ *Macklin and Murphy* (1838) 2 Lewin 225; *Walters* (1841) Car & M 164. This view appears to have had the support of Cockburn CJ, in *Desmond* (*The Times*, 28 April 1868) when he said that the mental element in murder was “knowledge or belief that a life was likely to be sacrificed.” See also *Vamplew* (1862) 3 F & F 520.

¹²² Sir J F Stephen, *History of the Criminal Law of England* (1883), cited by Lord Diplock in *Hyam* [1975] AC 55, 91.

¹²³ Clause 58.

¹²⁴ *Howlett* (1836) 7 C & P 275.

3.129 The fully subjective approach has been supported by the majority of Law Reform bodies across the world, as well as by judges and scholars working in the field.¹²⁵

3.130 In 1980, the Criminal Law Revision Committee mustered an impressive group of supporters for the fully subjective approach, including the Police Federation and the Criminal Bar Association. However, the clinching arguments put forward for the subjective view do not now perhaps appear quite so decisive as they might then have done. The Committee said:

The intention to cause serious bodily injury puts this killing into a different class from that of a person who is merely reckless, even gravely reckless ... the circumstances are so grave that the jury can find that he must have realised that there was a risk of causing death. For example, he has shot at a pursuer when he is escaping after a robbery, intending only to disable the pursuer but appreciating that there was a risk of wounding him mortally. The line between this and an intentional killing is so fine that both cases are justifiably classified as murder, as they are in the present law.¹²⁶

3.131 If, however, it is the intention to do serious (objectively life-threatening) injury that puts a killing into a morally “different class” from purely reckless killing, it is not clear that very much is added, morally speaking, by insisting on a further subjective mental element. The further element is little more than a fifth wheel on the coach, because it is the intention to do serious injury which, it is recognised, does the principal moral work. As its proponents admit, moreover, it also adds considerably to the problems of proof confronted by the prosecution,¹²⁷ a view shared by the Crown Prosecutors we surveyed.¹²⁸

3.132 We think it is better to regard the defendant’s awareness that death may be caused by the harm being intentionally inflicted solely as an aggravating feature of a killing that falls into the category of “second degree murder” simply because serious harm was intended. It should have the same status as the use of torture to inflict serious harm that causes death, something that will inevitably affect the sentence handed down but not something that changes the category of the offence. There is no immutable principle that demands that particular fault elements affect the category of offence rather than being aggravating features within a given category.

3.133 Moreover, it would be fair to say that wholly subjectivist principles of criminal liability are not as universally popular today as they were 25 years ago, although

¹²⁵ See eg: Law Reform Commission of Canada, *Recodifying Criminal Law* (1987) Report 31 57-58; Law Reform Commission of Victoria, *Homicide* (1990-1991) Report 40 paras 122-131; New Zealand Crimes Consultative Committee, *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991); House of Lords Select Committee on Murder and Life Imprisonment, *Report of the Select Committee on Murder and Life Imprisonment* (1989) HL Paper 78-1, para 195; A Criminal Code for England and Wales (1989) Law Com No 177, vol 1, para 54(b).

¹²⁶ Criminal Law Revision Committee, *Offences Against the Person* (1980) Report 14 Cmnd 7844, para 28.

¹²⁷ Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976), 35.

¹²⁸ See Appendix B.

they retain a wide and influential body of support.¹²⁹ Significantly, they have found little or no favour with recent governments, which have consistently preferred more objective principles of liability when reforming even very serious offences against the person, such as rape.¹³⁰

- 3.134 Even so, in 1989, the House of Lords Select Committee on Murder and Life Imprisonment (the “Nathan Committee”) sided with the fully subjective view recently taken in the Draft Criminal Code drawn up by the Law Commission for England and Wales in 1989, in which murder was to be confined to cases in which:

A person ... 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.¹³¹

- 3.135 As the Select Committee noted, however, the Crown Prosecution Service considered this would pose grave problems of proof.¹³² We recognise that many will prefer the fully subjective approach because it has that extra subjective gloss, in the form of an awareness that the injury may kill, on top of the intention to do serious harm. One question is whether, in practice, it is likely to make a crucial difference in any significant cases. Instances that have been discussed in this context include ones where the defendant places a pillow firmly over the victim’s face to stop the victim screaming, or punches or kicks the victim once, hard, in the head.¹³³

- 3.136 As we have already said, we are not attracted by the “potentially lethal harm” view, partly because it involves a complex mixture of subjective and objective elements, and partly because the objective element in the test involves asking a hypothetical question of doubtful value: was the injury potentially life-threatening at the time of its infliction? So, the test is likely to add little or nothing, other than extra complexity, to the present law.¹³⁴

¹²⁹ For contrasting approaches, see A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed 2003), where an approach less favourable to thorough-going subjectivism is taken, and A J Ashworth, *Principles of Criminal Law* (4th ed 2003), where a more subjectivist-friendly approach is taken. Contrasting approaches can be found in the cases as well. *G* [2003] UKHL 50, [2004] 1 AC 1034 takes a subjectivist approach to liability, whereas *Savage* [1992] 1 AC 699 takes a more objectivist approach.

¹³⁰ See Sexual Offences Act 2003, s 1 (definition of rape). See also the Protection from Harassment Act 1997.

¹³¹ Draft Criminal Code, cl 54(1), cited in House of Lords Select Committee on Murder and Life Imprisonment, *Report of the Select Committee on Murder and Life Imprisonment: Vol 1* (1989) HL 78 para 71.

¹³² *Ibid*, para 59.

¹³³ Law Reform Commission of Ireland, *Homicide: The Mental Element in Murder* (LRC-CP 17 –2001) Consultation Paper, para 3.46.

¹³⁴ Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976) 33.

3.137 We now also have doubts, however, about the Nathan Committee formula,¹³⁵ for the reasons already given.¹³⁶ In our view, it would be better to retain faith with the correspondence and subjectivity principles¹³⁷ by framing the fault element in a different way. The focus is firmly on the core fault element, the intention to cause serious harm, the element that puts a consequent killing in a “different class” from the purely reckless killer.¹³⁸

The views of the Irish Law Reform Commission

3.138 In its detailed consideration of the law in 2000-2001, the Irish Law Reform Commission helpfully sets out the arguments for and against some version of the grievous bodily harm rule, which it may help to cite in full:

The main arguments in favour of abolition are as follows:

1. Murder involves an unlawful killing, so following the ordinary doctrine of *mens rea* the mental element should envisage death. By allowing an intent to cause serious injury to suffice, the law runs the risk of turning its most serious crime into a constructive offence. In other words, the fault element does not correspond to the conduct leading to the charge, namely, the causing of death.

2. There is a significant moral difference between someone who intends to cause death, and someone who intends merely to cause serious injury, but does not intend or foresee death. The purpose of the offence of murder is to mark out and identify the most heinous killings. By treating an intentional killer on a par with a killer who neither intends nor foresees death, the law may blur this distinction. By so doing the law fails to distinguish clearly between the moral blameworthiness of the intentional killer and the lesser culpability of the unintentional killer.

3. Including an intention to cause serious injury within the *mens rea* of murder is unnecessary as the crime of manslaughter is adequate to deal with the intentional infliction of serious injury resulting in death. The crime of manslaughter allows the imposition of lengthy terms of imprisonment ... to reflect the seriousness of a particular offence ...

4. The concept of “serious injury” may be unacceptably uncertain. As the Law Reform Commission of Victoria has pointed out, this may leave open the possibility of differing verdicts from juries based on the same or broadly similar facts. The Commission highlighted a number of examples where it may be difficult for a jury to draw the line between a murder conviction and one of manslaughter ...

¹³⁵ See para 3.134.

¹³⁶ See paras 3.131-3.132.

¹³⁷ See para 3.15.

¹³⁸ Criminal Law Revision Committee, *Offences Against the Person* (1980) Report 14Cmnd 7844, para 28.

Stifling a victim's cries by putting a pillow over the mouth to suffocate the victim to point of unconsciousness;

Shooting the victim with a gun in the arm, leg or foot;

Punching the victim with the intention of knocking him or her out;

Applying a cigarette lighter briefly a number of times to the victim's body.

There is no doubt that a crime has been committed in each case, or that it deserves to be punished as such. However, it is less clear whether a jury would find an intention to cause serious injury in all these cases, and if they do, whether it is correct to describe the crime committed as murder.

5. The rule leaves too much scope for discretion on the part of the prosecution. Glanville Williams suggests that, in practice, deaths involving this type of mens rea are generally treated as manslaughter unless the accused was engaged in a "villainous enterprise"

6. It appears that, in practice, juries may be reluctant to convict for murder under this head. The Law Reform Commission of Victoria ... referred to submissions made to it by experienced practitioners that juries were generally reluctant to convict under the rule.

The main arguments in favour of retaining an intent to cause serious injury as part of the mens rea of murder are:

1. Anyone who intentionally inflicts serious injury, and thereby puts another's life at risk, deserves to be convicted of murder if death results. The human body is fragile and no one can ever predict whether death will result from serious injury, since it may depend on a range of individual and medical factors beyond the perpetrator's control. A person who is willing to inflict serious injury on another human being therefore possesses a degree of moral culpability comparable to an intentional killer. By choosing to inflict serious injury on a person the defendant crosses a moral threshold, and sufficient disregard for life has been shown to justify a conviction of murder if death results. This public policy argument has been articulated by the Indian Supreme Court ...¹³⁹

2. Abolition of the rule might facilitate defendants who wish to escape a murder conviction by allowing them to claim that they only intended to cause serious injury when, in fact, they did intend to kill ... In practical terms it would become more difficult for a prosecution to establish a conviction for murder as the accused could simply make the claim that he or she only intended to cause serious injury.

¹³⁹ *Virsa Singh* AIR [1958] SC 465.

3. In response to the argument that there is a lack of correspondence between the lesser degree of fault in a particular intent and the more dire fatal result, it may be contended that the doctrine of “common knowledge” applies. A defendant who intentionally inflicts serious injury must be taken to know that he is putting life at risk in view of the inherent vulnerability of the human body. That death may occur is a basic element of the body of knowledge that goes hand in hand with ordinary human experience and one cannot meaningfully claim not to know or believe that one’s actions could have such a result. Accordingly, a defendant who knowingly inflicts personal violence must bear the consequences of it, even if he failed to acknowledge those consequences at the point of assault

As the English decision of *Parker*¹⁴⁰ illustrates, insisting on conscious or front of the mind awareness may cause difficulties in practice ... Insisting on conscious awareness of a risk of death excludes certain types of misconduct. Thus, a defendant who claims that he was in such a rage that he “acted without thinking”, or a defendant who is so indifferent as to whether his victim lives or dies that he does not consider the risk of death, or a defendant who claims he was preoccupied by another aspect of what he was doing, would escape liability if conscious appreciation is a necessary ingredient of the mental element of murder.¹⁴¹

3.139 The Irish Law Reform Commission itself recommended retention of the grievous bodily harm rule. In the Commission’s view:

A defendant who deliberately inflicts serious injury must be taken to know that he is risking life in view of the inherent vulnerability of the human body and mind. Such a defendant therefore possesses sufficient moral culpability to justify a murder conviction.¹⁴²

3.140 This justification for the “serious harm” rule was founded by the Commission on the view that whilst D may not have consciously adverted to the risk of death inherent in his or her attack, where that attack took the form of the infliction of serious harm there must inevitably have been “back of the mind awareness” of such a risk.¹⁴³

3.141 No doubt there is such a thing as “back-of-the-mind” awareness.¹⁴⁴ However, the way that this notion is employed by the Irish Law Reform Commission to justify the grievous bodily harm rule is reminiscent of the much-criticised doctrine upheld by the House of Lords in *DPP v Smith*¹⁴⁵ (since overturned¹⁴⁶) that D must be

¹⁴⁰ [1977] 1 WLR 600.

¹⁴¹ Irish Law Reform Commission, *Homicide: The Mental element in Murder* (LRC-CP 17-2001) Consultation Paper, paras 4.083-4.084.

¹⁴² *Ibid*, para 4.097.

¹⁴³ *Ibid*, para 4.100.

¹⁴⁴ For a general discussion, see R A Duff, *Intention, Agency and Criminal Liability* (1990).

¹⁴⁵ [1961] AC 290.

¹⁴⁶ See Criminal Justice Act 1967, s 8.

taken to have intended the natural consequences of his or her acts. For that reason it will almost certainly be unacceptable to most English criminal lawyers.

- 3.142 We share the views of the Irish Law Reform Commission¹⁴⁷ that an intention to cause serious harm should suffice as a fault element in “second degree murder”. We invite the views of consultees, however, on whether the notion of “serious harm” should be given a restricted definition. **[Questions 3 and 4]**

Reforming the “serious harm” rule

- 3.143 Subjective versions of the “serious harm” rule, of the kind endorsed by the Nathan Committee,¹⁴⁸ have in practice rarely, if ever, found favour with legislatures in the common law world. There is a case, then, for retaining the “ordinary meaning” view of serious harm for the purposes of conviction for “second degree murder”. Upon conviction, the judge can match the sentence in part to the degree of harm the defendant intended, as well as to the fact that the victim was killed.
- 3.144 However, in this section we have discussed how the “serious harm” rule can be worryingly vague. For that reason, drawing on the arguments above, it is worth attempting to provide a version of the rule which is not wholly subjective, based on a more restricted definition of “serious harm”.

- (1) D is guilty of murder if he kills:
 - (a) intending to kill;¹⁴⁹ or
 - (b) intending to do serious harm.
- (2) For the purposes of 1(b), harm is not to be regarded as serious unless it is harm of such a nature as to endanger life, or to cause, or to be likely to cause, permanent or long-term damage to a significant aspect of physical integrity or mental functioning.¹⁵⁰

- 3.145 This proposal simply narrows the scope of the kinds of intentionally inflicted harm that count as serious for the purposes of the law of murder. It does not, though, *require* the jury to find that an injury falling within 1(b) is serious and in that sense it is not intended to be prescriptive.¹⁵¹

- 3.146 With “serious harm” so confined, some may think that an intention to do serious harm is now sufficiently blameworthy to warrant conviction for “first degree murder” and not just for “second degree murder.” **[Question 1]** We welcome expressions of opinion on this point, although our provisional view is that an

¹⁴⁷ See paras 3.138-3.142.

¹⁴⁸ Para 3.134.

¹⁴⁹ The meaning of “intention” is discussed in Part 4.

¹⁵⁰ This is an attempt to improve on the meaning of serious harm discussed in paras 3.138-3.142.

¹⁵¹ Morally defensible though it may be, however, it could hardly be said that such a definition of the mental element in murder has the added virtue of simplicity.

intention to cause serious harm, howsoever defined, should remain part of the offence of “second degree murder”.

A RADICAL ALTERNATIVE CATEGORISATION?

- 3.147 In Germany, causing death through the intentional infliction of bodily injury is treated neither as murder nor as manslaughter. Instead, it is treated as a kind of aggravated assault, in which a bodily injury intentionally done is made worse by the fact that it has unintentionally caused death.¹⁵² A suggestion for re-categorisation in English law as radical as this is likely to meet with considerable opposition. It is arguably not an accurate categorisation of what the defendant has done. Where the defendant causes death through an intentional infliction of harm, the defendant *kills* V.¹⁵³ It is morally appropriate, therefore, to convict the defendant of a homicide offence.¹⁵⁴
- 3.148 We now turn our attention to the merits of including reckless killing within the scope of “second degree murder”.

MURDER BY RECKLESS INDIFFERENCE TO CAUSING DEATH

- 3.149 **Our provisional proposal** is that, alongside killing through the intention to do serious harm, killing through reckless indifference – a “couldn’t care less” attitude – to causing death should be included within “second degree murder”.
[Provisional proposal 3]

- 3.150 Indifference to causing death would be defined as follows:

D is indifferent, manifesting a “couldn’t care less” attitude to death, when he or she realises that there is an unjustified risk of death being caused by his or her conduct, but goes ahead with that conduct, causing the death. D’s own assessment of the justifiability of taking the risk, in the circumstances, is to be considered, along with all the other evidence, in deciding whether D was recklessly indifferent and “couldn’t care less” about causing death.

Supplementing the “serious harm” rule, within “second degree murder”

- 3.151 It was suggested that the “serious harm” rule is meant to be the law’s answer to the question, “other than in cases where a killing was intentional, when is someone to be regarded as deservedly convicted of murder?”¹⁵⁵ It was suggested that, as a purported answer to that question, the rule may be in one respect too generous to, and in another respect too severe on, a person charged with murder.
- 3.152 As an answer to this question, the rule is arguably too generous because someone who sees death as a realistic consequence, or even as a highly probable consequence, of his or her actions cannot be convicted of murder. This

¹⁵² 227 StGB.

¹⁵³ See J Gardner, “On the General Part of the Criminal Law”, in R A Duff (ed), *Philosophy and the Criminal Law* (1998), chap 5.

¹⁵⁴ See Part 2.

¹⁵⁵ See para 3.14.

is because he or she did not think that death (or serious harm) was *virtually certain* to occur. It does not seem right that the distinction between murder and manslaughter should always turn on such a small difference of degree. The Irish Law Reform Commission's example, in paragraph 3.51, provides a good example to support this point.

- 3.153 Perhaps more promising, as a way forward, is the way of expressing malice given at the end of the passage in Lord Diplock's speech in *Hyam* where he said that what matters is:

[The defendant's] *willingness* to produce the particular evil consequence: and this, in my view, is the mens rea needed to satisfy a requirement ... [the accused] ... must have acted with 'intent' ... or ... with malice aforethought.¹⁵⁶

- 3.154 A willingness to tolerate the unjustified death of another, in order to achieve one's ends, may, depending on the circumstances, equally be manifested by a realisation that such a death is possible, probable, or highly likely to occur. The degree of probability that death may occur affects only the strength of the basis for inferring that the defendant was "willing" to tolerate the death in pursuit of his or her ends. In that regard, as indicated earlier, we prefer the terminology employed by the High Court of Australia, in which has spoken of a "substantial – a real and not remote – chance".¹⁵⁷
- 3.155 The key question is what does it mean to say that the defendant was "willing" to tolerate an unjustified death?
- 3.156 Under our provisional proposal, we believe that such willingness to kill would be conclusively manifested when the defendant kills through reckless indifference to death.
- 3.157 Killing through reckless indifference respects the two key principles of fault, the correspondence and the subjectivity principles.¹⁵⁸ The fault element must relate to the wrong done (killing), and it is subjective, meaning that is concerned with the defendant's state of mind at the time of the offence.
- 3.158 Reckless indifference can, in that respect, be distinguished from what was earlier called reckless stupidity. Reckless stupidity – "rashness", in C S Kenny's older account of recklessness¹⁵⁹ – is manifested by conduct which the defendant realises may result in a given consequence, such as death, but in circumstances where the defendant (a) stupidly thinks that the risk is highly unlikely to turn into reality, or (b) thinks that it is justified to run the risk when it is not, or (c) gives a glaringly obvious risk no thought at all.¹⁶⁰

¹⁵⁶ *Hyam* [1975] AC 55, 86 [emphasis added].

¹⁵⁷ *Bouhey v The Queen* [1986] 161 CLR 10.

¹⁵⁸ See para 3.15.

¹⁵⁹ C S Kenny, *Outlines of Criminal Law* (2nd ed 1907) 132-135, discussed in K J M Smith, *Lawyers, Legislators and Theorists* (1998) 156-157.

¹⁶⁰ *MPC v Caldwell* [1982] AC 341. (c) is effectively a kind of gross negligence.

3.159 Earlier in the twentieth century, some judges worked with a conception of recklessness that was closer to aggravated recklessness than to reckless stupidity.¹⁶¹ In *Andrews v DPP*,¹⁶² Lord Atkin said:

[F]or the purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before ... felony is established. Probably of all the epithets that can be applied “reckless” most nearly covers the case ... but ... “reckless” suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction [for manslaughter by negligence].¹⁶³

3.160 By the end of the twentieth century, however, the courts had come to understand recklessness in terms of reckless stupidity. *MPC v Caldwell*¹⁶⁴ (now overruled) held that recklessness encompassed a state of mind where the defendant gives no thought whatsoever to the risk. At odds with Lord Atkin’s remarks in *Andrews v DPP*, *Shimmen*¹⁶⁵ held that recklessness encompassed the state of mind where the defendant believes a risk is highly unlikely to turn into reality. In effect, recklessness became just one side of a “gross negligence” coin, something far from Lord Atkin’s understanding of the concept.

3.161 There may be some contexts in which it will still be appropriate to regard “recklessness” as an indivisible notion, encompassing both reckless stupidity and reckless indifference. An example is the proposed reform of manslaughter by unlawful and dangerous act.¹⁶⁶

3.162 Reckless stupidity, of the sort Lord Atkin thought was really a kind of gross negligence, has no place in the law of murder. This is because it is exemplified by merely hasty, rash, thoughtless or foolish risk-taking. The defendant can be found to have been simply or stupidly reckless, even if he or she would, *ex hypothesi*, not have gone ahead with his or her conduct had he or she realised the true nature or level of risk involved. So, this kind of recklessness involves a substantial element of objective judgement of the defendant’s behaviour after the fact, thus running contrary to the spirit, if not the letter, of the subjectivity principle.¹⁶⁷

Alternatives to “reckless indifference”

3.163 In a number of jurisdictions, an attempt has been made to distinguish aggravated recklessness from reckless stupidity in similar ways. In many common law

¹⁶¹ See, the definition of “rashness” given by John Austin in the 1870s, discussed by K J M Smith, *Lawyers, Legislators and Theorists* (1998) 126.

¹⁶² *Andrews v DPP* [1937] AC 576.

¹⁶³ [1937] AC 576 (HL), 583 [emphasis added]. For reasons given below, we prefer the definition of aggravated recklessness given above, to one centred on an evaluative or emotive term such as “indifference”.

¹⁶⁴ *MPC v Caldwell* [1982] AC 341.

¹⁶⁵ *CCASP v Shimmen* (1987) 84 Cr App R 7.

¹⁶⁶ See paras 3.190-3.192.

jurisdictions it is murder if the defendant kills with “wicked recklessness imply[ing] a disposition depraved enough to be regardless of the consequences”,¹⁶⁸ or with “recklessness under circumstances manifesting extreme indifference to the value of human life”.¹⁶⁹

- 3.164 In these jurisdictions, an overtly evaluative term (“wicked”; “extreme indifference”) is used to express the fault element sufficient to convict of murder in the absence of an intention to kill. The emphasis is on the defendant’s attitude towards causing the death, rather than simply on his or her intentions and on the probability that death will be caused. Therein is meant to lie the distinction between what we are calling reckless indifference – a “couldn’t care less” attitude – and mere reckless stupidity.
- 3.165 There is a potential problem with a fault element defined through the use of an evaluative criterion. It concerns the scope it gives to juries to use moral judgement in deciding after the fact whether the element was or was not present, in breach of the subjectivity principle. A jury may be more inclined to regard a killing as “wickedly” reckless, “extremely indifferent”, or as manifesting a “couldn’t care less” attitude, simply because the victim happened to be a child, because they have been told of the defendant’s previous convictions for offences of violence or because they are drawing on stereotypes (for example, “it is just not ‘natural’ for a woman to brandish a sawn-off shotgun”).¹⁷⁰
- 3.166 As we pointed out earlier, judges in England and Wales are already familiar with the need to instruct juries that they must find a “couldn’t care less” attitude or indifference, as that was the fault element in rape for some years.¹⁷¹ So, they will be familiar with the problems that may arise. In our view, a firm judicial direction that such factors are to be ignored or discounted ought to be sufficient to ensure that the jury remains focused on the defendant’s state of mind, in relation only to the conduct in question, the conduct that the defendant may have realised might cause death.
- 3.167 However, one alternative to the use of an “attitudinal” form of fault element is that the law could include, within the scope of the fault element for either “first degree murder” or “second degree murder”, the intention to endanger or to cause risk to life.¹⁷² We have given careful consideration to this option, as we do not regard it as the same as our understanding of reckless indifference, manifesting a “couldn’t care less” attitude.

¹⁶⁷ See para 3.15.

¹⁶⁸ See the Scottish case of *Cawthorne v HM Lord Advocate* [1968] JC 32, 35.

¹⁶⁹ Model Penal Code, 202.2(b). This has been adopted by a range of US states including New York.

¹⁷⁰ See A J Ashworth, *Principles of Criminal Law* (2nd ed 1995) 262-263; F McAuley and P McCutcheon, *Criminal Liability* (2000) 307.

¹⁷¹ See n 16.

¹⁷² For scholarly support for such a view, see A Pedain, “Intention and the Terrorist Example” [2003] Crim LR 579.

3.168 As we see it, the difficulty in focusing purely on the intention to endanger life is the uncertainty over whether it creates morally significant distinctions and hence draws the line in the right place between cases worthy of being treated as murder and those best left as manslaughter. Consider two examples given by the Irish Law Reform Commission:

- (1) The terrorist who plants a bomb in a city street, intending to damage property in an explosion.
- (2) The person who wantonly shoots into a moving car or busy shop.¹⁷³

3.169 Much may be made to depend upon further facts but it is not clear to us that in either of these examples D “intends to cause risk to life”, as such. It is perhaps going too far to say that with such examples we approach what Professor Lacey has called, “the analytical collapse of the distinction between intention and subjective recklessness”.¹⁷⁴ Even so, here, surely, are two examples where there is no moral reason to distinguish intention from foresight.¹⁷⁵ If foresight of the risk was present, we see a strong case for convicting of “second degree murder”, regardless of whether the intention – aim – in either (1) or (2) was to create a risk to life, as such.

3.170 Assume, however, that the defendant foresees that his or her conduct inevitably creates such a risk, whether or not the risk is itself desired. Then, it would be right to say (depending on how the jury think that the defendant’s own assessment of the justifiability of taking the risk affects the picture) that the defendant, by his or her action, shows a reckless indifference, a “couldn’t care less” attitude, to causing death.

Should killing by reckless indifference replace, or supplement, the “serious harm” rule?

3.171 If the intention to do serious harm is included within “second degree murder”, there might (depending on how “serious harm” is defined) be little more than a question of degree separating manslaughter, “second degree murder”, and “first degree murder”. There would be an understandable temptation to accept a plea of guilty to “second degree murder” in cases where there was any significant doubt over whether the defendant intended to kill. It is a matter for speculation, but cases such as *Cunningham*¹⁷⁶ might never be considered by a jury as potential “first degree murder” cases. Many may regard this as an unwelcome development.

3.172 These considerations may militate in favour of simply replacing the grievous bodily harm rule with a rule that killing by reckless indifference amounts to “second degree murder”. The likelihood is that a substantial proportion of cases

¹⁷³ Irish Law Reform Commission, *Homicide: The Mental element in Murder* (LRC-CP 17-2001) Consultation Paper, para 4.032. See also the American work, Perkins and Boyce, *Criminal Law* (3rd ed 1982) 60.

¹⁷⁴ N Lacey, “A Clear Concept of Intention: Elusive or Illusory?” (1993) 56 MLR 621, 632.

¹⁷⁵ See A P Simester, “Why Distinguish Intention from Foresight?” in A P Simester and A T H Smith, *Harm and Culpability* (1996) 71.

¹⁷⁶ [1982] AC 566.

where D intended to do serious harm will be ones in which there was also reckless indifference, although reckless indifference encompasses some highly culpable killings that fall outside the scope of the “serious harm” rule.

- 3.173 At present, though, we are provisionally minded to include an intention to do serious harm alongside killing by reckless indifference, within the category of “second degree murder”. There can sometimes be important distinctions between these two ways in which the death of another may culpably be brought about. In particular, as Professor William Wilson has pointed out to us, cases involving an intention to do serious harm typically involve a direct attack on the victim, whereas reckless killings normally do not. Killing by reckless indifference may involve highly culpable killing in the course of an activity or course of conduct other than an attack on the victim, as such in example 1 (paragraph 3.30).
- 3.174 It is, of course, quite common for a crime to have a fault element encompassing both intention and recklessness. Malicious wounding and criminal damage are examples. In “second degree murder”, the two fault elements involve two different ways in which a high degree of fault in killing, worthy of being labelled murder (albeit in the “second degree”), can be manifested.
- 3.175 On the one hand, the intentional infliction of serious harm does not reflect the correspondence principle,¹⁷⁷ because the intention does not relate to the killing. However, it does reflect the subjectivity principle.¹⁷⁸ What is more, it reflects that principle by using the most blameworthy species of fault: intention. On the other hand, killing by reckless indifference fully respects both the subjectivity and correspondence principles with regard to the harm for which D is held liable. It involves, though, a less blameworthy species of fault: recklessness.

Should the scope of murder though reckless indifference be further restricted?

- 3.176 We do not believe that murder by reckless indifference should ever be regarded as sufficient to justify a conviction for “first degree murder”, because that crime should always involve an intentional attack on the victim (and, in our view, an intention to kill through the attack).¹⁷⁹ Reckless indifference to causing death can be shown in the course of an activity quite unconnected with such an attack. An example might be where someone, in order to cut costs, knowingly installs dangerously faulty boilers in houses, which later explode, killing the occupants. It may be possible to prove a “couldn’t care less” attitude to causing death, in such a case, but there is no real “attack” on the occupants.
- 3.177 However, this kind of example may raise a different sort of worry. Should “cowboy” workers (amongst others), however recklessly indifferent to safety, be liable to conviction not just for manslaughter but for “second degree *murder*”, by virtue of engaging in workmanship they know to be bad? Such a step would draw even bigger distinctions than currently exist in point of potential liability, between, say, bad painters and decorators, whose knowingly shoddy workmanship does

¹⁷⁷ See para 3.15.

¹⁷⁸ See para 3.15.

¹⁷⁹ Putting on one side the special case where death is known to be virtually certain to accompany a directly intended goal: see Part 4.

not normally pose a risk of death, and bad gas fitters or electricians, whose knowingly shoddy workmanship will pose such a risk.

3.178 We are not unduly swayed by these kinds of considerations, because we do not believe that prosecutors would use charges of “second degree murder” except in the most outrageous cases in which a worker has been recklessly indifferent. In such cases, the fact that the killing arose from a workplace incident should not save the perpetrator from conviction of “second degree murder”, any more than it would save him or her from a conviction for manslaughter under the present law.

3.179 Even so, we recognise that there may be concerns about the potential scope of “second degree murder” by reckless indifference. For that reason, we are also asking for expressions of opinion on whether such a form of “second degree murder”, if introduced, should be restricted by being confined to cases in which the reckless indifference arose from the commission, or attempted commission, of a serious crime, possibly as defined in the Criminal Justice Act 2003.¹⁸⁰

[Question 8]

3.180 We can quite understand that there would be objections to this proposal. It resurrects the idea of “felony-murder”, abolished after 400 years by the Homicide Act 1957. The spectre arises of courts having to go back to the kind of technical and difficult questions that arise when one must decide whether someone was committing or attempting to commit a crime of the relevant kind and whether the reckless indifference to death “arose” from that.

3.181 Nonetheless, it has remained the case to the present day that someone can be convicted of manslaughter when death is caused by an “unlawful” and dangerous act and we are making only modest proposals for reform of that rule. Moreover, unlike the felony-murder rule, which was really meant to further punish those committing felonies if the defendant – even accidentally – caused death whilst committing a serious crime, the purpose of the “serious crime” restriction would be to limit the potential liability for “second degree murder”.

FAULT IN MANSLAUGHTER

Gross negligence manslaughter

3.182 We believe that it follows from our proposals for “second degree murder” by reckless indifference that the fault element for manslaughter should be gross negligence (leaving aside, for the moment, manslaughter by unlawful and dangerous act). As we have said, recklessness falling short of reckless indifference can really be regarded as a kind of gross negligence. The House of Lords indicated that this may be so when it held that it would not be wrong, when instructing a jury on the meaning of gross negligence, to give a direction in terms of recklessness.¹⁸¹ The fact that (as in *Shimmen*) the defendant saw a risk and wrongly discounted it or stupidly thought it insignificant is simply compelling evidence of the grossness of his or her negligence.

¹⁸⁰ Criminal Justice Act 2003, s 224. For an analogous proposal, see W Wilson, “Murder and the Structure of Homicide”, in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (2000) 45.

¹⁸¹ *Adomako* [1995] AC 171.

- 3.183 Making the difference between “second degree murder” and manslaughter turn on the distinction between reckless indifference and gross negligence gives effect to the ladder principle,¹⁸² according to which there should be clear and robust differences between offences of different degrees of gravity. We believe that it also makes best use of “murder” and “manslaughter” as different labels for different kinds of offending, as the labelling principle requires.¹⁸³
- 3.184 However, we have two final points supporting a change to the law of involuntary manslaughter by gross negligence, arising from our previous proposals on the subject.¹⁸⁴
- 3.185 First, we should reiterate how important is it that the grossness of negligence be made relative to someone’s individual capacity to appreciate the nature and degree of risks, which may be affected by youth or disability.¹⁸⁵ At present, such a capacity is not relevant to the question whether negligence was, in the eyes of the law, gross.¹⁸⁶
- 3.186 This is liable to create problems when someone is charged with both manslaughter by gross negligence and an offence of carelessness that *does* make capacity to appreciate risk relevant to liability. An example is causing or allowing the death of child or vulnerable adult,¹⁸⁷ where the question is in part whether the defendant “failed to take such steps as *he* could reasonably have been expected to take to protect the victim [emphasis added]”.
- 3.187 In such a case, if the defendant was also charged with gross negligence manslaughter, the judge would first have to tell the jury that youth or mental disability (for example) were *not* relevant to the question of whether the defendant’s failure to take protective steps was grossly negligent. Secondly, however, the judge would have to say that these characteristics *were* relevant to the culpability element constituted by the failure to take such steps in allowing the death of a child or vulnerable adult. This would be an embarrassment and is an anomaly that should be removed by any reform of the law of homicide.
- 3.188 Secondly, we previously recommended that gross negligence as to the causing of “serious injury” would suffice as a culpability element for gross negligence manslaughter.¹⁸⁸ We now believe that that is too broad a basis for liability for

¹⁸² See Part 1.

¹⁸³ See Part 1.

¹⁸⁴ Involuntary Manslaughter (1996) Law Com No 237.

¹⁸⁵ Involuntary Manslaughter (1996) Law Com No 237, Draft Bill, cl 2(1)(b). For further discussion, see A P Simester, “Can Negligence be Culpable?”, in J Horder (ed) *Oxford Essays in Jurisprudence* (4th Series 2000) 85.

¹⁸⁶ See the authorities on the old ‘gross negligence’ version of recklessness: *Elliot v C (A Minor)* [1983] 2 All ER 1005 (DC); *Stephen Malcolm* (1984) 79 Cr App R 334. See also C [2001] Crim LR 845.

¹⁸⁷ Contrary to the Domestic Violence, Crime and Victims Act 2004, s 5.

¹⁸⁸ Involuntary Manslaughter (1996) Law Com No 237, Draft Bill, cl 2(1)(a).

homicide as it breaches both the subjectivity and the correspondence principles.¹⁸⁹

- 3.189 It is a relatively small change but we think it is nonetheless very important that someone should not be held liable for gross negligence manslaughter unless they were grossly negligent as to the risk of causing death. That would ensure that the crime respects the correspondence principle. It also reflects the current legal position.¹⁹⁰

Unlawful act manslaughter: the Government's proposals

- 3.190 The Government has proposed that manslaughter by so-called "unlawful and dangerous act" should be replaced by a crime in which:

[a] person by his or her conduct causes the death of another; intending to cause injury or being reckless as to whether some injury was caused; where the conduct causing, or intended to cause, the injury constituted an offence.¹⁹¹

- 3.191 This reform would produce a slight – and fully justified – narrowing of the current offence by making the main focus, in terms of culpability, whether or not D intended to cause, or was reckless as to causing, injury. It is not acceptable that someone who accidentally causes death in the course of some minor act of criminal damage should be liable to conviction for manslaughter, even if his or her act posed a danger of some harm occurring to someone.

- 3.192 The proposal also has to be seen in the light of the other changes that we are proposing. We believe that, where the fault elements are concerned, it would create a readily understood, just, and fair law of homicide that, from the least serious offence to the most serious offence, respects the ladder principle:¹⁹²

- (1) Top Tier:

"First degree murder": intention to kill.

- (2) Intermediate Tier:

"Second degree murder": intention to cause serious harm; or reckless indifference to causing death.

- (3) Lower Tier:

"Manslaughter": gross negligence as to causing death; or causing death through a criminal act intended to cause injury, or where there was recklessness as to causing injury.

¹⁸⁹ See para 3.15.

¹⁹⁰ *Adomako* [1995] AC 171.

¹⁹¹ Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000) para 2.11. Note this is not a purported definition under statute.

¹⁹² See Part 1.

PART 4

INTENTION

QUESTIONS AND PROVISIONAL PROPOSALS

- 4.1 In this Part, we examine the meaning of the mental element of “intention” for the purpose of the offence of murder. We have devised two alternative proposals in relation to this on which we wish to consult. The First Model aims to provide a *definition* of “intentionally”. It has the advantage of certainty but the disadvantage of rigidity. The Second Model does not provide a comprehensive *definition* of “intentionally” as a matter of law. It sets pre-conditions which must be satisfied before the jury *may* find that a person acted intentionally. Under this model the jury has a degree of ‘moral elbow-room’ in deciding whether, on any particular facts, the defendant acted intentionally. While, this may be viewed as an advantage, the lack of absolute certainty about the meaning of “intention” may be regarded as a disadvantage.
- 4.2 We see advantages and disadvantages with each model and invite views on the merits of each.

The First Model

- 4.3 The First Model, based on the definition contained in the Draft Criminal Code,¹ would provide a *definition* of “intentionally” for the offence of murder in the following terms:

Subject to the proviso set out below:

a person acts “intentionally” with respect to a result when he or she acts either:

- (1) in order to bring it about, or
- (2) knowing that it will be virtually certain to occur; or
- (3) knowing that it would be virtually certain to occur if he or she were to succeed in his or her purpose of causing some other result.

Proviso: a person is not to be deemed to have intended any result which it was his or her specific purpose to avoid.

[paragraphs 4.13-4.63]

¹ Contained in a Criminal Code for England and Wales (1989) Law Com No 177. See clause 18(b).

The Second Model

4.4 The Second Model, based on codification of the common law, would not provide a comprehensive *definition* of “intentionally” as a matter of law. It would set pre-conditions which must be satisfied before the jury may find that a person acted intentionally:

- (1) A person is to be regarded as acting intentionally with respect to a result when he or she acts in order to bring it about.
- (2) In the rare case where the simple direction in clause (1) is not enough, the jury should be directed that:

they are not entitled to find the necessary intention with regard to a result unless they are sure that the result was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case.

- (3) In any case where the defendant’s chance of success in his or her purpose of causing some other result is relevant, the direction in clause (2) may be expanded by the addition of the following phrase at the end of the clause (2) direction:

or that it would be *if he or she were to succeed in his or her purpose of causing some other result*, and that the defendant appreciated that such was the case.

[paragraphs 4.64-4.69]

STRUCTURE OF THIS PART

4.5 Following the introductory paragraphs, the First Model is discussed from paragraphs 4.13 – 4.63. The Second Model is discussed from paragraphs 4.64 – 4.71. Finally, from paragraph 4.72, there is an overview of the doctrine of double effect and our view on the way the criminal law should meet issues raised by that doctrine.

INTRODUCTION

4.6 The ordinary meaning of “intention” is “aim or purpose”. A person intends a result when they act in order to bring it about. Some regard intentional acts as those that they want to occur by virtue of their action. For many legal commentators, this ordinary meaning is too narrow for the purposes of criminal responsibility. It fails to implicate the defendant in respect of a result he or she foresees as a virtual certainty but does not particularly want, for example, where the defendant is acting for another purpose. The classic example of this is the person who places a bomb on a plane for the purpose of making an insurance claim in respect of property but who foresees as a virtual certainty the death or serious injury of those who are on the plane when the bomb explodes. It is in order to capture the state of mind of such a defendant within the concept of “intention” that the law has expanded its meaning so that it can encompass that degree of foresight. This extension of the meaning of “intention” is known as oblique or indirect intention.

- 4.7 This cognitive approach, which focuses on the defendant's knowledge rather than his or her desires may, however, be over inclusive. It includes those who foresee virtually certain consequences but who act for what may be socially "good" or "excusable" purposes. For example, it includes a person who acts under duress of circumstance.²
- 4.8 The common law has approached this dilemma in two ways. On a case by case basis, it has sought tentatively to develop specific defences which may be raised even though, as a matter of law, the conditions for criminal liability have been established. In addition, the common law has stopped short of laying down a rule of law that a person who satisfies the cognitive test *must* be found to have intention. Instead, it has established cognitive based rules of law which, if satisfied, *permit* the jury to find intention.
- 4.9 One element of this approach is that the jury is directed not to confuse motive, that is, the aim which lies behind the achievement of the "intended" result, with the intention that such a result will occur. This approach gives rise to an apparent conundrum. If the *motive* for action giving rise to that foreseen as virtually certain is to be ignored, then in what circumstances would it be logical, let alone permissible, for a jury to conclude as a matter of fact that a virtually certain result was not intended? In particular, would a person "intend" an outcome that was virtually certain to occur even though its avoidance was the actual aim of that person's conduct?³
- 4.10 The approach taken in German criminal law to the meaning of "intention" is to have three types of intent: intention in the narrow sense (Intent First Degree); *dolus directus* (Intent Second Degree) and *dolus eventualis* (Intent Third Degree). Intent First Degree is the "purpose bound will". The *result* is what matters, though the final goal is irrelevant.⁴ In cases of Intent Second Degree, it is "knowledge" that dominates. The defendant *knows* that a certain incidental consequence will occur. It is irrelevant whether that consequence is desired or not.⁵ Intent Third Degree requires that the defendant foresees the result as possible and accepts the fact that his or her conduct could bring about the result, albeit an undesired result.⁶

² A scenario is given at para 4.21.

³ *Ibid.*

⁴ V Krey, *German Criminal Law, Vol II* (2003) para 338. For example D shoots his wife V dead hoping to profit from her life insurance. V's death is a necessary interim goal in order to realise the final goal of claiming the insurance.

⁵ *Ibid.*, para 343-344. For example D wants to commit an insurance fraud. He plans to set his farm on fire knowing that his paralysed grandmother, V, is living on the upper floor. D is sure that she will die and regrets this, as he is fond of her. This is not Intent First Degree, as D does not aim at V's death. That death was not a goal of D's at all. It is Intent Second Degree. D knew that the fire would kill V.

⁶ *Ibid.*, paras 346-348. For example, during a robbery, D1 and D2 want to strangle V with a leather belt to make him unfit to fight. Their attempts at stunning V had failed so they strangle him, realising that he could be strangled to death. They accepted death as a possible result of strangulation – this is Intent Third Degree.

- 4.11 In this paper we put forward for consideration two models for the meaning of intention. The first is based upon earlier Law Commission work. This model defines intention, as a matter of law. The second reflects the present state of the common law and in cases of oblique intention goes no further than to permit the jury to infer intention rather than requiring them as a matter of law to do so. Under each of these models, the meaning given to intention is wider than merely the defendant's "purpose", so that an oblique intention, explained in paragraph 4.9, can be included within its meaning.
- 4.12 Finally, although it is not a model that we propose, we describe the "Finnis" approach to the meaning of intention⁷. This confines the word "intention" to its ordinary meaning of aim or purpose.

THE FIRST MODEL: PREVIOUS LAW COMMISSION RECOMMENDATIONS FOR A DEFINITION OF "INTENTIONALLY"

- 4.13 A definition of "intentionally" is contained in clause 18(b) of the Draft Criminal Code (1989).⁸ A revised definition of "intentionally" is contained in clause 1 of the Draft Criminal Law Bill (1993).⁹ The approach of each of these drafts is to establish a rule of law which is cognitive in nature. It defines intention as a matter of law. Avoidance of criminal liability, for those who otherwise would be guilty – having committed the external elements of the crime with the necessary fault – then becomes a matter of the development of specific defences. In this respect, these definitions go beyond the common law.

Clause 18(b) of the Draft Criminal Code (1989)

- 4.14 Clause 18(b) provides that a person acts:

"intentionally" with respect to—

- (i) a circumstance when he hopes or knows that it exists or will exist;
- (ii) 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.

⁷ See paras 4.75-4.81.

⁸ Contained in A Criminal Code for England and Wales (1989) Law Com No 177.

⁹ Contained in Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218.

Shortcomings identified in relation to clause 18(b)(ii) of the Draft Code

- 4.15 The late Professor Sir J C Smith discussed three shortcomings of clause 18(b), in so far as it relates to intentional results, in “A Note on ‘Intention’”.¹⁰ These were considered by the Law Commission in our publications on Offences Against the Person and General Principles.¹¹

DANGER OF BLURRING THE DISTINCTION BETWEEN “INTENTION” AND “RECKLESSNESS”

- 4.16 First is the concern that the distinction between “intention” and “recklessness” may be blurred by the qualification to the second part of the definition, namely that the defendant is *aware* that a result *will occur* “in the ordinary course of events”. This concern is met in the Draft Criminal Law Bill by a change in the definition, so that it requires the actor to “*know*”, rather than be “*aware*” that the further result would occur.¹²

THE REQUIREMENT THAT AN EVENT WILL OCCUR IN THE ORDINARY COURSE OF EVENTS

- 4.17 The second shortcoming with the definition in clause 18(b)(ii) is that it treats a person as intending a secondary, perhaps undesired, result of his act if, but only if, the defendant is aware that that result *will* occur in the ordinary course of events. The formulation does not cater for the case in which the actor is not sure that his main purpose will be achieved, and so cannot be aware that the secondary result *will*, in the ordinary course of events follow.
- 4.18 For example, a man who places a bomb on a plane may know that the type of bomb used has a 50% failure rate. He could not be said to be aware that death of the crew *will* happen “in the ordinary course of events”, as there is a 50% chance that it will not happen. Yet everyone seems to agree that the bomber should be taken to have intended to kill the crew even where his main purpose may be to destroy the cargo in order to make an insurance claim.¹³
- 4.19 The revised provision in the Draft Criminal Law Bill aims to address this difficulty by the addition of the phrase “if he were to succeed in his purpose of causing some other result”. We will consider how effective that phrase might be at paragraphs 4.29-4.37.¹⁴

¹⁰ [1990] Crim LR 85.

¹¹ See Consultation Paper No 122 paras 5.9-5.11, and Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, paras 7.11-7.13.

¹² *Ibid*, para 7.11. Note that the Criminal Bar Association, in its comments on consultation responding to Legislating the Criminal Code: Offences Against the Person, Consultation Paper No 122, stressed the desirability of avoiding any suggestion that the second part of the definition of “intention” might encompass cases of mere recklessness.

¹³ Consultation Paper No 122, para 5.9. See also Law Com No 218, para 7.12.

¹⁴ Note the comment of Professor Smith in “A Note on ‘Intention’” [1990] Crim LR 85, 86, n 12 that the Code team was aware of this defect in the definition in the first version of the Code (Codification of the Criminal Law: A Report to the Law Commission (1985) Law Com No 143, clause 22) – see commentary on *Moloney* [1985] Crim LR 379, 382-3 – that “it is regrettable that the opportunity was not taken to deal with it in the later, current, version of the Code” [1989].

A RESULT WHICH IT IS THE ACTOR'S PURPOSE TO AVOID

4.20 The third shortcoming Professor Smith identified is that:

The definition leaves open the possibility that a person may be held to have intended a result that it was his purpose to avoid. He knows that it will happen in the ordinary course of events — it is a virtual certainty but not an absolute certainty and his whole purpose is to avoid it. It does not make good sense to say that he intended that result.¹⁵ This situation is unlikely to arise in other than exceptional and desperate circumstances...that is not a good reason for not providing for it.¹⁶

4.21 The example given by Lord Goff in the House of Lords debate on the Nathan Committee Report¹⁷ illustrates this shortcoming:

A house is on fire. A father is trapped in the attic floor with his two little girls. He comes to the conclusion that unless they jump they will all be burned alive. But he also realises that if they jump they are all likely¹⁸ to suffer serious personal harm. The children are too frightened to jump and so in an attempt to save their lives he throws one out of the window to the crowd waiting below and jumps with the other one in his arms. All are seriously injured, and the little girl he threw out of the window dies of her injuries.¹⁹

4.22 The phrase “if he were to succeed in his purpose of causing some other result”, which was introduced to address the second shortcoming, identified above, serves a dual purpose. It would also avoid a result being regarded as intended where it was the actor's specific purpose to avoid it. The oblique intention would operate only in respect of those defendants who succeed in their purpose of causing some other result: for example, the defendant described earlier, who uses a bomb with a 50% failure rate.

¹⁵ See eg the scenario described at para 4.21.

¹⁶ J C Smith, “A Note on ‘Intention’” [1990] Crim LR 85, 86.

¹⁷ Nathan Committee Report, Report of the House of Lords Select Committee on Murder and Life Imprisonment (HL paper 78-1, 1989).

¹⁸ The example might equally have read, “virtually certain” – the test which under the current *Nedrick* ([1986] 1 WLR 1025) / *Woollin* ([1999] 1 AC 82) test would need to be satisfied for a conviction of murder.

¹⁹ J C Smith, “A Note on Intention” [1990] Crim LR 85, 89.

Doubts about the standard formulation

4.23 In “Criminal Liability in a Medical Context: The Treatment of Good Intentions,”²⁰ Professor Andrew Ashworth cites cases such as *Gillick*,²¹ *Adams*,²² *Steane*,²³ and dicta in *Hyam*²⁴ as raising the question “whether the standard formulation²⁵ merely describes a general approach, or should be stated subject to exceptions, or is simply wrong”.²⁶ The argument deployed is this. The conduct of the defendants in *Adams* and *Steane*, of the doctors who would be administering treatment in *Gillick*,²⁷ and of the protagonist in the example in *Hyam*, appears to fall within the meaning of “intentional” according to the “standard formulation”, yet none was regarded as committing the offence in issue. Either the formulation cannot be right, as accurately capturing the existing law; or it is incompletely stated, as it must be subject to specific defences that prevent the commission of the offence even though the defendant has the requisite mens rea.

²⁰ In A P Simester and A T H Smith (eds) *Harm and Culpability* (1996) 173, 179.

²¹ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. The applicant sought a declaration that NHS guidance relating to contraceptive treatment for those under 16 was unlawful and wrong. The High Court refused to issue a declaration. The House of Lords allowed an appeal against the first declaration issued by the Court of Appeal and overruled a second declaration as erroneous.

²² Summarised in [1957] Crim LR 365. The defendant was a doctor who administered drugs in order to relieve pain and was acquitted of murder.

²³ [1947] KB 997, 998. The defendant’s conviction for the ‘ulterior intent’ offence of “doing an act likely to assist the enemy with the intent to assist the enemy” was quashed on appeal on the basis that if the act was as consistent with an innocent intent as with a criminal intent, the jury should be left to decide the matter.

²⁴ [1975] AC 55, 77. The example given is of the doctor who wounds his patient by “opening him up”. He would not be guilty of an offence because he would not have the required intent.

²⁵ The “standard formulation” to which Ashworth refers is explained in his opening paragraph: The standard formulation of intention in criminal law texts consists of either acting in order to bring about the prohibited result or, if the actor’s purpose is otherwise, acting with awareness that the result is virtually certain to follow (173). [The footnote at the end of this passage cites: “Law Commission No. 177, *A Criminal Code for England and Wales* (1989), vol. 1, cl. 18, as slightly re-drafted by Sir John Smith, ‘A Note on Intention’, [1990] *Criminal LR* 85.”]

²⁶ A Ashworth “Criminal Liability in a Medical Context: The Treatment of Good Intentions” in A P Simester and A T H Smith (eds) *Harm and Culpability* (1996) 173, 173.

²⁷ In *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, the House of Lords reversed the Court of Appeal decision. Lord Scarman, in the majority in the House of Lords, said:

The *bona fide* exercise by a doctor of his clinical judgment must be complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse.... If the prescription is the *bone fide* exercise of his clinical judgment as to what is best for his patient’s health, he has nothing to fear from the criminal law or from any public policy (190F-191A).

Lord Fraser, also in the majority, said:

[T]his appeal is concerned with doctors who honestly intend to act in the best interests of the girl, and I think it is unlikely that a doctor who gives contraceptive advice or treatment with that intention would commit an offence under section 28 [of the Sexual Offences Act 1956] (175A).

Our views about the shortcomings and doubts

- 4.24 We agree that each of the three factors identified by Professor Smith in his “Note on Intention”²⁸ should be addressed. In the light of criticism, considered below, of the way in which clause 1 of the Draft Criminal Law Bill sought to address them, we believe that they may be better addressed differently.
- 4.25 The cases to which Professor Ashworth refers highlight the need for the issues raised by the doctrine of double effect and duress of circumstances to be dealt with adequately either by the formulation of intention or by specific defences.²⁹ The doctrine of double effect is considered towards the end of this paper, beginning at paragraph 4.72.

Clause 1(a) of the Draft Criminal Law Bill

- 4.26 Clause 1(a) of the Draft Criminal Law Bill (1993) provides a definition of “intentionally” for the purposes of non-fatal offences against the person. It was developed from the definition in the Draft Code, and provides that a person acts—

“intentionally” with respect to a result when—

- (i) it is his purpose to cause it, or
- (ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events, if he were to succeed in his purpose of causing some other result....

Lord Bridge, also in the majority, 194F, adopted the passage from the judgment of Woolf J, at first instance [1984] QB 581, 593B–595E, with reference to possible criminal complicity of the doctor. Woolf J recognised that:

a doctor who is misguided enough to provide a girl who is under the age of 16, or a man, with advice and assistance with regard to contraceptive measures with the intention thereby of encouraging them to have sexual intercourse, is an accessory before the fact to an offence contrary to section 6 [of the Sexual Offences Act 1956] (593E).

He assumed that that would not usually be the attitude of the doctor (593F). “[I]n the majority of situations the probabilities are that a doctor will be able to follow the advice without rendering himself liable to criminal proceedings” (595F).

²⁸ [1990] Crim LR 85.

²⁹ It should be noted that in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, the House of Lords restored the first instance decision of Woolf J on a threefold basis:

- (1) Parliament regarded contraceptive treatment and advice as essentially medical matters. A girl under 16 years had legal capacity to consent to medical treatment if sufficiently mature to understand it.
- (2) The dwindling parental right to control a minor existed only insofar as required for child’s benefit and protection.
- (3) The bona fide exercise by a doctor of his clinical judgment was a complete negation of the guilty mind, which was essential for the commission of a criminal offence (*per* Lord Scarman, 190F-191A). It is unlikely that a doctor who honestly intends to act in the best interest in giving contraceptive advice or treatment would commit an offence under section 28 of the Sexual Offences Act 1956 (*per* Lord Fraser of Tullybelton).

- 4.27 There are differences between this provision and clause 18(b)(ii) of the Draft Code. As is explained in the Offences against the Person and General Principles Consultation Paper³⁰ and the subsequent Report,³¹ the changes aim to address specific shortcomings identified in respect of the earlier draft. The blurring of the distinction between intention and recklessness is met by use of the word “knows” that it would occur, in place of “aware” that it will occur. The phrase “if he were to succeed in his purpose of causing some other result” aims to meet the other two concerns, that of the bomb that may not go off and that of the result which it is the actor’s purpose to avoid.

Shortcomings identified in respect of clause 1(a) of the draft Criminal Law Bill

- 4.28 The way in which the Draft Criminal Law Bill sought to address the shortcomings of the definition in clause 18(b) of the Draft Criminal Code has itself been the subject of some concern.

DOES THE PHRASE “IF HE WERE TO SUCCEED IN HIS PURPOSE OF CAUSING SOME OTHER RESULT” MAKE THE DEFINITION OF “INTENTIONALLY” TOO NARROW?

- 4.29 The late Professor Sir J C Smith pointed out that the facts of *Woollin*³² showed that the definition in clause 1 of the Draft Criminal Law Bill (which concerned only offences of non-fatal violence) may be too narrow.³³ In that case, the Crown did not contend that it was the defendant’s purpose to kill or cause serious injury to his three-month-old son when he threw him onto a hard surface. As Professor Smith notes, the defendant “clearly...had no other purpose – except to vent his anger, which is not a purpose to cause a result”. Professor Smith continued: “If the child had not died, there would be no case on a charge under clause 1(1). That might be regarded as unacceptable.”³⁴ We are addressing the meaning of intention for the purpose of murder. The definition in clause 1(a) may similarly be regarded as too narrow for that offence.

- 4.30 A further revision suggested by Professor Smith was:

He knows that it will occur in the ordinary course of events, or that it would do so if he were to succeed in his purpose of causing some other result.³⁵

- 4.31 Simester and Sullivan, in *Criminal Law, Theory and Doctrine* (2nd ed) also suggest a “better version of the second limb” of the definition:

³⁰ Consultation Paper No 122.

³¹ Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218.

³² [1999] 1 AC 82.

³³ J C Smith, “Offences Against the Person: The Home Office Consultation Paper” [1998] Crim LR 317, 318.

³⁴ *Ibid.*

³⁵ *Ibid.*

[A]lthough it is not his purpose to cause that result, he *knows* that it *would* occur in the ordinary course of events either if he were to succeed in his purpose of causing some other event, or if he were to behave as he purposes.³⁶

IS THE WORD “PURPOSE” UNSUITABLE FOR A DEFINITION OF AN INTENTIONAL RESULT?

- 4.32 It has been argued that the word “purpose” is unsuitable in this definition because its construction is uncertain.³⁷ The argument is that a purpose is a reason for doing something (for example, the purpose of stealing from a bank might be to buy medicine) in contrast to an intention, which accompanies the action,³⁸ “we may do things *with* an intention but *for* a purpose”³⁹ (emphasis added). We deal with this criticism below.⁴⁰

Our views about the shortcomings with clause 1(a) of the Criminal Law Bill

SCOPE OF THE DEFINITION

- 4.33 We accept the criticism that clause 1(a) might be too narrow because a defendant who has no other purpose, such as the defendant in *Woollin*, may fail to be included within it. However, we do not believe that the revision suggested by Professor Smith would adequately solve this problem. The difficulty with this revision is that it would mean reverting to a definition that is capable of including as “intentional” a result that it is the actor’s specific purpose to avoid. We have already noted that in such a case, “it does not make good sense to say that he intended that result.”⁴¹ Further, although “[t]his situation is unlikely to arise in other than exceptional and desperate circumstances...that is not a good reason for not providing for it.”⁴²
- 4.34 Clearly, care must be taken, when correcting a deficiency of the original draft, that the provision which replaces it is not enlarged in its reach so that it becomes capable of deeming a result as “intended” when, on any common sense understanding, it is not. We consider below whether it might be possible to avoid undue enlargement of the reach of “intention” by qualifying its definition so as to remove from its ambit those results that it was the actor’s specific purpose to avoid.

³⁶ A P Simester and G R Sullivan, *Criminal Law, Theory and doctrine* (2nd ed 2003) 132, n 45. Italics show revisions to clause 1.

³⁷ A Khan, “Intention in Criminal Law: Time to Change?” (2002) 23(3) *Statute Law Review* 235. He suggests as a possible redraft:

A person acts with the intention to bring about a result when —

(a) he brings that result about with a wicked desire,

(b) although it is not his desire to cause it, it occurs in the ordinary course of events when he succeeds in his wicked desire of causing some other result (238).

³⁸ *Ibid.*

³⁹ A R White, *Grounds of Liability: An Introduction to the Philosophy of Law* (2nd ed 1989) 173.

⁴⁰ See paras 4.36-4.37.

⁴¹ J C Smith, “A note on ‘Intention’” [1990] *Crim LR* 85, 86.

⁴² *Ibid.*

4.35 The alternative version of the second limb suggested by Simister and Sullivan also seeks to address this problem. The language “if he were to behave as he purposes” may, however, be difficult for jurors to apply. Nor is it not entirely clear how that definition would work in respect of the example of the father in the burning building.⁴³

“PURPOSE”

4.36 The concerns voiced about “purpose”⁴⁴ deal with a confusion (which we accept afflicts the definition in clause 1(a)) between the purpose with which one may act in the sense of an ulterior motive, and, the purpose with which one acts in bringing about an immediate result. We are persuaded that the use of the word “purpose” could thus be problematic.

4.37 We propose that the wording in this respect should revert to the original clause 18(b) wording. The words “he acts...in order to bring about [a result]” remove any ambiguity. Our proposal is set out at paragraph 4.62. It avoids use of the word “purpose” in the first two limbs. This makes it clear that the only purpose of relevance to the meaning of intention is that with which one acts in bringing about an immediate result.

Our views on the definition of “intentionally”

4.38 At common law intention is regarded as an ordinary word, the meaning of which is a matter for juries and upon which, in the majority of cases, there is no need to elaborate. It has not been defined. In those cases in which a defendant did not desire the result in issue, guidance is given to the jury relating to the evidence from which intention *may* be inferred. This is best exemplified in *Nedrick*,⁴⁵ which was applied with a degree of modification in *Woollin*.⁴⁶ That this is the effect of *Woollin* has been confirmed in the recent decision of the Court of Appeal in *Matthews and Alleyne*.⁴⁷

⁴³ At para 4.21.

⁴⁴ A Khan, “Intention in Criminal Law: Time to Change?” (2002) 23(3) Statute Law Review 235.

⁴⁵ [1986] 1 WLR 1025. The defendant poured paraffin through the letterbox of a house and onto the front door and set it alight. The house burned down and a child died.

⁴⁶ [1999] 1 AC 82. The defendant lost his temper and threw his 3-month-old baby onto a hard surface. The baby sustained a fractured skull and died. The model direction, described by Lord Steyn as “by now a tried-and-tested formula”, is:

Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case. The decision is one for the jury to be reached upon a consideration of the evidence.

(This is the *Nedrick* direction as set out and modified by Lord Steyn in *Woollin* [1999] 1 AC 82, 96.)

⁴⁷ [2003] EWCA 192; [2003] 2 Cr App R 30, 43 *per* Rix LJ:

- 4.39 We agree with the views expressed in our report *Offences Against the Person and General Principles* (1993)⁴⁸ and the commentary to the Draft Code, that “it is in the interest of clarity and the consistent application of the criminal law to define intention”.⁴⁹ We have looked further at the definition in clause 18 of the Draft Criminal Code to see whether it can be improved so as to avoid both the pitfalls identified with the original version, and the “*Woollin*” problem found with clause 1(a) of the Draft Criminal Law Bill.
- 4.40 Our proposed “First Model” embodies a definition of intention based on that found in clause 18(b)(ii) of the Draft Criminal Code (which provides a definition of “intentionally” with respect to a result). We have seen that clause 18(b)(i) of the Draft Criminal Code defines “intentionally” with respect to a circumstance. The offence of murder, as currently defined at common law, involves no issues about acting “intentionally” with respect to a “circumstance”. Where the defendant is charged with murder, the requirement that the defendant acts “unlawfully” (a circumstance) is separate from the requirement that the defendant intends to kill or to cause grievous bodily harm. Both death and grievous bodily harm are the intended *results*.⁵⁰ In our view, in the context of murder, any definition of “intentionally” need only deal with the meaning of acting intentionally in respect of a result.

A new definition based on Clause 18(b)(ii) – “intentionally as to a result”

- 4.41 The commentary to the Draft Code explains that “[t]he practical effect [of *Nedrick*] seems to be to leave the jury to characterise the defendant’s foresight of the virtual certainty of result as ‘intention’, or not, as they think right in all the circumstances of the case”.⁵¹ In the interests of clarity, and of the consistent application of the law, the definition in clause 18(b)(ii) was recommended in preference to the common law approach.
- 4.42 It is crucial that a statutory definition of intention should not cause injustice, or absurdity, by deeming certain conduct to be intended when the circumstances show it to be otherwise. We regard the need for the law to operate justly and to avoid absurdity to take precedence over the need for consistent application of the law, if to do otherwise were to be capable of creating an injustice or an absurd result. To require a jury to reach a conclusion about a defendant’s intention which defies common sense cannot be a satisfactory way of constructing the criminal law, even if the law provides that defendant, in some other way, with a defence.

[W]e do not regard *Woollin* as yet reaching or laying down a substantive rule of law. On the contrary, it is clear from the discussion in *Woollin* as a whole that *Nedrick* was derived from the existing law, at that time ending in *Moloney* and *Hancock*, and that the critical direction in *Nedrick* was approved, subject to the change of one word.

⁴⁸ Law Com No 218, paras 6.1-7.3.

⁴⁹ Law Com No 177, vol 2, para 8.16.

⁵⁰ An example of an offence which involves intention with respect to a “circumstance” is criminal damage. In *Smith (DR)* [1974] QB 354 it was held that the fault elements of intention, recklessness and absence of lawful excuse required to constitute this offence refer to the circumstance that the property belongs to another.

⁵¹ Law Com No 177, vol 2, para 8.16.

- 4.43 It may often make sense to permit a jury to conclude that the defendant intended a result that he or she knew would be virtually certain to occur, even if it was not the defendant's immediate purpose. The case of the defendant who places a bomb on a plane for the purpose of making an insurance claim in respect of property demonstrates this. Where such a defendant foresees as virtually certain the death or serious injury of those who are on the plane when it explodes, the defendant also intended to kill those people. Equally, it may also make sense to permit a jury to acquit a defendant in certain limited circumstances where, though "intending" the result in this oblique way, the defendant acted in circumstances of duress or for a benign motive: for example the father who threw the child from the burning attic.⁵²
- 4.44 However, it does not make sense to require a jury to conclude that a defendant intended a result to occur which it was his or her precise wish to avoid. That is so, irrespective of whether the jury may be permitted to acquit on grounds of a defence.

Is it just to equate foresight of a virtually certain result with intention?

- 4.45 Under the common law approach, in a case of murder there is scope for a jury to decide that, in a particular case, despite foresight of virtual certainty of death or really serious bodily harm, a result was not intended. In contrast, there is no scope for this where the definition equates a particular degree of foresight with intention. The Commentary to the Draft Code states that:

[J]ustice requires the inclusion of the case where the defendant knows that his act will cause the relevant result, "in the ordinary course of events".... It is possible that, under the Code, juries will, in a few cases, find intention to be proved where, under existing law, they might not have done so.⁵³

- 4.46 The question is whether it will always be the case, as the Commentary asserts, that justice requires that in such a case the defendant should be found to have intended the result. If so, there is no need for the safeguard provided by *permitting* the jury to find intent. If, however, there may be cases where justice or common sense require the conclusion that the defendant did not intend the result, then there may be a case for *permitting* the jury the freedom to find, or not to find, intention rather than requiring them to do so.
- 4.47 Lord Goff's example given earlier in this paper,⁵⁴ about the father in the attic of a burning building, shows the potential for injustice arising from the Draft Code definition. The death of the daughter thrown from the attic was one which the father was aware would occur in the ordinary course of events. Nonetheless, in our view it would be contrary to common sense for the law to classify his acts as "intending" to cause the death of his child and to require the jury so to conclude. In fact, the father acted in the way that he did with the intention of saving the life

⁵² See para 4.21.

⁵³ Law Com No 177, vol 2, para 8.16.

⁵⁴ See para 4.21.

of the child.⁵⁵ This would be so even though he might, under the Draft Code, have a defence of duress of circumstances.

- 4.48 A true scenario that has also influenced our thinking relates to an oilrig worker. In the hope of saving his life, he jumped from a great height on a burning oilrig although he had been taught that from such a height the surface of the sea would be like concrete and he would almost certainly die. In fact he lived. Death was not intended although the worker was aware that in the ordinary course of events death would occur. If the incident on the oilrig had involved another party pushing the burning man to a virtually certain death but remotely possible safety, as opposed to a guaranteed death if he remained on the oilrig, it would highlight further the difficulty with clause 18(b)(ii).
- 4.49 As Professor Ashworth has observed, the definition under discussion “leaves little room for any evaluative element”.⁵⁶ It is this absence of scope for evaluation that we believe could, in an unusual case, lead the jury to make a counter-intuitive finding of intention, in order to honour their oath. We would not wish to propose a definition which created that possibility.

A proviso to exclude counter-intuitive findings from the definition of “intentionally”

- 4.50 We believe that this potential for causing injustice and/or nonsense in unusual cases needs to be removed if the clause 18(b) definition is to be taken forward. A defence of duress or necessity might be made available in such cases to reflect what has happened. There would, however, be a few cases in which a requirement upon a jury to find intent, coupled with a defence of necessity or duress, would be so far removed from what had occurred that there would be a risk of the law falling into disrepute. We have considered, therefore, whether a definition of intention could be made subject to a proviso that would avoid it potentially leading to counter-intuitive conclusions in certain cases. The simplest way would be to make the definition subject to a proviso, for example:

A person is not to be deemed to have intended any result, which it was his or her specific purpose to avoid.

- 4.51 It is important that the use of any such clause should be limited to the unusual cases contemplated. Namely, those where the result that the defendant is aware “will occur in the ordinary course of events” is the very result that it is the defendant’s purpose to avoid. Were the proviso to be open to any wider interpretation it could work injustice in the opposite direction, by removing from the scope of “intentional” acts certain acts which under the present law are capable of being found to be intentional. At common law the courts have made it

⁵⁵ Professor Smith comments that “[o]ne answer, and perhaps the best answer, to this might be that men who throw little girls out of attics to their deaths ought to be convicted of murder unless there is some very good reason why not; and the reason why this is not murder is that the necessity of the occasion justifies or excuses the father’s conduct” [1990] Crim LR 85, 89. Professor Smith then criticises the failure of the courts to develop a defence to deal with such circumstances. Our concern however, is that it is wrong that a person whose purpose it is to save a life and takes a very serious risk in order to do so should, in such a case, be deemed to have *intended* to kill.

⁵⁶ A Ashworth “Criminal Liability in a Medical Context: The Treatment of Good Intentions”, in A P Simester and A T H Smith (eds) *Harm and Culpability* (1996) 172, 183.

clear that motive is irrelevant to the question of intention. We would not want the proviso to be used as a means of giving motive any relevance to this question.

4.52 As a means of exploring how such a counter-intuitive clause might operate, we have applied such a test to the facts of *Yip Chiu-Cheung*,⁵⁷ a non-homicide case raising interesting issues of motive and intention. This Privy Council case concerned the appellant's conviction for conspiracy to traffic in dangerous drugs. It was held that an undercover enforcement officer (N) who entered into an agreement with the appellant and another to carry out drug trafficking, with the intention of carrying out the unlawful export, had the necessary mens rea for the offence of conspiracy. The undercover officer intended to commit the substantive offence by carrying heroin through customs in Hong Kong and onto an aeroplane, albeit for the best of motives of trying to break the drugs ring. The appellant, as a co-conspirator, could, accordingly, be convicted of a criminal conspiracy, for having conspired with him.

4.53 If the law were to reflect the Draft Code definition of intention coupled with a proviso of the type suggested, there would be no different outcome. It cannot be said that it was N's specific purpose to avoid carrying heroin onto the plane. His purpose was to carry the drug onto the plane in order to expose the drugs ring. The undercover officer thus intended to do the proscribed act.⁵⁸ His purpose or motive in doing the intended acts (to expose the drugs ring) was a secondary matter.

Other approaches to avoiding counter-intuitive outcomes

4.54 It was in an effort to avoid bringing such counter-intuitive outcomes within the Draft Code's definition of "intentionally" that the definition in clause 18(b)(ii) of the Draft Code was modified in clause 1(a) of the Draft Criminal Law Bill.⁵⁹ The addition of the phrase "if he were to succeed in his purpose of causing some other result" aimed to:

- (1) prevent the clause "will occur in the ordinary course of events" from being too narrow, so as to exclude the bomber whose make of bomb has a known 50% failure rate, and
- (2) save a defendant from being deemed to have intended a result, which it was his or her specific purpose to avoid.

⁵⁷ [1995] 1 AC 111.

⁵⁸ The exporting of illegal drugs.

⁵⁹ To provide:

[A] person acts —

(a) "intentionally" with respect to a result when —

(i) it is his purpose to cause it, or

(ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events, if he were to succeed in his purpose of causing some other result;

- 4.55 However, as we have observed, the facts of *Woollin*⁶⁰ have led us to doubt whether that phrase, in the way that it was used in clause 1(a) of the Draft Criminal Law Bill, offers a workable solution to these problems.⁶¹ The two difficulties identified in respect of clause 18(b) need to be solved in a differently.
- 4.56 In our view it would be better to return to clause 18(b) to find the solution rather than to work with the revision in clause 1(a), the flaws of which have been recognised. In doing so, we would revert to use of the expression “acts in order to bring about” in place of “purpose”. Any concerns about the use of the word “purpose” in the definition would, in consequence, be avoided.
- 4.57 We are unaware of criticism of the other change which clause 1(a) of the Draft Criminal Law Bill would have made to clause 18(b) of the Draft Code. That change was the substitution of the phrase “knows that it would occur in the ordinary...” rather than “aware that it would occur in the ordinary...”. We recognise that the word “knows” serves to “re-emphasise that this part of the definition is not dealing with a case of recklessness”.⁶² For that reason, we believe that the terminology of clause 1(a) is preferable to the expression used in the Draft Code. We retain that change in our proposed new definition.

The phrase “would occur in the ordinary course of events”

- 4.58 The phrase “would occur in the ordinary course of events” was used in the Draft Code in 1989.⁶³ In the same year, the Nathan Committee Report of the House of Lords Select Committee on Murder and Life Imprisonment recommended adoption of the Draft Code definition for the purpose of the law of murder.⁶⁴ Lord Lane CJ expressed approval of it in the House of Lords debate on this report, saying:

[T]he decision in *Nedrick*...endeavoured to provide a satisfactory definition of the word “intention”...It is equally true to say, as Professor Glanville Williams points out perspicaciously in an article reprinted on page 121 of the committee’s report, that in *Nedrick* the [C]ourt [of Appeal] was obliged to phrase matters as it did because of earlier decisions in your Lordships’ House by which it was bound...As a result, *Nedrick* was not as clear as it should have been. However, I agree respectfully with the conclusions of the committee that “intention” should be defined in the terms set out in paragraph 195 of

⁶⁰ [1999] 1 AC 82.

⁶¹ See paras 4.29-4.37.

⁶² *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218, para 7.11.

⁶³ The Commentary to the Draft Criminal Code 1989 states: “We have adopted the phrase ‘in the ordinary course of events’ to ensure that ‘intention’ covers the case of a person who knows that the achievement of his purpose will necessarily cause the result in question, in the absence of some wholly improbable supervening event.” (Law Com No 177, vol 2, para 8.15).

⁶⁴ Nathan Committee Report, Report of the House of Lords Select Committee on Murder and Life Imprisonment (HL Paper 78-1, 1989) para 71.

the report on page 50.⁶⁵ That seems to express clearly what in Nedrick we failed properly to explain....”

4.59 Lord Lane CJ had laid down the “virtually certain” test in the Court of Appeal in *Nedrick*⁶⁶ in 1986.⁶⁷ Consequently, in 1989, it was not the tried and tested phrase that it has since become.

4.60 In 1998, Lord Steyn pointed out in *Woollin*,⁶⁸ that “over a period of 12 years since *Nedrick*, the test of foresight of virtual certainty has apparently caused no practical difficulties. It is simple and clear...”.⁶⁹ This raises the question of whether it would be better to use the expression “virtually certain” in a new statutory definition of “intentionally”, rather than “in the ordinary course of events”. In our view, in light of the observations of Lord Steyn in *Woollin*, it would be preferable to use the tried and tested phrase “knowing that it is virtually certain to occur”. The phrase has the advantage of simplicity and it has proved to be workable.

Conclusion

4.61 We believe that the difficulties recognised in respect of each of the previous Law Commission definitions of intention should be addressed by way of revision of the original definition in clause 18(b)(ii) of the Draft Code. Subject to a proviso, the revised definition would continue to equate a certain degree of foresight of a result with intention. It would make it clear that a secondary result that the defendant knows is virtually certain to occur, if he or she succeeds in their purpose, is an intended result.⁷⁰ This can be achieved without creating the difficulty encountered with clause 1(a) of the Draft Criminal Law Bill, or those identified in respect of the other solutions proposed to improve that clause.⁷¹

The First Model: proposal based on Clause 18(b)(ii)

4.62 The proposed revision of Clause 18(b)(ii), to provide a definition of “intentionally” for the offence of murder, is as follows:

Subject to the proviso set out below:

a person acts “intentionally” with respect to a result when he or she acts either:

⁶⁵ The proposal referred to defines intentionally in the following way:

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.

⁶⁶ [1986] 1 WLR 1025.

⁶⁷ In the previous year, Lord Bridge in *Moloney* [1985] AC 905, 929, had used the expression “in the ordinary course of events” when explaining what was conveyed by the word “natural” in the old presumption that a man intends the natural and probable consequences of his act.

⁶⁸ [1999] 1 AC 82.

⁶⁹ *Ibid*, 94.

⁷⁰ Reference to “if he succeeds in his purpose” aims to make it clear that such a secondary purpose will be intended even if there is not a high chance of the primary purpose being attained.

⁷¹ See paras 4.29-4.37.

- (1) in order to bring it about, or
- (2) knowing⁷² that it will be virtually certain to occur; or
- (3) knowing that it would be virtually certain to occur if he or she were to succeed in his or her purpose of causing some other result.⁷³

Proviso: a person is not to be deemed to have intended any result,⁷⁴ which it was his or her specific purpose to avoid.⁷⁵

- 4.63 In directing a jury on the meaning of intention, the judge would be required only to refer the jury to the appropriate clause of this definition. There would be no need for a judge to refer jurors to the proviso, except in cases where the particular facts raise the possibility of it being applicable. A Practice Direction to this effect may be sufficient to ensure that this definition will provide a workable, clear, simple definition of intention.

THE SECOND MODEL: BASED ON CODIFICATION OF THE COMMON LAW

- 4.64 In contrast to the Draft Criminal Code (1989) and the Draft Criminal Law Bill (1993), the common law does not purport to define oblique intention in the hard edged sense that proof of a particular set of facts must result in the defendant being deemed to have intended a result. On the contrary, the common law goes no further than to say that once the conditions are established it is open to the jury to find that the defendant did intend the result. It does not provide a strict definition of “intentionally”. *Nedrick* and *Woollin* contain well-established expressions of the law. The current common law direction on intention is as follows:

Where the charge is murder and in the rare case where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and the defendant appreciated that such was the case.⁷⁶

- 4.65 We have seen under our discussion on the First Model that we need to avoid creating a definition that could require the fact-finder to reach a conclusion which defies common sense. One way of ensuring that the fact-finder is not *required* to

⁷² We are adopting “knowing” from the Draft Criminal Law Bill definition, in preference to the phrase “is aware that” as we believe that this provides a clearer distinction between cases that are “intentional”, and those that are “reckless”.

⁷³ See Professor J C Smith’s article, “Offences Against the Person: The Home Office Consultation Paper” [1998] Crim LR 317, 318.

⁷⁴ At present the mens rea of murder is the intention to cause death or grievous bodily harm; accordingly either such result could be excluded by the operation of this clause.

⁷⁵ The reason that we propose inclusion of this counter-intuitive clause is concern that, without it, the definition in para 4.62(2) could result in the defendant in the burning attic scenario being deemed to have intended a result that it was their purpose to avoid.

⁷⁶ This is the *Nedrick* [1986] 1 WLR 1025 direction as set out and modified by Lord Steyn in *Woollin* [1999] 1 AC 82, 96.

reach such a result is to *permit* the fact-finder the freedom to find, or not to find, intent, in the way that the common law does at present.

Our views

- 4.66 An advantage of codifying the common law is that it would avoid creating the difficulty which calls for the development of a proviso. Members of the jury are not *required* in such cases to find “intention”; it is open to them to do so, or not to do so.
- 4.67 The common law direction to the jury makes it clear that it is only in rare cases that the simple direction is not enough. It also has the advantage that it reflects what is now to be regarded as well established law with which courts and practitioners are familiar. It identifies in readily understandable terms what findings of fact are necessary in order to enable a fact-finder to *find*, or not to *find*, intention.
- 4.68 There is a possible deficiency in the present statement of the common law. It does not appear to meet the case of the defendant who uses a bomb with, for example, a 50% failure rate.⁷⁷ If the preferred way forward were the codification of the common law we would recommend reform designed to address this apparent weakness. This would require that, in such a case, the direction should include reference to the question of whether the defendant would have been “aware that a result was virtually certain (barring some unforeseen intervention) if he or she were to succeed in his or her purpose of causing some other result”.

The Second Model: proposal based on codification of the common law

- 4.69 A codification of the common law would need, first, to refer to the ordinary situation in which a person is to be regarded as acting intentionally. Then it should replicate the *Nedrick*⁷⁸/*Woollin*⁷⁹ direction. Finally, the clause relating to the chances of the defendant succeeding in some other purpose should be introduced. The resulting formulation would be as follows:

- (1) A person is to be regarded as acting intentionally with respect to a result when he or she acts in order to bring it about.
- (2) In the rare case where the simple direction in clause (1) is not enough, the jury should be directed that:

they are not entitled to find the necessary intention with regard to a result unless they are sure that the result was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case.

⁷⁷ See para 4.18.

⁷⁸ [1986] 1 WLR 1025.

⁷⁹ [1999] 1 AC 82.

- (3) In any case where the defendant's chance of success in his or her purpose of causing some other result is relevant,⁸⁰ the direction in clause (2) may be expanded by the addition of the following phrase at the end of the clause (2) direction:

or that it would be *if he or she were to succeed in his or her purpose of causing some other result*, and that the defendant appreciated that such was the case.

CONCLUSION

4.70 We see advantages and disadvantages in both approaches, namely:

- (1) The First Model, defining intention as a matter of law; and
- (2) The Second Model, codifying the present common law, with modification, by providing for the circumstances in which the jury is entitled to find oblique intention.

4.71 We invite responses on which model is preferable.

THE DOCTRINE OF DOUBLE EFFECT

4.72 Whichever of the above approaches is preferred, the fact that the criminal law gives "intention" a wider meaning than that of "purpose" raises some difficult questions, particularly in the context of medical treatment of the terminally ill. A doctor may administer drugs on a sound medical basis to a patient in the knowledge that this treatment, though conducted in good faith, will almost certainly shorten the patient's life. Treatment, for example to alleviate pain and suffering in such a case may have a double effect. A doctor's awareness of the virtual certainty of that other effect, the shortening of the patient's life would, without more, classify the medical treatment as an intentional killing.⁸¹

4.73 The doctrine of double effect is one which, as Robert Walker LJ commented in *Re A (Children) (Conjoined Twins: Surgical Separation)* "has been debated by moral philosophers, as well as lawyers, for millennia rather than centuries..."⁸²

The basis of this doctrine

The distinction between intended results and side-effects

4.74 Joseph Boyle explains that:

⁸⁰ Clarification would be required where the defendant uses a bomb with a higher than 50% failure rate. Otherwise it could not be said that: "they feel sure that the result was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and the defendant appreciated that such was the case."

⁸¹ Brooke LJ explained in *Re A (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 216G, that the doctrine of double effect does permit a doctor, in the best interests of his or her patient, to administer painkilling drugs in appropriate quantities for the purpose of relieving that patient's pain, even though the doctor knows that an incidental effect of the administration of these drugs will be to hasten the moment of death. See also *Airedale NHS Trust v Bland* [1993] AC 789, 867, and *Re J* [1991] Fam 33, 46, referred to in the judgment.

⁸² [2001] Fam 147, 251.

The doctrine of double effect rests on a distinction between what a person intends in acting and what a person brings about as a side effect of an intentional action. According to the doctrine of double effect this distinction has moral significance: it is sometimes permissible to bring about as a side effect of one's intentional action what it would be wrong to bring about intentionally.⁸³

4.75 Finnis describes side-effects in the following way:

[S]ide-effects, in the sense relevant to morals (and law), are effects which are not intended as end or means, i.e., which figure neither as end nor as means in the plan adopted by choice.⁸⁴

4.76 If someone adopts a plan by choice, Finnis believes that they intend both the means necessary to carry out the plan and the end point of the plan itself but not the side-effects:

What states of affairs are means and what are side-effects depends on the description which they have in the proposal or plan adopted in the choice which brings them about, i.e., in the clear-headed practical reasoning which makes that plan seem a rationally attractive option.⁸⁵

4.77 Finnis adds that the doctrine of double-effect does not operate “regardless of certain side-effects”:

One's acceptance of the side-effects must satisfy all moral requirements (must “be proportionate”, as it was often vaguely put). That something is a side-effect rather than an intended means entails the satisfaction of one, important, but only one, moral requirement: that one never choose – intend – to destroy, damage or impede any instantiation [concrete instance] of a basic human good.⁸⁶

4.78 There is thus a limit to what can legitimately be accepted as a side-effect. “[V]ery often, then, options should be rejected because bringing about the side-effects would be unfair or unfaithful.”⁸⁷

The distinction between intention and emotional desire

4.79 Finnis distinguishes intention from emotional desire, but not from volitional desire. Emotional desire concerns something which appeals to one's feelings. Volitional desire is different. One often chooses, intends and does what one does not [emotionally] desire.⁸⁸

⁸³ J Boyle, “Who is Entitled to Double Effect” (1991) 16 *The J of Medicine and Philosophy* 475, 476.

⁸⁴ J Finnis “Intention and Side-effects” in R G Frey, *Liability and Responsibility* (1991) 32, 42.

⁸⁵ *Ibid*, 43.

⁸⁶ *Ibid*, 56. See also the concluding remarks at 63-64.

⁸⁷ *Ibid*, 63.

⁸⁸ *Ibid*, 37.

Intention includes all that is chosen whether as end or as means, and noting that what is chosen as means is often strongly repugnant to desire in the sense of feelings and emotion.⁸⁹

- 4.80 This distinction turns on the issue of choice. Intention involves choosing something, that is, adopting a plan or proposal, in response to rational motivation.

Whatever, then, is included within one's chosen plan or proposal, whether as its end or as a means to that end, is intended, i.e. is included within one's intention(s).⁹⁰

A definition of murder suggested by Finnis, adopting a narrow meaning of intent

- 4.81 Finnis suggests broadening the definition of murder "to include not only (i) killing with intent to kill⁹¹ but also (ii) doing without lawful justification or excuse an act which one is sure will kill."⁹² In clause (i) the meaning of intent would be confined to that chosen whether as an end or a means. It would not include oblique intent. In clause (ii) justification or excuse are not factors which might act as mitigation or a defence once the offence has been made out; rather they are integral to the presence or absence of a culpable mental state.

Adams

- 4.82 In *Adams*⁹³ the defendant was a doctor, charged with murder, on the basis that he administered increasing doses of morphine to a terminally ill patient who died as a result. Devlin J's directions to the jury included the following:

There has been a good deal of discussion about the circumstances in which a doctor might be justified in giving drugs which would shorten life in cases of severe pain. It is my duty to tell you that the law knows no special defence of this character. But that does not mean that a doctor aiding the sick or the dying has to calculate in minutes or hours, or perhaps in days or weeks, the effect on a patient's life of the medicine which he administers. If the first purpose of medicine, the restoration of health, can no longer be achieved there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten life. That is not because there is any special defence for medical men; it is not because doctors are put into any category different from other citizens for this purpose. The law is the same for all, and what I have said to you rests simply upon this: no act is murder which does not cause death. 'Cause' means nothing philosophical or technical or scientific. It means what you twelve men and women sitting as a jury in the jury box would regard in a

⁸⁹ *Ibid*, 41.

⁹⁰ *Ibid*, 36.

⁹¹ By "intent" here, Finnis means that which has been chosen as the end or the means but not accepted side-effects.

⁹² *Ibid*, 49.

⁹³ Summarised in [1957] Crim LR 365.

common-sense way as the cause. If for, for example, a doctor had done something or omitted to do something and death occurs, say on...the Monday instead of the Tuesday, no one with common sense would say the doctor caused death. They would say the cause of death was the injury, or whatever it was, that brought her to hospital....⁹⁴

4.83 In their analysis of this case, Kennedy and Grubb explain:

Devlin J may have been saying that although the doctor did an act which 'played some part in' the death of the patient, the doctor should not be liable, unless he intended to bring about the death. Devlin J must have meant that the doctor should not be held to have intended the death because of the theory of 'double effect', if the jury found that his primary intention was to relieve the pain of his patient. The theory of 'double effect' which Devlin J introduces into English criminal law purports to be a theory about intention. It seems to say that if an act may have two effects and the actor *desires* only one of them, which is considered a *good effect*, then he should be regarded as blameless even though his act also produces a bad effect. The words 'primary' and 'secondary' are used to describe the intention concerning the good and the bad effect....⁹⁵

Glanville Williams

4.84 Glanville Williams argued that, for the lawyer, the above theory is not without difficulties:

When you know that your conduct will have two consequences, one in itself good and one in itself evil, you are compelled as a moral agent to choose between acting and not acting by making a judgment of value, that is to say by deciding whether the good is more to be desired than the evil is to be avoided. If this is what the principle of double effect means, well and good; but if it means that the necessity of making a choice of values can be avoided merely by keeping your mind off one of the consequences, it can only encourage a hypocritical attitude towards moral problems.⁹⁶

What is true of morals is true of the law. There is no legal difference between desiring or intending a consequence as following from your conduct and persisting in your conduct with knowledge that the

⁹⁴ Quoted in I Kennedy and A Grubb, *Medical Law:Text with Materials* (2nd ed 1994) 1205, and R Hallworth and M Williams, *Where There's A Will... The Sensational Life of Dr John Bodkin Adams* (1983).

⁹⁵ I Kennedy and A Grubb, *Medical Law:Text with Materials* (2nd ed 1994) 1205.

⁹⁶ Challenging this, Finnis, in his paper, "Intention and Side-effects" in R G Frey, *Liability and Responsibility* (1991) 32, 51, said: "Williams manifested the most thoroughgoing misunderstanding of the so-called doctrine of double effect, which in the aspects here relevant is nothing more than an analysis of intention in terms of chosen means and ends. Such an analysis of intention has nothing to do with "keeping one's mind off" the unintended but foreseen consequences, nor with whether one emotionally welcomes that consequence."

consequence will inevitably follow from it, though not desiring that consequence. When a result is foreseen as certain, it is the same as if it were desired or intended.⁹⁷

- 4.85 Kennedy and Grubb conclude that Glanville Williams must be right on the law when he makes clear that the consequence that is undesired may nevertheless be intended in law (citing *Moloney*⁹⁸ and *Nedrick*⁹⁹), adding:

Thus for the lawyer, if not for the moral philosopher, the judgment that an act is blameless cannot analytically rest on a theory of intention as expressed in the 'double effect' theory. It must rest, if anywhere, on a judgment that acts (though intended) ought as a matter of moral judgment and public policy to be regarded as attracting non-blame because of their social worth.¹⁰⁰

How should the law of murder address the doctrine of double effect?

- 4.86 In *Re A (Children) (Conjoined Twins: Surgical Separation)*,¹⁰¹ two different arguments for the basis of the double effect doctrine were put forward. Counsel for the NHS trust¹⁰² relied on dicta in *Bland*,¹⁰³ and in *Re J*,¹⁰⁴ to argue that what matters in this context is the surgeon's primary purpose. The accelerated death of Mary (the conjoined twin who was bound to die if the surgeons separated her from her stronger twin, Jodie) would be a secondary effect of the surgeon's action which would not justify his conviction for murder. Counsel summarised an argument from "Criminal Liability in a Medical Context: The Treatment of Good Intentions" as:

- (1) The true meaning of intention is purpose;
- (2) One may purpose ends or means;
- (3) One does not purpose a side effect;
- (4) Therefore a consequence, even if prohibited, is not intended if it is a side effect.¹⁰⁵

- 4.87 Counsel for Jodie¹⁰⁶ (the stronger twin, who would be expected to benefit from surgical separation) referred the Court to a passage in the textbook of Kennedy

⁹⁷ Glanville Williams, *The Sanctity of Life and the Criminal Law* (1958, Carpentier Lectures at Columbia, 1956), 286.

⁹⁸ [1985] AC 905.

⁹⁹ [1986] 1 WLR 1025.

¹⁰⁰ I Kennedy and A Grubb, *Medical Law: Text with Materials* (2nd ed 1994) 1206.

¹⁰¹ [2001] Fam 147.

¹⁰² Mr A Whitfield, QC.

¹⁰³ [1993] AC 789, 867, *per* Lord Goff.

¹⁰⁴ *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, 46.

¹⁰⁵ A Ashworth, "Criminal Liability in a Medical Context: The Treatment of Good Intentions", in A P Simester and A T H Smith (eds) *Harm and Culpability* (1996) 172.

¹⁰⁶ Mr T Owen QC.

and Grubb,¹⁰⁷ which criticises the doctrine of double effect in so far as it is advanced as negating the necessary elements of intention or causation for the crime of murder, saying:

[T]he more appropriate analysis is as follows: the doctor by his act *intends* (on any proper understanding of the term) the death of his patient and by his act *causes* (on any proper understanding of the term) the death of his patient, but the intention is not culpable and the cause is not blameworthy because the law permits the doctor to do the act in question.¹⁰⁸

- 4.88 Brooke LJ acknowledged that this argument answered the anxieties about manipulation of the law of causation expressed by Lord Mustill in *Bland*,¹⁰⁹ but held that it was not necessary for the purpose of the decision in *Re A*, to decide authoritatively whether this is the correct analysis.
- 4.89 Robert Walker LJ pointed out that *Woollin*¹¹⁰ has nothing to say about cases where an individual acts for a good purpose that cannot be achieved without also having bad consequences. In a similar vein, neither does the provision on “intention” in the Draft Code say anything about this. Provided that Kennedy and Grubb’s analysis is preferred, this does not present a problem. Recognition of the doctrine can be made elsewhere in the law, under “Defences”.¹¹¹

Conclusion

- 4.90 We agree with the analysis of Kennedy and Grubb. We would not want the adoption of either the First Model or the Second Model to have the effect of making a doctor who gives pain killing medication to a terminally ill patient guilty of murder merely because he or she knew that it would have the effect of shortening the patient’s life. However, we do not believe that this result would follow. It is now an accepted part of the common law that a doctor may lawfully prescribe such medication in such circumstances and, thereby, have a defence to a charge of murder.
- 4.91 As we said in paragraph 1.3, in this project we are not addressing defences based on justifications, including necessity, for killing. Accordingly we do not think that there is a need to introduce a specific qualification to either the First or the Second Model formulations in order to cater for such cases.

¹⁰⁷ I Kennedy and A Grubb, *Medical Law: Text and Materials* (2nd ed 1994).

¹⁰⁸ *Ibid*, 1207.

¹⁰⁹ [1993] AC 789, 895-896.

¹¹⁰ [1999] 1 AC 82.

¹¹¹ Addressing the offence/defence borderline when reviewing Alan Norrie’s critique of the criminal law in *Punishment, Responsibility and Justice: A Relational Critique* (2000) G R Sullivan comments that that is an issue “which should be regarded as without substance. The matter of substance is whether the necessary and sufficient conditions of proof for liability for a given offence can be identified with a reasonable degree of assurance.” In “Is Criminal Law Possible” (2002) 22(4) OJLS 747, Sullivan welcomes the decision of the House of Lords in *Lambert* [2001] UKHL 37, [2002] 2 AC 545 “for the clear recognition that whether a matter requiring proof or disproof in terms of liability for an offence is designated an offence element or a defence element may merely reflect different modes of drafting and does not go to the substance of the presumption of innocence.”

PART 5

COMPLICITY IN “FIRST DEGREE MURDER”

QUESTIONS AND PROVISIONAL PROPOSALS

5.1 Where a person (“D”) has provided the perpetrator (“P”) with encouragement or assistance in relation to P’s offence of “first degree murder”, we ask:

(1) When should D be guilty of “first degree murder”? **Our provisional proposal is where:**

- (a) **D intends that “first degree murder” should be committed;**
- (b) **D was a party to a joint venture with P to commit “first degree murder”; or**
- (c) **D was a party to a joint venture with P to commit another crime and he foresaw that P might commit “first degree murder” in the course of that venture).**

[paragraphs 5.48–5.51]

(2) Should D be granted a partial defence to “first degree murder” simply on the basis that he was not a perpetrator and had only a peripheral role in the joint venture? **Our provisional proposal is that D should not.**

[paragraph 5.58]

(3) Should D be able to rely on duress as a defence to “first degree murder”? **Our provisional proposal is that D should be able to rely on it as a partial defence which would reduce D’s offence for “second degree murder”.**

[paragraph 5.75]

(4) Should D be able, in certain circumstances, to be guilty of “complicity in an unlawful killing” (alternatively, manslaughter) instead of “first degree murder”? **Our provisional proposal is that D should if he was a party to a joint venture to commit a crime with P, he intended or foresaw that harm (or the fear of harm) might be caused by a party to the venture and it would have been obvious to a reasonable person in D’s position that someone might be killed as a result of the venture.**

[paragraph 5.83]

INTRODUCTION

5.2 The common law doctrine of secondary liability (or “complicity”) governs, amongst other things, the criminal liability of a person (“D”) who does not himself perpetrate the commission of a criminal offence but indirectly participates in its commission by encouraging or assisting a perpetrator (“P”) before it is committed

or while it is being committed (or both).¹ The offence committed by P, for which D is liable, is usually referred to as the “principal offence”.

- 5.3 The doctrine is of general application, so an encourager or assister can be liable for any principal offence committed by P, including the offences of murder and attempted murder.
- 5.4 In this paper we set out our views on the doctrine of secondary liability as it relates to the offence of murder and our proposed offence of “first degree murder”. The doctrine raises a number of problems in this context, primarily for two reasons.
- 5.5 First of all, D can in some circumstances be liable for murder, and therefore subject to the mandatory life sentence, merely on the basis that he foresaw the possibility that grievous bodily harm might be caused,² a culpable state of mind quite different from that required for primary liability as a murderer.³
- 5.6 Secondly, the defence of duress cannot at present excuse D from secondary liability for murder⁴ even though D may be so liable by the application of the doctrine’s broader fault requirement. It follows that if D is charged with murder, and the elements of the defence of duress are made out, D is nevertheless to be found guilty of murder and sentenced to life imprisonment, even if he merely believed that relatively “minor” serious harm (of a non-life-threatening type) might be caused to another person.⁵
- 5.7 The following analysis of the law of criminal complicity as it relates to murder is structured in four sections:
 - (1) In the first section we summarise the common law doctrine of secondary liability and the problems the courts have had to deal with when applying it to murder.
 - (2) In the second section, we set out our proposals for reforming the doctrine of secondary liability at a general level and recapitulate our proposal for a new fault requirement for (primary) liability for murder.⁶ We then go on to explain what impact our proposals will have on the doctrine of secondary liability as it applies to murder and “first degree murder”.

¹ D is sometimes referred to as a “secondary party” or an “accessory”, but his (secondary) liability is no different from a perpetrator’s (primary) liability. The position where D intentionally causes an offence to be committed through the medium of an “innocent agent” or a “semi-innocent agent” does not fall within the scope of the doctrine of secondary liability and is therefore not addressed in this paper. Nor, it will be seen, do we address the anomalous “procuring” aspect of the doctrine of secondary liability, which imposes such liability for a no-fault offence D intentionally causes to be committed.

² We discuss the problems engendered by the “grievous bodily harm rule” in Part 3.

³ The (direct or oblique) *intention* to cause grievous bodily harm or death.

⁴ *Howe* [1987] AC 417. Nor is the defence available in respect of attempted murder: *Gotts* [1992] 2 AC 412.

⁵ This is, however, subject to a common law defence that enables D to avoid liability for the death if P’s act was “fundamentally different” from anything D envisaged.

⁶ “First degree murder”.

- (3) In the third section we address duress as a defence to complicity in “first degree murder”, again in the context of a reformed doctrine of secondary liability.
- (4) In the fourth section, we set out our proposals for a new offence of homicide for cases where, under our reformed doctrine of secondary liability, D would not be liable for the “first degree murder” committed by P.

SECONDARY LIABILITY AND MURDER AT COMMON LAW

- 5.8 As explained above, the doctrine of secondary liability imposes criminal liability on a person, D, for indirectly participating in the principal offence committed by the perpetrator, P.⁷ The term “principal offence” includes an attempt by P to commit a substantive offence (and therefore includes attempted murder).⁸
- 5.9 The following explanation of the doctrine sets out its key features and the problems which have arisen in cases where the principal offence is murder. Aspects of the doctrine and defences which are unlikely to be of any relevance in murder cases are either not addressed or are mentioned only in passing. We therefore omit any further reference to the concept of “procuring”, a somewhat anomalous form of secondary liability⁹ which has been used by the courts to impose criminal liability on persons who bring about the commission of a no-fault principal offence by a non-culpable (but nonetheless guilty) perpetrator¹⁰ or the actus reus of an offence by a person who is (in effect) an innocent agent.¹¹ The present analysis focuses on persons who encourage or assist murder but cannot be said to have been the cause, or one of the causes, of that crime. Procuring is a relatively incidental facet of the doctrine of secondary liability, and is unlikely to be of relevance in cases where the principal offence is murder.¹²

D’s conduct – the general rule

- 5.10 Section 8 of the Accessories and Abettors Act 1861 sets out the key procedural rule that any person who “shall aid, abet, counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted, and punished as a

⁷ D’s secondary liability is governed by a doctrine of the common law: *Jefferson* [1994] 1 All ER 270, 280 (CA); and see generally *Russell on Crime* (12th ed 1964) 157 and J C Smith, “Aid, Abet, Counsel, or Procure” in P R Glazebrook (ed) *Reshaping the Criminal Law, Essays in Honour of Glanville Williams* (1978) 120, 125.

⁸ Contrary to the Criminal Attempts Act 1981, s 1. See *Hapgood and Wyatt* (1870) LR 1 CCR 221, *Dunnington* [1984] 1 QB 472 and *O’Brien* [1995] 2 Cr App R 649.

⁹ Procuring is anomalous because, unlike assisting or encouraging, it requires D to have been the cause (or one of the causes) of P’s principal offence: see *A-G’s Reference (No 1 of 1975)* [1975] QB 773.

¹⁰ For example, where D surreptitiously adds alcohol to the non-alcoholic drink of a driver (P) and so brings about the commission of P’s no-fault offence of drink-driving: *A-G’s Reference (No 1 of 1975)* [1975] QB 773.

¹¹ For example, where D encourages a male (P) who lacks the capacity for criminal responsibility to commit the actus reus of rape: *DPP v K and B* [1997] 1 Cr App R 36.

¹² The relevant doctrine is that of innocent (and semi-innocent) agency.

principal offender”.¹³ Disregarding procuring, it is generally accepted that these specified modes of involvement – aid, abet and counsel – cover two types of conduct: the provision of *encouragement* or *assistance*.¹⁴ The nature of D’s encouragement or assistance may take any form, so long of course as his conduct occurs before or during the commission of the principal offence.¹⁵

5.11 By virtue of section 8 of the Accessories and Abettors Act 1861, it is not necessary for the Crown to prove the accused’s precise mode of participation in the principal offence. For example, if two persons (A1 and A2) are charged with having murdered V, and it can be proved that each co-accused was *either* P or D, then the jury are entitled to convict them both of “murder” even though they cannot be sure which of them was the perpetrator and which the encourager or assister.¹⁶ In *Giannetto*,¹⁷ for example, the allegation was that the accused had either hired a hit-man to murder his wife or had himself perpetrated the killing, but it could not be proved which. The Court of Appeal upheld his conviction for murder on the ground that, because his mode of participation was a matter of legal indifference, it had been permissible for the jury to convict him of murder so

¹³ Magistrates’ Courts Act 1980, s 44(1), governs, in similar terms, secondary liability for summary offences. Section 44(2) provides that an alleged accessory to an offence which is triable either way may be tried summarily or on indictment.

¹⁴ See *Smith & Hogan, Criminal Law* (11th ed 2005) 171; Kadish, *Blame and Punishment: Essays in the Criminal Law* (1987) 135, 151; Williams, “Complicity, Purpose and the Draft Code” [1990] Crim LR 4, 7; Dennis, “The mental element for accessories” in Smith (ed) *Criminal Law, Essays in Honour of JC Smith* (1987) 40, 42. In *A-G’s Reference (No 1 of 1975)* [1975] QB 773 the Court of Appeal was of the view that each of the words “aid, abet, counsel or procure” was to be given its ordinary meaning, representing a different mode of participation. Accordingly, *counselling* describes encouraging or advising before the principal offence is committed; *abetting* must mean *encouraging* P during the commission of the principal offence; and *aiding* means *assisting* P prior to and/or during the commission of the principal offence.

¹⁵ Most conduct which assists or encourages a perpetrator will comprise an overt act by D, but D may be liable as a secondary party if (with the requisite mens rea) he assists or encourages P by his failure to act when as a matter of law he is duty-bound to do so. A legal duty to act may arise from a legal entitlement to act. In other words, if D has a specific legal right to intervene to control P’s conduct, and by failing to exercise that right he provides P with assistance or encouragement, D will be secondarily liable for P’s offence (if D satisfies the mens rea requirement for such liability).

¹⁶ Although the Crown is expected to specify in the indictment the nature of the accused’s alleged participation (*DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350) this is unnecessary if it is not possible to say whether he was the perpetrator or an accessory. The Crown is entitled to put its case on the basis that the accused was either one or the other, and the jury may convict on that basis: see *Gaughan* [1990] Crim LR 880 and *Giannetto* [1997] 1 Cr App R 1. In *Mercer* [2001] EWCA Crim 638 it was held that there is no violation of Article 6(3) of the European Convention on Human Rights where the Crown alleges that the accused was a party in a joint enterprise but cannot specify his precise role.

¹⁷ [1997] 1 Cr App R 1.

long as they were satisfied that he was either P or D, even if they were divided on his actual mode of participation.¹⁸

- 5.12 For D to be secondarily liable for murder on the basis of his having encouraged or assisted P, it is necessary for the Crown to prove that murder has indeed been committed. That is to say, it must be proved that P killed another human being with the intention to kill or cause serious harm. However, it is *not* necessary that P should actually be liable for that offence before D can be so liable. P may be able to rely on a partial defence to murder which is unavailable to D.¹⁹
- 5.13 Nor is it necessary for the Crown to prove any “but for” causal link between D’s relevant conduct and the commission of the principal offence. Implicit in the concept of encouraging or assisting another person to commit a principal offence, and D’s being *derivatively* liable for *that* offence rather than primarily liable for it as a joint perpetrator, is that D’s conduct made a contribution to its commission but not a causal connection. This contribution cannot be one of “but for” causation, moreover, because the concept breaks down in the vast majority of cases where the conduct of a fully-informed autonomous individual (P) intervenes between D’s conduct and the commission of the principal offence.²⁰
- 5.14 There must, however, be a “derivative connection” between D’s conduct and P’s offence. Indeed, if this were not the case D would be liable on an inchoate basis without reference to P’s offence.²¹ Nevertheless, although reference has been made in a number of cases to the requirement of some kind of connection

¹⁸ The effect of *Giannetto*, and the Court of Appeal’s approval of the decision of the Supreme Court of Canada in *Thatcher* [1987] 1 S.C.R. 652, is that where the evidence is *consistent* with both theories it is immaterial that the jury are split on the nature of the accused’s involvement, so long as they are all satisfied that he was either a perpetrator or an accessory. As Lamer J noted, the jury would be satisfied that the accused had *participated* in the offence. However, in line with *Brown* (1984) 79 Cr App R 115 (CA) it may not be possible to convict the accused in a case where the Crown evidence is *inconsistent*, with some evidence (accepted by some jurors but rejected by others) suggesting that the accused was P acting alone and other evidence (accepted by some jurors but rejected by others) suggesting that he was D.

¹⁹ D can be liable for murder even though P is liable for nothing more than voluntary manslaughter on the basis of the excusatory partial defence of provocation or diminished responsibility. For the general principle that D can be secondarily liable even though P is excused from liability, see *Bourne* (1952) 36 Cr App R 125 and *Austin* [1981] 1 All ER 374. (The excusatory defence of duress is unavailable to a murderer.)

²⁰ There are also dicta to the effect that the required contribution is not one of “but for” causation; see *A-G v Able* [1984] 1 QB 795, 812 and *Calhaem* [1985] 1 QB 808, 813. That no “but for” test applies is also apparent from some decisions on the facts, for example *Wilcox v Jeffery* [1951] 1 All ER 464, where D was one of many members of an audience listening to P’s illegal performance on his saxophone. (It should be noted, however, that the concept of “but for” causation has been extended in recent years to cover an activity and an outcome which would not traditionally be regarded as causally linked; see *Kennedy (No 2)* [2005] EWCA Crim 685, [2005] 1 WLR 2159.)

²¹ The existence of the general inchoate offence of encouraging (ie, “incitement”) alongside secondary liability for encouraging (ie, “abetting” or “counselling”) is the clearest evidence that there must be a connection between D’s conduct and the commission of the principal offence for D to be secondarily liable for it. In the context of murder, there is a separate statutory form of incitement in s 4 of the Offences Against the Person Act 1861 (soliciting murder).

between D's conduct and the commission of the principal offence by P,²² the case law provides no fully articulated explanation of its nature.

5.15 Given that the contribution is not one of "but for" causation, the doctrine would seem to require, as an essential ingredient for secondary liability, that D *actually* encouraged or assisted P in the sense that:

- (1) *for encouraging*, D's relevant conduct was communicated to P and to some extent encouraged P in his intention to commit the principal offence,²³ and
- (2) *for assisting*, D's relevant conduct to some extent facilitated the commission of the principal offence by P, whether or not he was aware of the assistance.²⁴

5.16 The issue has not been adequately addressed by the courts, presumably because it has always been clear that encouragement or assistance was in fact provided. Nevertheless, the issue may be raised by the defence, and in principle the Crown would need to prove that D's conduct did in fact provide P with some (presumably any degree of) encouragement or assistance on the basis that it is an element of the basis of D's alleged liability. Speculating further, it may be that there is a rebuttable presumption that D actually encouraged or assisted P in the commission of the principal offence once the Crown has proved that D's conduct (having the capacity to encourage the commission of the offence) was communicated to P²⁵ or D's conduct (having the capacity to assist the commission of the offence) might have assisted P.²⁶ If this is correct it is presumably no more than an evidential presumption.²⁷

D's state of mind – the general rule

5.17 The basic principle is the same in all cases of encouraging or assisting (at least in cases where there is no "joint enterprise")²⁸ but it is difficult to pinpoint the precise state of mind needed for secondary liability from the case law. No one case

²² *A-G v Able* [1984] 1 QB 795, 812; *Calhaem* [1985] 1 QB 808, 813.

²³ Encouraging is broad enough to encompass incitement, advising and expressing support for what P already intends to do. In *Giannetto* [1997] 1 Cr App R 1 the trial judge directed the jury that D could be liable as an accessory to murder if P suggested the crime and D, patting P on the back and nodding, said "Oh goody". The Court of Appeal noted (at 13) that *any* involvement from "mere encouragement upwards" suffices.

²⁴ In *State v Tally* (1894) 15 So 722 (Supreme Court of Alabama) D was secondarily liable for murder on account of his conduct in preventing a warning being sent to the prospective victim. It was irrelevant to D's liability that P was unaware of his assistance.

²⁵ *Giannetto* [1997] 1 Cr App R 1 suggests that a communication which has the capacity to encourage gives rise to a presumption that P was indeed encouraged.

²⁶ Professor K J M Smith suggests that there is a "covert doctrine" to this effect in his *A Modern Treatise on the Law of Criminal Complicity* (1991) 19.

²⁷ In other words, if D is able to refer to admissible evidence which might lead the jury to have a reasonable doubt as to whether or not any actual encouragement or assistance was provided, the Crown would have to prove beyond reasonable doubt that P was actually encouraged or assisted by D (albeit to any extent).

²⁸ Joint enterprises are discussed from para 5.26.

explicitly sets out a general test, and the cases from which a general test may be inferred are not consistent.

5.18 What is clear, however, is that in any case (whether or not there is a joint enterprise) D may be liable as a secondary party even if:

- (1) it was not his purpose that the principal offence should be committed,²⁹ and
- (2) it was not his purpose to encourage or assist P to commit the principal offence,³⁰

although either of these two states of mind suffices for secondary liability.

5.19 Accordingly, the only intention needed is the intention to do the act which provided P with encouragement or assistance.³¹

5.20 For D to be convicted of an offence as a secondary party (in a case where there is no joint enterprise) it would seem to be sufficient if he “knew” (that is, believed):

- (1) that the principal offence would be committed (or that it was in the process of being committed); and
- (2) that his own (intentional) conduct would provide P with encouragement³² or was capable of providing P with assistance.³³

²⁹ *National Coal Board v Gamble* [1959] 1 QB 11, 23; *DPP for Northern Ireland v Lynch* [1975] AC 653 approving *Lynch* [1975] NI 35, 55; *Clarke* (1985) 80 Cr App R 344; *JF Alford Transport* [1997] 2 Cr App R 326, 335. (See also the “procuring case” of *Blakely and Sutton v DPP* [1991] RTR 405 and the “joint enterprise” case of *Rook* (1993) 97 Cr App R 327, 331.) The old case of *Fretwell* (1862) 152 Le & Ca 161, which suggests that there is a requirement of purpose, can be explained on the basis of an excusatory defence of “benevolent purpose”. The same point may be made in respect of certain dicta in the (non-criminal) case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

³⁰ It is clear from *JF Alford Transport* [1997] 2 Cr App R 326 that an encourager need not have as his purpose that P should be encouraged. Although there are cases which suggest a requirement of an “intention to encourage”, this would seem to require nothing more than that D should intend to do his own act in the knowledge or belief that encouragement is being provided (see n 32).

³¹ In *JF Alford Transport* [1997] 2 Cr App R 326, 334 the Divisional Court felt that “it would have to be proved that [D] intended to do the acts which he knew to be capable of assisting or encouraging the commission of the crime”, save that where D’s conduct is an omission there must be “a deliberate decision to refrain” from acting.

³² This requirement can be derived from the cases dealing with persons who encourage by passively watching an offence being committed. See *Clarkson* [1971] 1 WLR 1402, 1406–1407, approving the dictum of Hawkins J in *Coney* (1882) 8 QBD 534, 558. The mens rea requirement for encouraging by presence alone is knowledge that the offence is being committed and “wilful encouragement”, which, according to *Clarkson* [1971] 1 WLR 1402, 1407, requires that D “intended to give encouragement”. It would appear, however, that “intention” is broad enough to include a realisation by D (ie, knowledge or belief) that he is encouraging P by his presence (*Clarkson* [1971] 1 WLR 1402, 1407). The latter state of mind is analogous to “indirect intention” for primary liability. It is to be noted, however, that in *JF Alford Transport* [1997] 2 Cr App R 326 the Divisional Court felt (at 334) that D could be secondarily liable for P’s offence if he merely believed that his intended conduct had the capacity to encourage (that is, might encourage) P (see n 31).

5.21 With regard to the requirement in paragraph 5.20(1), what is required is knowledge of “the essential matters” which constitute the commission of the principal offence.³⁴ The essential matters would seem to encompass the various aspects of the actus reus and the fact that P will be acting (or is acting) with the mens rea required for primary liability.³⁵

5.22 In the context of encouraging or assisting crime, knowledge that something exists (or will exist) must include a *belief* that it exists (or will exist). For example, D cannot “know” P’s state of mind, but he can form an *equivalent* level of understanding from what he has been told or directly perceived. Similarly, knowledge that P will commit the actus reus of the principal offence must include a *belief* that P *will* commit it.³⁶

5.23 Thus, for D to be secondarily liable on the basis of encouragement or assistance provided *during* P’s ongoing commission of the principal offence, it seems that:

- (1) D must know or believe that P *is* committing the actus reus of the principal offence with the requisite mens rea for primary liability;³⁷ and
- (2) D must know or believe that his own (intentional) conduct is providing P with encouragement or is capable of providing P with assistance.

For example, D finds P violently kicking V in the head and shouts encouragement to ensure that the kicking continues. If P is aware of the encouragement, and V dies as a result of the kicking, D will be liable for the murder committed by P.

5.24 And for D to be secondarily liable on the basis of encouragement or assistance provided *in advance of* P’s commission of the principal offence, it seems that:

- (1) D must know or believe that P *will* commit the actus reus of the principal offence with the requisite mens rea for primary liability;³⁸ and

³³ See *JF Alford Transport* [1997] 2 Cr App R 326, 334 (n 31). It is to be noted, however, that in *DPP for Northern Ireland v Lynch* [1975] AC 653, 699 Lord Simon said (in the context of assisting) that the “act of supply must be voluntary ... and it must be foreseen that the instrument or other object or service supplied will probably (or possibly and desiredly) be used for the commission of a crime”.

³⁴ *Johnson v Youden* [1950] 1 KB 544, *National Coal Board v Gamble* [1959] 1 QB 11.

³⁵ In the context of secondary liability for an unintended offence of murder arising out of a joint enterprise (where foresight of a possibility suffices) Lord Steyn has said that D “*must have been aware, not merely that death or grievous bodily harm might be caused, but that it might be caused intentionally*” (*Powell and Daniels*; *English* [1999] 1 AC 1, 13–14, emphasis in original).

³⁶ As opposed to, say, a belief that P *might* commit it.

³⁷ In *Carter v Richardson* [1974] RTR 314 it was said (obiter) that an assister or encourager could be liable on the basis of a circumstance which D thought was “probable”. However, the weight of authority demands knowledge: ie, a belief that something *does* exist.

- (2) D must know or believe that his own (intentional) conduct is providing (or will provide) P with encouragement or is capable of providing P with assistance.

For example, D sells P a knife believing that he will cause serious harm with the intent to cause such harm, knowing that the knife could be used. If P uses the knife to murder V, D is also liable for murder.

5.25 With regard to the requirement in paragraph 5.24(1), it is not necessary that D should “know” the *particular* principal offence P will ultimately commit (and for which D will ultimately be liable). It suffices if D “knows” the *type* of offence P ultimately commits.³⁹ There are a number of points to note about this principle:

- (1) If D provides P with assistance in relation to a type of offence he believes P will commit, D will incur secondary liability for each and every such offence P commits with that assistance. Thus, if D sells P a gun believing that he will use it to commit murder, D will be liable for all the murders P subsequently commits with it.
- (2) If D believes that P will commit an offence with his assistance, but does not have a firm belief that P will commit a particular type of offence, D will be liable for P’s offence only if the principal offence is one of the range of possible types of offence D believes P might commit. In other words, foresight of a possibility suffices as to the type of principal offence committed by P, so long as D believed that P *would* commit *an* offence – the *Maxwell* principle.⁴⁰ For example, if D sells P a knife believing that he will use it to commit a crime and that the crime might be murder or might be causing actual bodily harm or might be robbery, he will be secondarily liable for murder if P uses the knife to commit that offence.
- (3) Presumably D will not be liable for the fatal consequences of P’s conduct if D believed P would commit an offence against V in a particular way (eg, serious bodily harm by breaking V’s toes) and P committed the offence in a fundamentally different way (for example, life-threatening serious harm by repeatedly kicking V’s head) resulting in V’s death.⁴¹
- (4) It *may* be the law that D will incur secondary liability for P’s principal offence (offence X) if D believed that P would commit offence Y but

³⁸ There is, however, a case on the “procuring” form of secondary liability which suggests that foresight of a possibility as to the commission of the (prospective) principal offence suffices: *Blakely and Sutton v DPP* [1991] RTR 405. Although the court was not limiting its comments to procuring, the case should be confined to its own facts given the weight of authority requiring “knowledge” for secondary liability (in the absence of a joint enterprise) – eg, *National Coal Board v Gamble* [1959] 1 QB 11 and *Bainbridge* [1960] 1 QB 129.

³⁹ *Bainbridge* [1960] 1 QB 129.

⁴⁰ *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350.

⁴¹ In the context of joint enterprises, D will not be liable for the fatal consequences of P’s conduct if P committed the agreed (or contemplated) offence in a “fundamentally different” way from that envisaged by D (*Powell and Daniels; English* [1999] 1 AC 1, 28). This principle has been applied only in cases of murder, however, so it remains to be seen whether it is available in relation to non-fatal consequences.

merely believed that P might also (or alternatively) commit offence X while executing his plan to commit offence Y or while escaping from the scene.⁴² An example would be where D sells P a jemmy believing that he will commit burglary, and D also believes that, if caught in the act, P might use it to commit murder to avoid being apprehended.

D's conduct and state of mind – joint enterprises

- 5.26 The “joint enterprise” is a particular aspect of the doctrine of secondary liability, the difference being that in such cases there will have been an express or tacit agreement to commit an offence, or the existence of a common purpose in relation to the commission of an offence, before P commits the principal offence.
- 5.27 For ease of exposition, the term tacit agreement is used in the following paragraphs to include a meeting of minds as to the commission of an offence – that is, where D and P act in concert with a common purpose to commit a crime – even though, strictly speaking, it would be difficult to say that there had been a communicated “agreement” between them. An example would be where D involves himself in an existing fight between P and V to provide P with assistance by causing V actual bodily harm. If P also intended to cause such harm, or greater harm, it would be possible to say that D and P acted with a common purpose to cause V some harm.
- 5.28 In many (if not the vast majority of) cases where a principal offence has been committed by P, encouraged or assisted by D, it will be possible to infer the existence of an agreement to commit that (or another) offence. In other words, joint enterprises would seem to comprise the most important aspect of secondary liability in practice. Most problems with the law have arisen in this context, in cases where the principal offence is murder.
- 5.29 The law governing joint enterprises is part of the general doctrine of secondary liability, because D's liability emanates from the offence committed by the perpetrator whom D encouraged or assisted, and section 8 of the Accessories and Abettors Act 1861 applies to this sort of situation just as it applies to encouragers and assisters generally.
- 5.30 It should therefore be the case that D can be liable as a secondary participant in the commission of P's principal offence only if D provided him with actual

⁴² In the context of joint enterprises, D would be liable for offence X if P and D were participants in an enterprise to commit offence Y and D foresaw the possibility that offence X might be committed (*Chan Wing-Siu* [1985] 1 AC 168).

encouragement or assistance in relation to that offence.⁴³ It must also be the case, moreover, that D may be liable for P's principal offence regardless of whether it was D's purpose that it (or any other offence) should be committed and regardless of whether it was his purpose that assistance or encouragement should be provided.⁴⁴

- 5.31 However, there are aspects of the law governing D's secondary liability in cases of joint enterprise which clearly differ from the position where there is no such enterprise.
- 5.32 Importantly, in cases of joint enterprise where D is an "indifferent" participant,⁴⁵ the mens rea requirement in respect of the commission of the principal offence is not "knowledge" (or an equivalent belief) but foresight of a possibility. The twin requirements that D was a party to an agreement to commit an offence,⁴⁶ and that D foresaw that the principal offence *might* be committed, replace the standard secondary liability requirement (for indifferent participants) of knowledge or belief that the principal offence *would* be committed (for encouragement or assistance provided in advance of the commission of the principal offence).⁴⁷ The justification can be found in the additional culpability which comes with being involved in an express or tacit agreement with one or more other persons to commit an offence.
- 5.33 It may also be the law that there is a requirement for joint enterprises, in line with the requirement for secondary liability generally, that an "indifferent" D must have known or believed that his conduct would encourage P or that it had the capacity to assist P in relation to the commission of an offence (if not the principal offence ultimately committed). It will be seen below that secondary liability may be incurred for any contemplated offence committed pursuant to, or in relation to the fulfilment of, the joint enterprise, whether or not it is the offence the parties

⁴³ Paras 5.15–5.16. In the absence of any other conduct or participation, the mere act of entering into a conspiracy (an agreement) should provide sufficient evidence of encouraging for secondary liability. If D is a party to a conspiracy to commit murder, and the offence is committed by another party (P) without any assistance from D, D's secondary liability for murder derives from the fact that P has been encouraged by D on account of their common involvement in the same conspiracy; see, for example, *Croft* [1944] 1 KB 295, 297. If the conspiracy is a "chain" or "wheel" conspiracy, and D and P never met or directly communicated with each other, it *may* be that D will be secondarily liable for P's offence on the basis of the "indirect encouragement" provided by their common participation in the same conspiracy (Cf *Smith & Hogan, Criminal Law* (11th ed 2005) 170). It would seem that there is no English authority directly on this point, although in *Fletcher, Fletcher and Zimnowodski* [1962] Crim LR 551 the Court of Criminal Appeal would appear to have assumed that, in the absence of an effective withdrawal, any party to a conspiracy to commit an offence is secondarily liable for it once it is committed. In the United States the principle is clearer. According to the US Supreme Court in *Pinkerton v United States* 328 US 640 (1946), D's participation with P in a conspiracy to commit an offence is of itself enough to sustain D's conviction for the principal offence committed by P in furtherance of the conspiracy.

⁴⁴ Para 5.18.

⁴⁵ That is, D's purpose is something other than the commission of the offence ultimately committed by P.

⁴⁶ Including the concept of "common purpose" where, technically, no agreement can be inferred.

⁴⁷ If D provides his encouragement or assistance during the commission of the offence he will almost certainly know or believe that the principal offence *is* being committed.

agreed to commit. Thus, if there is a requirement of mens rea on the part of D in respect of the possible effects of his conduct it is likely to be that D knew or believed that his conduct would encourage P or that it had the capacity to assist P in relation to the commission of the offence they *agreed* to commit (that is, the object of the enterprise or their common purpose) whether or not it is the same offence as the principal offence.⁴⁸ Alternatively, it may be that there is no mens rea requirement in relation to D's own conduct in joint enterprise cases, where D is a party to an express or tacit agreement that an offence be committed.⁴⁹

- 5.34 The requirement that there should be an agreement does not mean that D should have had the commission of the "agreed offence" (the criminal object of the joint enterprise) as his purpose to be liable for it should it be committed.⁵⁰ Indeed it would appear that D does not need to satisfy any mens rea requirement in respect of the agreement. Whether an agreement can be inferred would appear to be a straightforward question of fact with reference to the way the parties conducted themselves or worked together.⁵¹ Thus, if D and P agreed to murder V, and P subsequently murders V in pursuance of their agreement, D will be secondarily liable for murder even if his purpose in entering the agreement was to defraud P of money and decamp without participating in the offence.⁵² D's liability depends on encouragement or assistance having been provided by him in respect of the murder⁵³ and foresight by him that the murder might be committed.
- 5.35 The same principle applies in cases where the principal offence which P ultimately commits is not the "agreed offence" but some other offence (a "collateral offence"). So long as D foresaw that the collateral offence *might* be committed in relation to the fulfilment of the enterprise, and it can be said that D provided P with encouragement or assistance, D will be secondarily liable for that offence.⁵⁴
- 5.36 For example, if D and P expressly or tacitly agree to commit burglary, and D is aware that P has a knife which he might use to murder any householder who disturbs him, D will be liable for murder if P does indeed commit murder during the course of their joint enterprise.
- 5.37 The following points should be noted:

⁴⁸ If D knows he is providing encouragement or assistance in relation to the joint enterprise, he may be presumed to know that he is also providing encouragement or assistance in relation to any contemplated offence he envisages will be committed as an incident to the enterprise.

⁴⁹ In joint enterprise cases the courts have focused on D's state of mind in respect of the commission of the principal offence, disregarding the question of D's state of mind in relation to the possible effect of his own conduct.

⁵⁰ Of course if there is no communicated agreement, but D and P acted with a common purpose in relation to the commission of an offence, it follows that D must have had the commission of that offence as his purpose.

⁵¹ In many (if not most) cases where there is an agreement to commit an offence, the parties will in any event share a common purpose that that agreed offence should be committed.

⁵² *Rook* (1993) 97 Cr App R 327.

⁵³ Which, as explained already, may be provided by his merely being a party to the conspiracy.

- (1) The courts have adopted a pragmatic approach in response to the question whether encouragement or assistance was provided in relation to the commission of a collateral offence. The accepted position is that because D has provided encouragement or assistance in relation to the joint enterprise (to commit the agreed offence), he must thereby have provided encouragement or assistance in relation to the collateral offence which was committed as an incident to it.⁵⁵
- (2) It follows that for D to be liable for a collateral offence, it must have been committed by P (and foreseen by D) as something done in relation to the fulfilment of the enterprise.⁵⁶ This presumably covers collateral offences committed during any of the following periods: (a) the preparatory stages immediately leading up to the attempt to commit the agreed offence; (b) the commission stage, where there is (or would have been) an attempt to commit the agreed offence; and (c) the subsequent stage during which the parties effect, or try to effect, their escape.
- (3) If the collateral offence is murder, D will be secondarily liable for it if he foresaw the possibility that P might seriously harm another person with the intention of causing serious harm or death.⁵⁷
- (4) D is not liable for any collateral offence deliberately committed by P which D did not foresee as a possibility.⁵⁸ However, D is liable for the unforeseen “unusual consequences” arising from the foreseen execution of the joint enterprise by P.⁵⁹ For example, if D foresaw that P might punch V in the back of the head to cause him no more than actual bodily harm, and P acted in accordance with that foresight, the consequence being that V died on account of his latent thin skull, D would be liable as a secondary party to P’s offence of manslaughter.
- (5) D is not liable for a murder committed by P, or indeed for manslaughter, if

⁵⁴ *Smith* [1963] 1 WLR 1200, *Chan Wing-Siu* [1985] 1 AC 168, *Hyde* [1991] 1 QB 134, *Hui Chi-Ming* [1992] 1 AC 34, *Powell and Daniels; English* [1999] 1 AC 1.

⁵⁵ *Hyde* [1991] 1 QB 134, 139.

⁵⁶ It is sufficient that D foresaw that a party to the enterprise might commit the offence, regardless of whether D had any particular individual in mind (*Nelson* (1999) unreported (98/01747/Z5)).

⁵⁷ In *Powell and Daniels; English* [1999] 1 AC 1, 13–14 Lord Steyn said that D “must be proved to have been [subjectively] reckless, not merely whether death might be caused, but whether murder might be committed” but added that D “*must have been aware, not merely that death or grievous bodily harm might be caused, but that it might be caused intentionally*” (emphasis in original). In *Hyde* [1991] 1 QB 134, 139 Lord Lane CJ said that for D to be secondarily liable for the collateral offence of murder, D must realise that “[P] may kill or intentionally inflict serious harm”

⁵⁸ *Davies v DPP* [1954] AC 378, 401, *Mahmood* [1994] Crim LR 368, *Powell and Daniels; English* [1999] 1 AC 1.

⁵⁹ *Baldessare* (1931) 22 Cr App R 70, *Anderson and Morris* [1966] 2 QB 110, 118.

- (a) it was agreed that murder should be committed against a particular individual and P wilfully and knowingly committed it against a different person;⁶⁰ or
- (b) it was agreed that an offence⁶¹ should be committed against a particular person and P wilfully committed an offence “of a quite different nature” (that is, murder) against him;⁶²

D will be liable for murder in both cases, however, if he foresaw the possibility that P might deviate as he in fact did.

- (6) As a general rule, D is liable for the principal offence (including murder) committed by P if D agreed to and/or contemplated a particular time, location or method for the offence but P committed it at a different time or in a different place or in a different way.⁶³ There is, however, an exception in the case of murder (and possibly the non-fatal offence of causing serious harm with intent)⁶⁴ where D contemplates that P will cause V serious harm with intent in a particular (that is, non-life-threatening) way and P causes V serious harm with intent in a “fundamentally different”⁶⁵ (that is, life-threatening) way. P’s fundamentally different conduct means that D will be guilty of neither murder nor manslaughter.⁶⁶ The following points should be noted:

- (a) If D contemplates that P will cause V serious harm with intent with a particular weapon, and P uses a different weapon to cause V serious harm with intent, D will not be liable for V’s death (or presumably the serious injury which led to his death) if the jury regard P’s conduct in using that weapon as he did as a “fundamentally different” act from the type of act contemplated. Whether an act is “fundamentally different” is a question of fact, a

⁶⁰ *Saunders and Archer* (1573) 2 Plowd 473; *Leahy* [1985] Crim LR 99; Hawkins, *A Treatise of the Pleas of the Crown*, Vol 2, (8th ed 1824), Chapter 29, section 21; Stephen, *A Digest of the Criminal Law* (9th ed 1950) Article 22; Hale, *The History of the Pleas of the Crown*, Vol 1 (1800), 616.

⁶¹ An offence other than murder or causing (life-threatening) serious harm with intent.

⁶² Hawkins, *A Treatise of the Pleas of the Crown*, Vol 2, (8th ed 1824), Chapter 29, section 21; Stephen, *A Digest of the Criminal Law* (9th ed 1950) Article 22; Hale, *The History of the Pleas of the Crown*, Vol 1, (1800) p 616; *Russell on Crime*, Vol 1 (12th ed 1964) p 161. This ties in with the “fundamental difference” test developed by the courts in recent years: *Powell and Daniels*; *English* [1999] 1 AC 1, *Greatrex and Bates* [1999] 1 Cr App R 126, *Uddin* [1999] QB 431.

⁶³ Hawkins, *A Treatise of the Pleas of the Crown*, Vol 2, (8th ed 1824), Chapter 29, section 20; Stephen, *A Digest of the Criminal Law* (9th ed 1950) Article 19; Hale, *The History of the Pleas of the Crown*, Vol 1, (1800) p 617. For example, where D agrees that P should stab V in the heart but P instead shoots V in the heart.

⁶⁴ Offences Against the Person Act 1861, s 18.

⁶⁵ “Fundamentally different” (*Powell and Daniels*; *English* [1999] 1 AC 1, 28, *Greatrex and Bates* [1999] 1 Cr App R 126, 137–138); “entirely different” or “completely different” (*Uddin* [1999] QB 431, 441).

⁶⁶ *Anderson and Morris* [1966] 2 QB 110, 120; *Powell and Daniels*; *English* [1999] 1 AC 1; *Greatrex and Bates* [1999] 1 Cr App R 126; *Uddin* [1999] QB 431, 441; *A-G’s Reference (No 3 of 2004)* [2005] EWCA Crim 1882. Cf *D* [2005] EWCA Crim 1981 (n 73 and n 77).

“significant factor” being P’s use of an un contemplated weapon (unless the weapon was “equally likely to inflict fatal injury”).⁶⁷

- (b) Although the question is one of fact, in truth D’s liability for P’s offence would seem to turn on whether D contemplated a non-life-threatening form of serious harm and P committed a life-threatening form of serious harm. For example, it would seem to be implicit in Carswell J’s ruling in *Gamble*⁶⁸ that P’s use of a gun to shoot V in a vital part of his body would have been regarded as fundamentally different from the contemplated (and possibly non-life-threatening) act of shooting V in the kneecaps.⁶⁹ As the law stands, however, there is no guidance available to the judge or jury as to what is meant by “fundamentally different”.⁷⁰
- (c) If P’s actual conduct was the same (or presumably of the same type) as that contemplated by D, but P’s state of mind was different, P and D will each be liable to the extent of their individual mens rea. Thus, in *Gilmour*,⁷¹ where D assisted P in the delivery of a petrol bomb to a house, causing the death of three occupants, P was liable for murder (as he had the intent to kill or cause serious harm) but D was liable only for manslaughter (as he had not contemplated P’s true state of mind and had himself intended only to frighten the occupants).⁷²
- (d) Similarly, if P punches V’s head with the intention of causing serious harm, and D contemplated a punch of that ferocity intending (and believing that P intended) no more than actual bodily harm, P will be liable for murder and D liable for

⁶⁷ *Uddin* [1999] QB 431, 441 *per* Beldham LJ.

⁶⁸ [1989] NI 268, 283–284.

⁶⁹ In fact the victim died on account of the cut to his throat, inflicted just prior to or after his being shot in a life-threatening way.

⁷⁰ In *Powell and Daniels; English* [1999] 1 AC 1 the House of Lords felt that the use of a knife to cause serious harm was fundamentally different from the use of a wooden post to cause serious harm. It is to be noted that their Lordships did not expressly articulate a distinction based on whether the injury contemplated by D would or would not have been life-threatening.

⁷¹ [2000] 2 Cr App R 407.

⁷² The position is unclear if P’s conduct is *superficially* the same as but inherently different from that contemplated by D, and D did not contemplate P’s state of mind. It may be that D and P will be liable to the extent of their own mens rea in relation to the facts as they *believed* them to be. For example, if D assists P to inject a liquid into V’s arm which P knows is a lethal poison but which D believes is a mild sleeping draught, P would be liable for murder whereas D would be liable for manslaughter. Alternatively P’s conduct may be regarded as fundamentally different from that contemplated by D, which would mean that D could not be liable for manslaughter. The latter result would be more consonant with the policy underlying the doctrine of fundamentally different deviations.

manslaughter if the punch causes V's death (on account of his thin skull, which P but not D was aware of).⁷³

- (e) In the light of the approach adopted by the House of Lords in *Powell and Daniels; English*⁷⁴ it may be presumed that the earlier decision of the Court of Appeal in *Stewart and Schofield*⁷⁵ no longer reflects the law.⁷⁶ In that case D knew that P had an iron bar and that he might use it to cause V actual (that is, minor) bodily harm. P ultimately used the iron bar in a racially-motivated attack aimed at causing V serious harm or death, which resulted in V's death. D was held to be liable for manslaughter. However, on the basis that D cannot now be liable even for manslaughter if P's conduct was fundamentally different from that contemplated by D, it is to be assumed that, as a vicious attack with an iron bar would have to be regarded as "fundamentally different" from a "mild" assault with an iron bar involving only minor bruising, D could not now be liable for manslaughter in a case such as this.⁷⁷

5.38 Nevertheless, with regard to the final point, there is an argument that D should be liable for manslaughter in *some* cases where P intentionally causes serious harm resulting in V's death, and D avoids liability for murder on account of P's fundamentally different act, notwithstanding D's belief that V would or might suffer serious harm.

SECONDARY LIABILITY FOR MURDER – OUR PROPOSALS

5.39 We have explained elsewhere⁷⁸ our proposal that P, who has caused another person's death, should be guilty of "first degree murder" only if it was his intention⁷⁹ to kill.

5.40 In addition, we intend to publish in the near future our detailed proposals and draft Bill for a new statutory doctrine of secondary liability to complement our

⁷³ This would explain the dictum in *Roberts* [2001] EWCA Crim 1594 to the effect that the use of physical force on another person could give rise to a *Gilmour*-type situation (although *Gilmour* was not referred to). Unfortunately in *D* [2005] EWCA Crim 1981 [33] and [34], the Court of Appeal would seem to have interpreted *Roberts* as authority for a *general* proposition that D, foreseeing nothing more than actual bodily harm, can be liable for manslaughter if P murders V.

⁷⁴ [1999] 1 AC 1.

⁷⁵ [1995] 1 Cr App R 441.

⁷⁶ This would appear to have been the view of Professor Sir John Smith, who omitted any reference to the case (in this context) in *Smith & Hogan, Criminal Law* (10th ed 2002).

⁷⁷ In *C* [2002] EWCA Crim 3154 and *Van Hoogstraten* [2003] EWCA Crim 2280 the Court of Appeal assumed that D could be liable for manslaughter in circumstances of this sort, albeit without addressing the impact of *Powell and Daniels; English* [1999] 1 AC 1. The recent judgment of the Court of Appeal in *A-G's Reference (No 3 of 2004)* [2005] EWCA Crim 1882 has confirmed the law as stated in this paper. Nevertheless, in the more recent case of *D* [2005] EWCA Crim 1981 the Court of Appeal upheld D's conviction for manslaughter even though P had attacked (and killed) V with the intention to kill or cause serious harm. As noted above (n 73) this would appear to have been on the basis of a misunderstanding of *Roberts* [2001] EWCA Crim 1594.

⁷⁸ See Part 2.

⁷⁹ Direct intention (purpose) or oblique intention (foresight of a virtual certainty).

imminent Report and draft Bill on inchoate liability for encouraging or assisting crime.⁸⁰

A new doctrine of secondary liability

- 5.41 For present purposes it is sufficient if we summarise our proposals for secondary liability in broad terms. In short, we recommend the retention of much of the common law doctrine. However, “procuring” would be removed from the doctrine;⁸¹ and in cases where there is no joint enterprise, D (an encourager or assister) would not be liable for P’s principal offence unless he intended that it should be committed. The “indifferent” encourager or assister who was not a party to a joint enterprise, and who did not intend that the principal offence should be committed,⁸² would no longer incur secondary liability for P’s offence. He would instead be liable for the new inchoate offence of knowingly encouraging or assisting a crime.
- 5.42 The doctrine of secondary liability would apply only in relation to cases where D’s moral responsibility for the principal offence could properly be said to equate to that borne by P himself.
- 5.43 Our proposal is that the doctrine of secondary liability should apply to render D guilty of P’s principal offence only in the following three types of situation, where D’s conduct actually encouraged or assisted P:
- (1) it was D’s intention that the principal offence should be committed;
 - (2) D and P were parties to a joint venture⁸³ to commit the principal offence; or
 - (3) D and P were parties to a joint venture to commit an offence other than the principal offence and D foresaw the possible commission of the principal offence in relation to the fulfilment of the venture (which is what happened).
- 5.44 The existence of a “joint venture” would be proved if the parties agreed to commit an offence or it is possible to infer that they acted with a common purpose to commit an offence. Under our proposals for joint ventures, D would be liable for P’s principal offence regardless of whether he intended that it should be committed.
- 5.45 Our view is that there should continue to be a uniform basis for determining secondary liability applicable across the entire spectrum of criminal offences,

⁸⁰ These proposals, if adopted, will replace the inchoate offence of incitement with two new inchoate offences of intentionally encouraging or assisting a crime and knowingly encouraging or assisting a crime.

⁸¹ To be replaced by a new offence of causing an offence of strict liability, in tandem with a refined doctrine of innocent (and semi-innocent) agency.

⁸² For example the shopkeeper in *Bainbridge* [1960] 1 QB 129.

⁸³ We prefer this term over “joint enterprise”.

including murder. Similarly, our proposed inchoate offences of encouraging or assisting a crime would generally apply to all offences, including murder.⁸⁴

5.46 This means, therefore, that an “indifferent” D who provides P with assistance in the belief that it will be used to commit murder would no longer be liable for murder (if P commits it) unless they were parties to a joint venture. D would instead be guilty of the offence of knowingly encouraging or assisting murder, carrying a maximum sentence of life imprisonment.

5.47 Applying the principles set out above to “first degree murder”, D would be liable for a “first degree murder” committed by P if he actually encouraged or assisted P in the following three situations. **[Proposal 1(a)–(c)]**

(a) D “INTENDED” THAT “FIRST DEGREE MURDER” SHOULD BE COMMITTED

5.48 D would be liable for the “first degree murder” committed by P if D’s purpose was to encourage or assist the commission of (the conduct element of) “first degree murder”, and:

- (1) D himself intended that death should be caused; or
- (2) D foresaw that, if the conduct element of “first degree murder” were to be committed, P would act with the intention to kill.⁸⁵

(b) D AND P WERE PARTIES TO A JOINT VENTURE TO COMMIT “FIRST DEGREE MURDER”

5.49 D would be liable for the “first degree murder” committed by P if they were both parties to a joint venture⁸⁶ to commit (the conduct element of) “first degree murder”, and:

- (1) D himself intended that death should be caused; or
- (2) D foresaw that, if the conduct element of “first degree murder” were to be committed, P, another party to the venture, would act with the intention to kill.

(c) D AND P WERE PARTIES TO A JOINT VENTURE TO COMMIT ANOTHER OFFENCE

5.50 D would be liable for the “first degree murder” committed by P if they were both parties to a joint venture to commit a criminal offence and D foresaw that “first degree murder” might be committed during the course of the venture (which is what happened).

⁸⁴ There are to be some exceptions, for example D would not be liable for knowingly encouraging or assisting another inchoate offence.

⁸⁵ Or, if the encouragement or assistance was provided contemporaneously with the commission of the principal offence, D knew that the perpetrator was acting with that intention and would continue to do so.

⁸⁶ An express or tacit agreement, or a shared common purpose, on the part of two or more persons (including D and P) to commit an offence.

5.51 The requirement that D foresaw that “first degree murder” might be committed during the course of the venture would be satisfied if D foresaw that (the conduct element of) “first degree murder” might be committed by another party in relation to the fulfilment of the venture, and:

- (1) D himself intended that death should be caused; or
- (2) D foresaw that, if the conduct element of “first degree murder” were to be committed (in relation to the fulfilment of the venture) P, another party to the venture, would act with the intention to kill.

5.52 For example, if D and P expressly or tacitly agreed to commit burglary, and D was aware that P had a knife which he might use intentionally to kill any householder who disturbed them, D would be liable for “first degree murder” if P committed that offence during the course of their joint venture. This of course follows the common law.

“First degree murder” rather than “second degree murder”?

5.53 Our proposals for reforming the doctrine of secondary liability are underpinned by the policy that D should be liable for the offence committed by P only if there is what might be called “parity of culpability” between them.

5.54 This term should not be taken literally, however. It simply means that an encourager or assister should be liable for P’s offence only if his involvement was such that he might properly be considered to be as morally culpable as P, or more culpable than P, and should therefore (in the context of murder) be held responsible in law for the victim’s death.

5.55 The principle of parity of culpability also justifies the procedural rule whereby a defendant may be convicted of murder even if the jury cannot be sure whether he was the perpetrator or an encourager or assister.⁸⁷

5.56 Our view is that D can properly be considered to be as culpable as, if not more culpable than, P in the three situations described above in paragraphs 5.48 to 5.51. Our view is that D can properly be considered less culpable than P in all other situations. Accordingly, those other situations would be removed from the ambit of the doctrine of secondary liability.

5.57 The “indifferent” encourager or assister (D) would not be liable for a “first degree murder” committed by P unless they were both parties to a joint venture. This test would therefore apply to any “peripheral actor” in a joint venture to commit a criminal offence. That is to say, a “peripheral actor” in a joint venture would be liable for a “first degree murder” committed by another party only if he had the requisite intention (paragraph 5.48) or he provided his encouragement or assistance as a party in the belief that another party might commit “first degree murder” (paragraphs 5.49–5.51).

5.58 Given the principle of parity of culpability, and indeed the high moral culpability of anyone falling within any of our three proposed categories of secondary liability, it follows that *any* encourager or assister (D) who is *prima facie* liable for a “first

⁸⁷ *Giannetto* [1997] 1 Cr App R 1, *Mercer* [2001] EWCA Crim 638.

degree murder” committed by P on the basis of our proposed doctrine should be liable for that offence rather than a lesser offence such as “second degree murder”. In other words, in cases where the doctrine of secondary liability bites, there should be no partial defence for D to liability for P’s “first degree murder” merely on the basis that his role in the venture was peripheral. **[Proposal 2]**

A special defence for secondary participants in murder?

- 5.59 Under our proposals for reforming the doctrine of secondary liability, D’s liability will be dependent on the commission of an offence by P. What will need to be established is that P committed the actus reus of the principal offence with the requisite mens rea and that, before or during the period when that actus reus was committed, D provided P with (actual) encouragement or assistance with the mens rea for secondary liability.⁸⁸
- 5.60 As explained above, a particular problem the courts have faced at common law, in cases where P’s offence is murder, has arisen because, first, the present mens rea for (primary liability for) murder does not distinguish between life-threatening serious harm and non-life-threatening serious harm and, secondly, D’s secondary liability for P’s offence does not (as a general rule) take into account differences between the way the offence was committed and what D expected. As a general rule, D is liable at common law for the principal offence committed by P even if D agreed to and/or contemplated a particular time, location or method for the offence but P committed it at a different time or in a different place or in a different way.
- 5.61 Subject to any available defence, D is secondarily liable at common law for murder committed by P if D foresaw that P might cause V *non-life-threatening* serious harm (that is, relatively “minor” grievous bodily harm) with the intention of causing such harm, but P’s intention was to kill or cause *life-threatening* harm. Thus, if D and P agree to burgle V’s house, and D believes that if V confronts them P might use his foot to stamp on V’s foot to break his toes (intentionally causing a non-life-threatening serious injury), D is prima facie liable for the murder committed by P even though P deliberately killed V by attacking his head with a meat cleaver.
- 5.62 Appreciating that it can be unfair to hold D liable for murder in some cases, it has been seen that the courts have recognised a common law defence to (secondary liability for) murder, and manslaughter, in relation to V’s death if P’s commission of the offence was “fundamentally different” from D’s expectation, as in the last example. Our present proposals for reforming secondary liability include a defence of this sort on the assumption that the mens rea for murder remains as it is, that is, an intention to cause *any* “grievous bodily harm”.
- 5.63 At common law, and under our proposals, if D contemplates that P might cause V serious harm with intent in a particular (in effect, non-life-threatening) way and P causes V serious harm with intent in a “fundamentally different” (in effect, life-threatening) way, D will not be liable for the murder committed by P. Subject to

⁸⁸ D will be liable for “first degree murder” committed by P even though P is liable for nothing more than a lesser degree of murder (replacing voluntary manslaughter) on the basis of provocation or diminished responsibility or indeed any novel partial defence to murder.

another, independent basis for imposing liability for V's death on D,⁸⁹ P's fundamentally different conduct at common law and under our proposals means that D will not be guilty of murder or manslaughter on the basis of V's death.

- 5.64 However, the need for a special defence of this sort stems from the very broad scope of the present "grievous bodily harm rule" for the mens rea for murder. On the assumption that the mens rea for (primary liability for) "first degree murder" will be limited to an intention to kill, the problem disappears.⁹⁰
- 5.65 There is, after all, no unfairness in holding D liable for "first degree murder" committed by P in any of the three situations described in paragraphs 5.48 to 5.51. Accordingly, if the mens rea for murder is narrowed in line with our proposal, no special defence to secondary liability for murder (or manslaughter) is needed. In all such cases it is right and proper that D should be liable for the "first degree murder" committed by P.

A PARTIAL DEFENCE OF DURESS FOR PARTICIPANTS IN MURDER?

- 5.66 The defence of duress (as a complete excuse negating liability) is unavailable to perpetrators or accessories in relation to murder and attempted murder.⁹¹
- 5.67 The defence is also unavailable in relation to participation in other offences, if the accused was voluntarily involved in a criminal gang and foresaw, or ought reasonably to have foreseen, the possibility of being subjected to compulsion by threats of violence.⁹²
- 5.68 The justification for extending duress to secondary participants in "first degree murder", as a partial defence if not a complete defence, again stems from the broad scope of the common law doctrine of secondary liability. For example, many people would be disturbed if they knew that at present D, an otherwise innocent taxi driver, could be convicted of murder on account of his having driven P to the victim's address, at gunpoint, on the mere basis that D was aware that murder would be committed there. The fact that D drove P to avoid being killed cannot be taken into consideration when determining his liability for the murder committed by P.
- 5.69 As explained above, however, the "indifferent" encourager or assister (D) will not be secondarily liable for P's offence (of "first degree murder") under our new statutory scheme unless D was a party to the joint venture to commit "first degree murder" (or to commit some other offence believing that "first degree murder" might incidentally be committed). D would be regarded as a party to the venture if he "agreed" to his participation or he shared the parties' "common purpose".

⁸⁹ See from para 5.79 onwards.

⁹⁰ The problem may occasionally arise in the context of second degree murder, if defined with reference to "serious harm", where P intends a life-threatening injury but D contemplates only "minor" serious harm. However, the difference between what D contemplated and what P intended can be taken into consideration when D is sentenced.

⁹¹ *Howe* [1987] AC 417; *Gotts* [1992] 2 AC 412.

⁹² *Hasan* [2005] UKHL 22, [2005] 2 WLR 709.

- 5.70 This raises a fundamental question: should D be regarded as having “agreed” to his participation in a joint venture if his consent was not freely given because, for example, he had a loaded gun held to his head at the time he gave his assent?
- 5.71 Certainly proof of an agreement to participate cannot depend upon a requirement that D acted with the purpose of achieving the goal set by the parties. If D conspires with other persons to the effect that V should be killed, but he is in it just for the money and has no personal animosity towards V – indeed he hopes that the venture will fail – he should still be liable for their “first degree murder” of V if it is committed and he provided the perpetrator with encouragement or assistance.⁹³ Accordingly the concept of “agreeing” must be given a broad meaning. But should it cover the situation where D’s assent is obtained by a threat to cause him or his family serious harm or death?
- 5.72 As a matter of “common sense” it might be thought that D should not be regarded as having “agreed” to participate in a venture in such circumstances. However, the “common sense” approach would give rise to an unacceptable outcome. If the taxi driver is not to be regarded as a party to the joint venture because of the threats made against him, and he drives P to the place where P commits murder, D would not be liable for *any* offence at all. He would not be secondarily liable for the offence committed because he was not a party to the joint venture (to attempt and to commit “first degree murder”) and he would not be liable for any other offence because of his defence of duress. But if we accept that P’s liability should be reduced from “first degree murder” to “second degree murder” if he acted under duress, P would be liable for the latter offence if he acted under the same threat that D was under. That would be an unacceptable outcome.
- 5.73 It follows, therefore, that D must be regarded as having “agreed” to participate in a joint venture even if his assent is procured by a threat to kill or cause serious harm. In other words, the question must simply be whether or not he did *in fact* give his assent to becoming involved in the venture. His motive or reason for acting must be disregarded.
- 5.74 It also follows, given the principle of parity of culpability, that both D and P should have the mitigation of duress taken into consideration when determining their liability and sentence, if it is thought prudent to extend duress to “first degree murder” as a partial defence for P’s benefit.
- 5.75 Our provisional proposal⁹⁴ is indeed that duress should be a defence to “first degree murder” for perpetrators, reducing P’s liability to “second degree murder”. Accordingly, our view is that the defence should also be available to a secondary participant (D) on the same terms. **[Proposal 3]**
- 5.76 The principle of parity of culpability leads us to another conclusion. If it is proved that D was a secondary participant in a “first degree murder” his culpability will equate to, if not exceed, P’s own culpability by virtue of the way the doctrine of secondary liability is to be reformulated. Accordingly, the defence of duress should not be available to secondary participants in “first degree murder”, whether as a full or partial defence, *merely* on the ground that they are secondary

⁹³ See, for example, the case of *Rook* (1993) 97 Cr App R 327.

⁹⁴ See Part 7, paras 7.31-7.32.

participants, even if they are indifferent or opposed to the commission of the murder. The following example illustrates why there should be no such special defence for secondary parties:

M kidnaps the daughter of a couple, D and P, and tells them she will be murdered unless D and P immediately murder V. D, the more phlegmatic of the two, holds V down and encourages P to cut V's throat, which is what P does.

- 5.77 It would be quite absurd if P had to be convicted of "first degree murder" on the basis that he was the perpetrator, whereas D (arguably the more culpable of the two malefactors) could avoid liability for "first degree murder" on the ground of duress, facing instead a lesser form of conviction (for example, "second degree murder"). If there is to be a defence to "first degree murder", reducing the accused's liability to "second degree murder", it should be available to D and P, in line with our Proposal 3.
- 5.78 We are proposing only minor changes to the rules governing the defence of duress and we are proposing no changes to the rule relating to how a voluntary involvement in a criminal joint venture prevents D from raising duress as a defence.⁹⁵

A NEW HOMICIDE OFFENCE FOR SOME PARTIES TO A JOINT VENTURE

- 5.79 In paragraph 5.63, in relation to our proposals for a special defence to secondary liability for murder (as currently defined) arising out of a joint venture, we stated that "subject to another, independent basis for imposing liability for V's death on D, P's fundamentally different conduct at common law and under our proposals means that D will not be guilty of murder or manslaughter on the basis of V's death".
- 5.80 We now consider whether, in the light of our proposals for reforming the doctrine of secondary liability and the definition of the mens rea for "first degree murder", there should be an "independent basis for imposing liability for V's death" in joint venture cases where P is liable for "first degree murder" (or "second degree murder") but D would not be so liable because, applying the general test for secondary liability arising from a joint venture, he did not intend or foresee serious harm or death but he did intend or foresee harm or the fear of harm.
- 5.81 In the years prior to the decision of the House of Lords in *Powell and Daniels; English*⁹⁶ D could be held liable for manslaughter on account of P's commission of murder, notwithstanding P's act being unforeseen or unintended by D.⁹⁷ This also reflects the present position in a number of other common law jurisdictions.⁹⁸ Our view is that it would be quite wrong to hold D liable for V's death – that is,

⁹⁵ This means that if there was a joint venture, the defence may be of only limited practical assistance to D (and for that matter P) given the judgment of the House of Lords in *Hasan* [2005] UKHL 22, [2005] 2 WLR 709.

⁹⁶ [1999] 1 AC 1.

⁹⁷ See *Stewart and Schofield* [1995] 3 All ER 159 and *Reid* (1975) 62 Cr App R 109.

liable for manslaughter – under our reformed doctrine of secondary liability in a case where the scope of the joint venture was limited to causing actual bodily harm or relatively “minor” serious harm (such as a broken foot) and yet P, on a frolic of his own, deliberately inflicted life-threatening harm which resulted in V’s death. A scheme which would impose liability for manslaughter in such cases could lead to quite bizarre, not to say unjust, convictions. It would mean, for example, that if two schoolboys, D and P, agreed to punch their tormentor, V, a few times with a view to giving him some bruises or a bloody nose, and during their attack, P acted entirely out of character by violently kicking V in the head intending to kill or cause a life-threatening injury, D would be liable for manslaughter. We do not think it would be just to hold D criminally responsible for the death of V in such a case.

- 5.82 Nevertheless, there are some situations where, we believe, it would be just to impose liability on D for V’s death, despite P’s conduct in killing V not being foreseen by D. This liability would not arise out of the doctrine of secondary liability, however. D’s liability for V’s death would have an independent basis, one that is conceptually linked with the present common law basis for imposing primary liability for manslaughter on the ground of “gross negligence” and our recommendations in Law Com No 237⁹⁹ for replacing that offence with a new offence of “killing by gross carelessness”.¹⁰⁰
- 5.83 Drawing on our proposals in Law Com No 237 for the necessary conceptual framework, D would be liable for a new homicide offence of “complicity in an unlawful killing” if D intended or foresaw (non-serious) harm or the fear of harm and, in the circumstances, it would have been obvious to a reasonable person in D’s position that someone might suffer death or serious injury as a result of the joint venture.¹⁰¹ The reasonable person would be taken to have knowledge of any relevant facts which D had at the material time.¹⁰² **[Proposal 4]**
- 5.84 This offence could properly be regarded as a new species of gross carelessness and could, alternatively, be labelled as manslaughter. D’s voluntary involvement in a criminal venture (with foresight of harm or the fear of harm) would render him liable for V’s death on the basis that a reasonable person in his position would have foreseen an obvious risk of death or serious injury.
- 5.85 In summary, D would be guilty of this new offence of “complicity in an unlawful killing” if:

⁹⁸ See, for example, the Canadian cases of *Jackson* [1993] 4 SCR 573 and *Kirkness* [1990] 3 SCR 74 and the New Zealand cases of *Hamilton* [1985] 2 NZLR 245 and *Rapira* [2003] 3 NZLR 794.

⁹⁹ *Involuntary Manslaughter* (1996).

¹⁰⁰ See Law Com No 237 at pp 47–53 and clause 2 of the draft Involuntary Homicide Bill appended to the Report. In that Report we proposed, amongst other things, a new offence of “killing by gross carelessness” partly modelled on the test for “dangerousness” in section 2A(1) of the Road Traffic Act 1988 (thereby avoiding reliance on the concepts of negligence and duty of care). Part IV of the Report provides an analysis of the moral basis of criminal liability for unintentionally causing death.

¹⁰¹ See cl 2(1)(a) of our draft Involuntary Homicide Bill (*ibid*).

¹⁰² See cl 2(2)(a) of our draft Involuntary Homicide Bill (*ibid*).

- (1) D and P were parties to a joint venture to commit an offence;
- (2) P committed the offence of “first degree murder” or “second degree murder” in relation to the fulfilment of that venture on account of his intention to kill or cause serious injury;¹⁰³
- (3) D intended or foresaw that (non-serious) harm or the fear of harm might be caused by a party to that venture; and
- (4) a reasonable person in D’s position, with D’s knowledge of the relevant facts, would have foreseen an obvious risk of death or serious injury being caused by a party to that venture.

5.86 The jury would be able to connect D with the killing and so give effect to the community’s sense that D should bear a share of the criminal responsibility for it, particularly in a case where D knew that P was armed with a dangerous weapon. The availability of the offence would therefore give:

effect to the community’s sense that a man who joins in a criminal enterprise with the knowledge that knives (or other weapons such as loaded guns) are being carried should bear a share of criminal responsibility for an ensuing death”¹⁰⁴

5.87 The new offence would be particularly apt as a mechanism for imposing on D liability for the death of a victim in a case where D was aware that P was armed with a dangerous weapon but did not foresee that P might use it to cause death or serious injury. In the absence of exceptional circumstances, we would expect a reasonable person to envisage the possibility of death or serious injury in cases where there is a joint venture and one or more of the parties to it are armed with a club, knife or gun. As pointed out by Kirby J in *Gillard v The Queen*:

the law’s experience shows, particularly when dangerous weapons are involved in a crime scene, whatever the actual and earlier intentions of the secondary offender, the possibility exists that the primary offender will use the weapons, occasioning death or grievous bodily harm to others.¹⁰⁵

5.88 If, however, the circumstances are such that a reasonable person (with D’s knowledge of the relevant facts) would *not* have foreseen any possibility of serious injury or death, for example because D believed that P was unarmed and that he would cause nothing more than bruising, then D will not be liable for the death caused by P. Thus the schoolboy, D, in the scenario described in paragraph 5.81 would not be guilty of “complicity in an unlawful killing” because a reasonable person with his knowledge would not have contemplated the harm caused by P.

¹⁰³ That is, in the context of the joint venture, but beyond the scope of what was agreed or intended or foreseen by D.

¹⁰⁴ *Tomkins* [1985] 2 NZLR 253, 255, *per* Cooke J.

¹⁰⁵ [2003] HCA 64 [62], (2003) 219 CLR 1, 24. See also the observation of Sir Robin Cooke in *Chan Wing-Siu* [1985] AC 168, 178, a case concerning armed burglars, that “disastrous violent action on the impulse of a moment of emergency is very apt to occur when intruders have weapons”.

PART 6

DIMINISHED RESPONSIBILITY AND PROVOCATION

QUESTIONS AND PROVISIONAL PROPOSALS

6.1 We ask:

- (1) Do consultees agree that the effect of a successful plea of diminished responsibility should be to reduce “first degree murder” to “second degree murder” rather than to manslaughter?

[paragraphs 6.12-6.22]

- (2) Do consultees agree that diminished responsibility should not be a partial defence to “second degree murder”?

[paragraphs 6.23-6.33]

- (3) Should the current definition of diminished responsibility in section 2 of the Homicide Act 1957 be replaced?

[paragraphs 6.34-6.61]

- (4) If the answer to (3) is “yes”, should it be:

- (a) replaced by the reformulation of the defence that we put forward for further consideration in our report *Partial Defences to Murder*?¹ or;

[paragraphs 6.34-6.61]

- (b) replaced by a different definition?

[paragraphs 6.62-6.70]

- (5) If the definition were to remain broadly as it is under section 2 of the Homicide Act 1957, should it at least be reformed to the extent of removing the need to show that an abnormality of mind had to arise from one of the causes stipulated in the section?

[paragraphs 6.39-6.41]

- (6) Whatever the definition, should developmental immaturity (“youth”) be added as a possible source of diminished responsibility, irrespective of whether the accused person’s development was “arrested or retarded”?

[paragraphs 6.71-6.98]

¹ *Partial Defences to Murder* (2004) Law Com No 290, para 5.97.

- (7) If your answer to (6) is “yes”, should such a possibility be limited to children or young persons?

[paragraph 6.85]

- (8) Is the provision of expert evidence in diminished responsibility cases satisfactory?

[paragraphs 6.99-6.116; see also Appendix F]

- (9) If your answer to (9) is “no”, in what ways should the system for providing such evidence be improved?

[paragraphs 6.99-6.116; see also Appendix F]

- (10) Should provocation reduce “first degree murder” to “second degree murder” or to manslaughter?

[paragraphs 6.118-6.127]

- (11) Should provocation, as a partial defence to “first degree murder”, be reformed in the way that we recommended in our report *Partial Defences to Murder*,² namely that it should be available only when the defendant acts in response to gross provocation or in response to fear of serious violence towards him or herself or another, or a combination of both?

[paragraphs 6.118-6.127]

- (12) If the answer to (11) is “no”, how should the partial defence of provocation be reformed?

[paragraphs 6.118-6.140]

- (13) Do consultees agree that a successful plea of provocation should have the same effect as a successful plea of diminished responsibility?

[paragraphs 6.141-6.143]

6.2 We are provisionally proposing that:

- (1) A successful plea of diminished responsibility should reduce “first degree murder” to “second degree murder” but should not be a partial defence to “second degree murder”.

[paragraphs 6.12-6.33]

- (2) The definition of the defence of diminished responsibility should be reformulated as follows:

- (a) A person who would otherwise be guilty of “first degree murder” is not guilty of “first degree murder” if, at the time of the act or omission causing death, that person’s capacity to

² *Partial Defences to Murder* (2004) Law Com No 290, para 1.13.

- (i) understand events; or
- (ii) judge whether his or her actions were right or wrong; or
- (iii) control him or herself,

was substantially impaired by an abnormality of mental functioning arising from an underlying condition, developmental immaturity, or both; and

- (b) The abnormality, the developmental immaturity, or the combination of both, was a significant cause of the defendant's conduct in carrying out or taking part in the killing.
- (c) "Underlying condition" means a pre-existing mental or physiological condition.³

[paragraphs 6.34-6.61]

- (3) A successful plea of provocation should reduce "first degree murder" to "second degree murder" but should not be a partial defence to "second degree murder".

[paragraphs 6.118-6.127]

- (4) The principles that should govern the partial defence of provocation are those that we recommended in our report *Partial Defences to Murder*.⁴

[paragraphs 6.118-6.127]

- (5) Provocation and diminished responsibility should have the same effect, namely to reduce "first degree murder" to the *same* lesser crime of "second degree murder", so that the jury is not forced to choose between them when they are pleaded together.

[paragraphs 6.141-6.143]

DIMINISHED RESPONSIBILITY

Introduction

6.3 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

³ This, apart from the reference to "developmental immaturity", is the formulation that we put forward for consideration in *Partial Defences to Murder* (2004) Law Com No 290, para 5.97. The term "developmental immaturity" is the suggestion of Dr Madelyn Hicks, Consultant Psychiatrist, Honorary Lecturer, Institute of Psychiatry, King's College London.

⁴ *Partial Defences to Murder* (2004) Law Com 290, para 1.13.

substantially impaired his mental responsibility for his acts or 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.

6.4 “Abnormality of mind” is not a psychiatric term. Consequently, its meaning has had to be developed by the courts in individual cases. It has been found to include schizophrenia, psychosis, psychopathy, and organic brain disorder. In exceptional cases, it may also include depression and pre-menstrual tension. Accordingly, a person pleading the defence might be:

- (1) a mentally sub-normal boy cajoled into taking part in a murder by the dominating elder brother he idolises;
- (2) a woman physically and mentally abused by her partner over many years;
- (3) a severely depressed husband who has finally given in to his terminally ill wife's demands that he “put her out of her misery”; or
- (4) a highly dangerous sexual psychopath who finds it exceptionally difficult, if not impossible, to control perverted sexual desires.

6.5 A survey of public opinion conducted in 2003 by Professor Barry Mitchell revealed broad public support for treating in a tolerant way those who kill because of a serious mental abnormality, so long as the public remains adequately protected against dangerous offenders.⁵

6.6 Judges are able to deal with offenders convicted of manslaughter on the grounds of diminished responsibility, including those who are highly dangerous, by way of disposals and sentences that enable the offender to be treated while at the same time ensuring that the public is protected. The options include passing a sentence of life imprisonment or making an order that the offender be detained in a secure hospital.

6.7 The power to make a hospital order is particularly important. A court can make a hospital order if it is satisfied by medical evidence that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment, or mental impairment and that it is appropriate for him or her to be detained for medical treatment.⁶ If the court is also satisfied that it is necessary to do so in order to protect the public from serious harm in the future, it may further order that the

⁵ Partial Defences to Murder (2004) Law Com No 290, Appendix C, para 77.

⁶ Mental Health Act 1983, s 37. In the cases of psychopathic disorder or mental impairment, the court must also be satisfied that the treatment is likely to alleviate or prevent a deterioration of the offender's condition.

hospital order be without a limit on time.⁷ This means that the defendant will only be discharged if a Mental Health Review Tribunal subsequently finds that it is safe to do so.

- 6.8 Research conducted by Professor Mackay⁸ into 157 cases in which diminished responsibility was raised as a defence between 1997 and 2001 shows that of the 126 cases in which the defence was successfully pleaded,⁹ 62 (49.2%) resulted in the defendant being made the subject of a hospital order without limit on time.¹⁰ In a further ten cases the defendant was sentenced to life imprisonment.

Our previous position on whether diminished responsibility should be retained as a partial defence to murder

- 6.9 In our consultation paper on Partial Defences to Murder¹¹ we asked whether consultees favoured the abolition of diminished responsibility as a partial defence to murder. Only one consultee favoured abolition of the defence if the mandatory life sentence were to be retained.
- 6.10 In our report, we recommended that, so long as there is a mandatory sentence of life imprisonment for all those convicted of murder, there should be a partial defence of diminished responsibility to reduce murder to manslaughter.¹²
- 6.11 We expressed no firm view as to whether the defence should be abolished if the mandatory life sentence were to be abolished.

Our current position

A partial defence to “first degree murder”?

- 6.12 After we published our report, the Victorian Law Reform Commission (“the VLRC”) published a report¹³ in which it considered whether it should recommend the introduction of a partial defence of diminished responsibility. The VLRC concluded that the defence should not be introduced in Victoria.¹⁴ At the same time, it recommended that the partial defence of provocation should be abolished¹⁵ partly because of the ease with which the plea could be used by violent and easily angered men. The VLRC’s conclusion was an important one:

⁷ Mental Health Act 1983, s 41(1).

⁸ Partial Defences to Murder (2004) Law Com No 290, Appendix B.

⁹ Of the 126, 118 were pleas of diminished responsibility that were accepted by the prosecution. Of the 157 cases that Professor Mackay studied, the prosecution refused to accept the plea in 36. In only 8 of the 36 did the jury return a verdict of guilty of manslaughter on the basis of diminished responsibility. Of the other 28 cases, the jury convicted the defendant of murder in 22 cases, while in six cases a verdict of manslaughter was returned but not on the basis of diminished responsibility.

¹⁰ Partial Defences to Murder (2004) Law Com No 290, Appendix B, Table 12c.

¹¹ Consultation Paper No 173.

¹² Partial Defences to Murder (2004) Law Com No 290, para 5.11.

¹³ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004).

¹⁴ *Ibid*, 243 (recommendation 45).

¹⁵ *Ibid*, 58 (recommendation 1).

If provocation were to be abolished, in accordance with the Commission's recommendations, diminished responsibility could be used as a replacement defence. This may be of particular concern in cases involving men who kill their female partners at the end of a relationship. Since the Commission's view is that provocation should be abolished, in part because of the inappropriate use of the defence by men who kill in the context of sexual intimacy, it would be illogical to create a new defence which might have many of the same defects to take its place.¹⁶

- 6.13 Professor Susan Edwards has gone so far as to say of diminished responsibility as a partial defence:

Whichever way, reasonable man or unreasonable man, essentially what we have in this defence is moral culpability wrapped up in psychiatric nosology where instead anger, and rage and jealousy are the sickness.¹⁷

- 6.14 However, as Professor Mackay has pointed out to us, provocation and diminished responsibility each has a different rationale. So, it is not obvious that criticisms of the way one defence works necessarily spill over into criticism of the way that the other may work.

- 6.15 Further, Professor Mackay's findings do not support the view that the defence operates in England and Wales in a gender discriminatory fashion. His research reveals no actual bias in favour of male and against female defendants pleading diminished responsibility.¹⁸ His findings are supported by those which we made as a result of studying judges reports on 510 male defendants convicted of murder between 1997 and 2003 and 184 female defendants convicted of murder between 1974 and 2003.¹⁹

- 6.16 Accordingly, we do not believe that a case has been made out for abolishing diminished responsibility as a partial defence to murder on the grounds that it operates in England and Wales in a gender discriminatory way. The defence is capable of benefiting both women and men charged with murder. For that reason, its continued existence was supported by, for example, Rights of Women, who told us that the defence:

... needs to take into consideration the effects of a domestic violence situation, which can lead to a woman not being able to control her physical acts with rational judgement due to an abnormality of mind brought on by continued and threatened abuse Despite its problems we do believe that there should be a defence of diminished

¹⁶ *Ibid*, para 5.131. It should be noted that there is no mandatory life sentence for murder in Victoria, making it easier to recommend that no partial defence, or lesser offence, should exist to accommodate a provoked killing or a killing attributable to diminished responsibility.

¹⁷ S M Edwards, *Sex and Gender in the Legal Process* (1996) 402.

¹⁸ We detailed the findings of his research in *Partial Defences to Murder* (2004) Law Com No 290 at paras 5.32-5.42.

¹⁹ *Partial Defences to Murder* (2004) Law Com No 290, Appendix D.

responsibility if the definition is changed to be more of a use than a hindrance

- 6.17 Cases where the suspicion is that the offender killed out of jealousy or anger, seeking to dominate or punish a partner or former partner, need to be understood as ones in which the jury should be encouraged to take a robust approach to the issue of causation. Was the abnormality of mental functioning *really* a substantial cause of the defendant's conduct if other factors were at work? Or, were the other factors, jealousy, anger, a desire to dominate or punish, the real or predominant explanation, with the abnormality of mind being a minor background factor of inadequate moral significance to affect the verdict?
- 6.18 Those who commit intentional homicide only because of a severe mental disorder do not deserve to be labelled as "first degree murderers". In this respect Professor Mackay's findings in relation to the use of hospital orders are very significant. As noted above, in 49.2% of the cases in his study that resulted in a conviction of manslaughter on the grounds of diminished responsibility, the defendant was made the subject of a hospital order without limit on time.
- 6.19 Moreover, our research into 'lifers' released less than ten years after beginning their sentence shows that the influence of mental disorder at the time of the offence was sometimes a significant factor in the decision to release them early if they were not dangerous.²⁰ It would not be right to increase the numbers of offenders given the mandatory sentence only for them to be released within what may be (for good reasons) a relatively short period. Similarly, it would be a retrograde step if defendants who hitherto have been made the subject of a hospital order without limit on time had to receive the mandatory life sentence and rely on the Home Secretary's administrative powers to effect a transfer to a mental hospital.
- 6.20 We believe that diminished responsibility should continue to operate as a partial defence in cases where the sentence for murder is a mandatory sentence of life imprisonment. Accordingly, **our provisional proposal** is that diminished responsibility should be a partial defence to "first degree murder".

Should diminished responsibility reduce "first degree murder" to "second degree murder" or to manslaughter?

- 6.21 Under the current law, diminished responsibility reduces murder to manslaughter. The offence of "first degree murder" that we are proposing would, unlike the current offence of murder, be confined to intentional killing. We believe that the seriousness of an intentional killing, even if there is powerful mitigation, is such that it would be wrong to permit diminished responsibility to reduce "first degree murder" to any lesser offence than "second degree murder". **[Question 1]**
- 6.22 **Our provisional proposal** is that the partial defence of diminished responsibility should reduce "first degree murder" to "second degree murder". **[Provisional proposal 1]**

²⁰ See Appendix E.

A partial defence to “second degree murder”?

- 6.23 In our report on Partial Defences to Murder²¹ we considered in detail the arguments for and against the retention of diminished responsibility as a partial defence to murder should the mandatory sentence of life imprisonment be abolished.²² However, we declined to express a firm view, noting that although the preponderance of opinion was in favour of retaining the defence even if the mandatory sentence was abolished, it was not an overwhelming preponderance. We also observed that some respondents, although favouring the retention of the defence, expressed reservations about the way that it currently operates.²³
- 6.24 We do not intend to set out again all the competing arguments. However, we do highlight the arguments that persuaded the New South Wales Law Reform Commission (“the NSWLRC”) to recommend that diminished responsibility should be retained as a partial defence even after the mandatory sentence of life imprisonment had been abolished in New South Wales. According to the NSWLRC, the principal reason for retaining the partial defence is:

... the vital importance of involving the community, by way of the jury, in making decisions on culpability and hence enhance community acceptance of the due administration of criminal justice (including acceptance of sentences imposed) Moreover, 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 inevitably 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 an inappropriately harsh penalty in individual cases.²⁴

- 6.25 In addition, the NSWLRC thought that culpability for serious offences had to be measured according to the accused’s mental state at the time of committing the offence:

It is therefore essential that factors which significantly affect that mental state be taken into account in determining degrees of

²¹ Partial Defences to Murder (2004) Law Com No 290.

²² *Ibid*, paras 5.18-5.46.

²³ *Ibid*, paras 5.23-5.31.

²⁴ NSWLRC *Report on Partial Defences to Murder: Diminished Responsibility* (1997) Report No 82, para 3.11. It did not, however, persuade the New Zealand Law Commission (“the NZLC”) when it was considering what defences should be available to abused women who kill: *Report on Some Criminal Offences with Particular Reference to Battered Defendants* (2001) Report 73. The NZLC did not recommend (para 140) introducing a partial defence of diminished responsibility.

culpability. People who kill while in a state of substantially impaired responsibility should not be treated as “murderers”.²⁵

- 6.26 We have taken account of the considerations that the NSWLRC found persuasive. However, we believe that there are more compelling arguments supporting the opposite conclusion. In its response to our consultation paper on Partial Defences to Murder, the Royal College of Psychiatrists stated:

There is essentially a profound mis-match between the thinking of law and psychiatry (and psychology) and particularly where the law is considering verdict. It is here that the law adopts a “binary” approach, rather than a more graded approach as occurs in its consideration of sentencing Once psychiatry is placed solely within sentencing hearings, rather than hearings directed towards jury decisions about verdict, the effect of the mismatch between legal and medical thinking is all but abolished. In taking account of medical information by way of “mitigation”, or in pursuit of a sentence that reflects natural justice, a judge is not required to fit “dimensional” and “balanced” reality into one particular legal category or another.

- 6.27 We agree with this analysis. Further if, as the Royal College maintains, in many homicide cases psychiatrists “are pushed by the way the law is constructed into disagreement and convoluted argument”, the value of a jury verdict becomes less obvious.

- 6.28 In addition, there is no logic in having a partial defence based on mental condition for “second degree murder” but not for other lesser offences. If the NSWLRC was correct in saying that the defence properly reflects different degrees of culpability then it should also apply to other offences. The reason it is a partial defence to only murder is because it was introduced, not to reflect different degrees of culpability, but in order to enable the courts to avoid imposing the mandatory sentence for murder in cases where there was powerful mitigation. For all other offences mitigation is exclusively a matter for the judge at the sentencing stage.²⁶

- 6.29 No doubt there is an argument that, if labels are important, no one should be labelled a murderer (not even a “second degree murderer”) if a substantial cause of their conduct was an abnormality of mental functioning. We see the force of this argument, but we find it to be somewhat fastidious. “Manslaughter” is also a significant label; but it does not necessarily follow that someone who commits ‘motor-manslaughter’ only through diminished responsibility should for that reason have the offence reduced to causing death by dangerous driving. We think that such logic is over-refined.

- 6.30 We accept that sentences imposed for “first degree murder” and “second degree murder” would be likely to attract widespread scrutiny by the media and the

²⁵ NSWLRC, *Report on Partial Defences to Murder: Diminished Responsibility* (1997) Report No 82, para 3.18.

²⁶ No consultee to the Partial Defences to Murder Consultation Paper who supported retention of diminished responsibility as a partial defence suggested that it should be extended to other offences.

public. However, we believe that the concerns expressed by the NSWLRC as to public confidence in sentencing can be addressed.

- 6.31 First, we believe that the public will recognise that “second degree murder”, while a very serious offence, is not as serious as “first degree murder”. They will therefore understand a judge imposing a lesser sentence for “second degree murder”. By contrast in New South Wales there are no “degrees” of murder.
- 6.32 Secondly we envisage that, should our proposals for a new structure of homicide offences be implemented, the Sentencing Guidelines Council (chaired by the Lord Chief Justice of England and Wales), would issue sentencing guidelines for the offences of “second degree murder” and manslaughter that we are proposing. The public will be aware that the guidelines will only have been published after a process of wide consultation while the guidelines themselves will encourage and facilitate consistent sentencing.
- 6.33 **Our provisional proposal** is therefore that diminished responsibility should not be a partial defence to “second degree murder”. **[Question 2] [Provisional proposal 1]**

Reformulating the definition of diminished responsibility

- 6.34 Turning to section 2 itself, the key issue is whether an abnormality of mind “substantially impaired [the defendant’s] mental responsibility for the killing”. The abnormality of mind must stem from one of the four causes set out in the section.²⁷ Section 2(2) places the burden of proof on the defence, but in practice, the plea is commonly simply accepted by the prosecution.²⁸
- 6.35 Although this is not stipulated, a trial judge can withdraw the issue from the jury where there is no evidence that the abnormality of mind stemmed from one of the causes set out in section 2. In theory, the judge could also withdraw the issue if there were no evidence that the abnormality of mind substantially impaired the defendant’s responsibility.
- 6.36 The wording of section 2 has been heavily criticised by judges, psychiatrists, and academic lawyers. Buxton LJ has described it as “disastrous” and “beyond redemption”.²⁹ The late Professor Griew said of it: “the wording is altogether a disgrace”.³⁰ Some consider the idea of a “substantial impairment of mental responsibility” to be nonsensical. Either one was responsible for killing someone, or one was not. “Responsibility” cannot be either enhanced or diminished. It is

²⁷ “[A] condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury”. Immaturity and the effect of traumatic events other than those involving injury are not included.

²⁸ House of Lords, Report of the Select Committee on Murder and Life Imprisonment, Vol II – Oral Evidence, part 1 (1988-1989) 115.

²⁹ In evidence given to the Law Commission: Partial Defences to Murder (2004) Law Com No 290, para 5.43 n 40.

capacity or culpability that can be enhanced or diminished, and that is doubtless how the “impairment of responsibility” wording is understood.

- 6.37 This is not a purely semantic issue. The reference to impairment of responsibility encourages tolerance of expert evidence on what should be in theory purely a jury question, namely whether the abnormality of mind substantially reduced the defendant’s culpability.³¹ Many psychiatrists regard their evidence as of primary relevance to sentencing decisions.³²
- 6.38 We propose that the definition be replaced by a version that is properly modernised, and that can take account of evolving diagnostic practice. **[Question 3]**
- 6.39 The requirement that diminished responsibility must stem from an abnormality of mind that has one of the stipulated causes has been heavily criticised. **[Question 5]** Even if the basic definition of diminished responsibility is not changed we believe that this requirement should be abolished. The causes stipulated in section 2 have no defined or agreed psychiatric meaning and so doctors may disagree on the cause of an abnormality. That may not trouble the prosecution unduly in its decision whether or not to accept a plea if there is clear evidence that the defendant was affected at the time of the killing by a serious abnormality of mind. It may, however, confuse a jury at trial.
- 6.40 Suppose that the jury accepts that medical evidence shows that the defendant was suffering from paranoid psychosis that gravely diminished his or her responsibility at the time of the killing. Should it then really matter whether they have been properly directed to consider if they are also persuaded in law by that same evidence that the psychosis can be attributed either to inherent causes, or to inducement by disease?³³ As Dr Madelyn Hicks³⁴ put it to us:

[A]ttempting to specify the cause of mental disorders ... is irrelevant, misleading, and in fact there are almost always multiple causes stemming from the interaction between genetic vulnerability and life events.

³⁰ E Griew, “Reducing Murder to Manslaughter: Whose Job?” (1986) 12 *Journal of Medical Ethics* 18, where it is also described as “quite shockingly elliptical”. Dr Madelyn Hicks, a Consultant Psychiatrist, has told us that “the drafting of this defence is very poor”. Dr B Mahendra, a Consultant Psychiatrist and Barrister, has commented: “The definition of mental disorder given in section 2(1) of the 1957 Act has been properly criticised. It appears to be outmoded and unnecessarily contentious at the same time”.

³¹ E Griew, “The Future of Diminished Responsibility” [1998] *Crim LR* 75, 85. The Law Commission’s research revealed that 70% of psychiatrists are drawn into expressing a view on the “ultimate issue”: *Partial Defences to Murder* (2004) *Law Com No 290*, para 5.51.

³² See the evidence of the Royal College of Psychiatrists, in: *Partial Defences to Murder* (2004) *Law Com No 290*, para 5.44.

³³ *Sanderson* (1994) 98 *Cr App R* 325.

³⁴ Consultant Psychiatrist, Honorary Lecturer, Institute of Psychiatry, King’s College London.

6.41 One study found that it was not uncommon for medical reports to fail to refer to the cause of an abnormality of mind altogether.³⁵ That is understandable. If the defendant was suffering from an abnormality of mind stemming from an underlying condition, it ought not to matter exactly what form the condition took, so long as it can be established, through medical evidence, that the abnormality of mind substantially impaired “responsibility”. As the New South Wales Law Reform Commission puts it:

The requirement to identify a specified cause adds unnecessary complexity to the defence ... the restriction of the defence to conditions arising from ... listed causes appears quite arbitrary and may generate a high level of complexity and confusion in relation to the expert evidence which is led in diminished responsibility cases.³⁶

Our provisional proposal, and the New South Wales solution

6.42 In New South Wales, the Crimes Amendment (Diminished Responsibility) Act 1997 largely adopts the recommendations that the NSWLRC made for reform of the diminished responsibility defence. The NSWLRC recommended a definition of diminished responsibility along the following lines:

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.³⁷

6.43 The first issue to consider is the one raised by the final and most important element, namely that the defendant’s mental functioning must be “so substantially impaired ... as to warrant reducing murder to manslaughter”. The NSWLRC saw virtue in this provision, in that they believed it would make it clear that this was a matter of moral judgement for the jury on which they might legitimately differ from the opinion of experts.³⁸ As the NSWLRC puts it:

Our reformulation requires the jury to decide whether murder should be reduced to manslaughter by considering the extent to which the

³⁵ S Dell, *Murder into Manslaughter: The Diminished Responsibility Defence in Practice* (1984) 39.

³⁶ NSWLRC, *Partial Defences to Murder: Diminished Responsibility* (1997) Report No 82, para 3.40.

³⁷ *Ibid*, para 3.43.

³⁸ *Ibid*, paras 3.42 & 3.57.

accused's capacity to understand events, or to judge, or to control his or her actions, was affected by reason of an underlying condition.³⁹

- 6.44 There is no 'ultimate issue' rule in New South Wales that prevents experts from giving evidence on whether the defendant's responsibility was diminished by substantial impairment of mental functioning. Even so, the NSWLRC believed its reformulation of the defence would make it clear that the ultimate issue was one of culpability for the jury, on which expert evidence would be irrelevant. Expert evidence would be relevant only to the nature of the defendant's abnormality of mental functioning (if any) and to whether it had the effect at the time of the offence of reducing the defendant's capacity to understand events.⁴⁰
- 6.45 Along similar lines, the Butler Report recommended for England and Wales that the ultimate issue should be whether, "in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter".⁴¹
- 6.46 We share the concerns of those who are uneasy with a test that, in effect, leaves an individual jury to set its own standard for reducing murder to manslaughter.⁴² That is the inevitable consequence of linking the degree of mental impairment with the question as to whether the offence ought to be murder or a lesser offence. There is considerable judicial dislike of such unstructured discretion, which merges a question of law with a question of fact, being given to the jury.⁴³ Bluntly, it looks like a 'cop-out', in which the law ducks the question whether the reduction from murder to manslaughter is to be on moral or medical grounds or, if on some combination of these, on what combination.
- 6.47 This may leave the expert in an uncomfortable position, professionally, in giving evidence.⁴⁴ In any case where there is evidence of mental disorder, the expert may well feel that his or her evidence should be slanted towards a conclusion that gives the sentencer maximum flexibility, namely conviction for a lesser offence of homicide. That will inevitably entail trespassing on the jury's territory.
- 6.48 It was for this reason that in our report on Partial Defences to Murder, our tentative re-formulation of the NSWLRC's criteria placed the emphasis on the need for the jury to find simply that the substantial impairment in mental functioning was a significant cause of the defendant's conduct. The question, at least provisionally, was whether:

[the] person's capacity to understand events, or judge whether his actions were right or wrong, or control himself was substantially impaired by an abnormality of mental functioning arising from an

³⁹ *Ibid*, para 3.58.

⁴⁰ *Ibid*, para 3.63.

⁴¹ *Report of the Committee on Mentally Abnormal Offenders*, (1975) Cmnd 6244, para 19.17.

⁴² *Partial Defences to Murder* (2004) Law Com No 290, para 5.56.

⁴³ See the responses to it in *Partial Defences to Murder* (2004) Law Com No 290, para 5.55.

underlying condition [a pre-existing mental or physiological condition ...], and the abnormality was a significant cause of the defendant's conduct⁴⁵

- 6.49 On this account, the expert's opinion on whether the abnormality of mind "substantially" impaired the defendant's capacity for control, judgement or understanding, and whether that impairment was a cause of the defendant's conduct is crucial.
- 6.50 What about the re-definition of the "abnormality of mind" requirement? We have already indicated that we favour dispensing with the need to show that abnormalities of mind have a stipulated cause. The NSWLRC's proposal also dispenses with such a requirement.
- 6.51 The NSWLRC thought that "abnormality of mental functioning" was preferable to "abnormality of mind" because the latter phrase "is an ambiguous and not particularly meaningful term".⁴⁶ The NSWLRC, with the agreement of forensic psychiatrists and psychologists, thought that their preferred term "would instead expressly require experts to consider the way in which an accused's mental processes were affected by reason of some underlying or pre-existing condition".⁴⁷
- 6.52 We are minded to agree that the term "abnormality of mental functioning" is an improvement on "abnormality of mind". The idea of mental functioning places a clear emphasis on the defendant's general capacity to understand the nature of his or her interactions with others, to appreciate the (in)appropriateness of responding to different kinds of stimuli in certain ways, and so forth.
- 6.53 As the NSWLRC indicates, however, it is important to link any abnormality of mental functioning with the influence of some kind of "underlying condition". The need to show that the abnormality of mental functioning stems from an "underlying condition" is tied to the need for a plea of diminished responsibility to be backed by medical evidence, in that it is the pre-existing condition that must be recognised by medical science as a diagnosable entity. It is worth citing what the NSWLRC says about this in full:

By "abnormality of mental functioning", we are really referring to seriously disturbed mental processes, caused by an underlying condition, which affect the accused's capacity in [the relevant] respects, and not simply to any behaviour which seems unusual or bizarre. It is considered that, under this formulation, the defence might typically apply to people who, for example, suffer from severe

⁴⁴ A matter sensitively explored by psychiatrist Professor Nigel Eastman, "The Ethics of Clinical Risk Assessment and Management: Developing Law and the Role of Mental Health Professionals", in N Gray, J Laing, and L Noaks, *Criminal Justice, Mental Health and the Politics of Risk* (2002) chapter 4.

⁴⁵ *Partial Defences to Murder* (2004) Law Com No 290, para 5.97 (punctuation altered).

⁴⁶ NSWLRC, *Partial Defences to Murder: Diminished Responsibility* (1997) Report No 82, paras 3.40 and 3.49.

⁴⁷ *Ibid*, para 3.50.

depression or have an intellectual disability, or hypomanic people, but only if they can prove that by reason of these conditions, their capacity to judge, understand, or control their actions was substantially affected.⁴⁸

- 6.54 In its primary sense, an “underlying” condition is a mental condition that obtains independent of the external circumstances that gave rise to the commission of an offence. However, our understanding of “underlying” or “pre-existing” condition is that it will include cases in which the origins of the condition itself lie in adverse circumstances with which the offender has had to cope.
- 6.55 For example, depression and post-traumatic stress disorder are prevalent mental health consequences of intimate-partner violence, of (in lawyers’ terms)⁴⁹ cumulative provocation and other forms of ill-treatment leading up to – perhaps over many years – the killing.⁵⁰ These abnormalities of mental functioning have been shown to persist, in varying degrees of intensity, in about half of the number of women affected for up to a decade or longer after the women in question have left an abuser.⁵¹ It would be unfortunate, to say the least, if the connection between the abuser’s treatment of the defendant and her mental functioning were to give rise to an argument that the depression or post-traumatic stress disorder were not underlying conditions. We do not believe that a requirement that an abnormality of mental functioning stem from an “underlying” condition would create legal space for such arguments.
- 6.56 Similarly, in Part 8, we will argue that any reduction of “first degree murder” to a lesser offence when a depressed carer has killed the victim should be effected in whole or in part through a reformed diminished responsibility plea. We believe that the path to mitigation will rightly be made easier, in this regard, by the removal of the need to show that an abnormality of mind (of “mental functioning”, in our formulation) had one of the specified causes. Having said that, the connection between the external circumstance (the burden of long-term care) and the internal ‘cause’ (the severe depression) should not be regarded as weakening the claim in appropriate cases that the depression amounted to an “underlying condition”.
- 6.57 That brings us to the three ways in which the NSWLRC recommended that the effect of the abnormality of mental functioning should be described, namely in terms of an impact on the capacity to:
- (a) understand events; or
 - (b) judge whether that person’s actions were right or wrong; or
 - (c) control himself or herself.

⁴⁸ *Ibid.*

⁴⁹ See M Wasik, “Cumulative Provocation and Domestic Killing” [1982] Crim LR 29.

⁵⁰ See Jacquelyn C Campbell, “Health Consequences of Intimate Partner Violence” (2002) 359 *The Lancet* 1331, 1333.

⁵¹ S Woods, “Prevalence and Patterns of Posttraumatic Stress Disorder in Abused and Postabused Women” (2001) 21 *Issues in Mental Health Nursing* 309.

6.58 The NSWLRC recognised that the inclusion of (c) might be controversial because of the well-known difficulty in distinguishing the claim ‘he or she could not control his or her conduct’ from the reality that ‘he or she chose not to control his or her conduct’. Sir James Stephen expressed the same worry, in relation to the development of the insanity plea, over 100 years ago:

I should be sorry to countenance the notion that the mere fact that an insane impulse is not resisted is to be taken as proof that it is irresistible. In fact such impulses are continually felt and resisted, and I do not think they ought to be any greater excuse for crime than the existence of other motives, so long as the power of control or choice ... remains.⁵²

6.59 However, the NSWLRC decided to include (c) in order to avoid the unfair exclusion of, for example, “brain-damaged people, hypomanic people, or people suffering from auditory hallucinations”.⁵³ We agree that, without (c), the definition would be too narrow.

6.60 It must be said that (a) and (b) are reminiscent of the terminology used in English law’s outmoded definition of insanity. In order to fulfil this definition, a defect of reason must lead the defendant either not to know the nature or quality of the act (the first criterion), or that that act is wrong (the second criterion).⁵⁴ None the less, a “substantial impairment” of someone’s capacity to understand events, for example, is not the same as an inability to understand them *at all*, as required by the insanity defence. So, the focus in (a) and (b) is not open to the same kinds of objections that have been levelled at the definition of insanity. The fact that the criteria of the NSWLRC have attracted widespread support from the medical profession shows that they are unlikely to be interpreted and understood in the restrictive way that similar criteria in the definition of insanity have been understood.

6.61 For these reasons, **we provisionally propose** a version similar but not identical to the revised NSW law. [**Provisional proposal 2**]

Other reform options and alternative definitions of diminished responsibility

German law

6.62 Whilst there are always problems when relying on translations of legal language, it is worth setting out the gist of articles § 20 and § 21 of the German Criminal Code to set alongside the NSWLRC’s proposals. § 21 states that if, at the time of the commission of the offence, the perpetrator’s ability to appreciate the wrongfulness of his or her conduct or his or her ability to act in accordance with such appreciation is substantially diminished because of one of the reasons indicated in § 20, his or her punishment may be mitigated.

⁵² J F Stephen, *A History of the Criminal Law of England*, vol ii (1883) 172.

⁵³ NSWLRC, *Partial Defences to Murder: Diminished Responsibility* (1997) Report No 82, para 3.54.

⁵⁴ *McNaughton’s Case* (1843) A Car & Kit 130n.

6.63 § 20 refers to defendants who satisfy § 21 “by reason of a pathological emotional disorder, severe mental disturbance, severe mental retardation or some other severe mental abnormality”. Arguably, this provision has been construed too generously in that “severe mental disturbance” can be proven by, for example, proof of severe intoxication. It must be remembered, however, that (as in French law) the primary relevance of this provision is to sentencing and not offence categorisation. It is the effect these conditions must have, as expressed in § 21, that is important.

The Mental Health Act 1983

6.64 It might adequately modernise the definition of diminished responsibility if the abnormality of mental functioning requirement (and the causes it must stem from) were replaced by, or defined in terms of, or a variation on, the formula employed in section 1(2) of the Mental Health Act 1983. This was the proposal in clause 56(1) of the Draft Criminal Code.⁵⁵

6.65 The Draft Code defines a mental disorder as

[serious] mental illness, [severe] arrested or [very] incomplete development of mind, [serious] psychopathic disorder, and any other [severe] disorder or disability of mind.⁵⁶

The Draft Code added, however, that intoxication was not to be regarded as falling within “any other disorder or disability of mind”.

6.66 The Mental Health Act formula was not, of course, directed at the needs of the criminal justice system. However, an attempt to confine abnormality of mind or mental disorder within stricter bounds may run the risk that a legislative definition will become outmoded as medical knowledge about the mind develops.⁵⁷

6.67 It may be that the addition of “serious”, “severe”, and “very” as restricting conditions is unnecessary so long as one insists that the mental disorder or disability be the main or significant cause of the defendant’s conduct. There is a case for saying that the diminished responsibility test should not be difficult to satisfy because the offender’s relative culpability can be reflected in sentence.

6.68 What is more, a less restrictive definition makes it easier to accommodate deserving cases that might have to be excluded if a stricter view was taken. These might include:

- (1) a ‘mercy’ killing performed without the consent of the victim but while the offender was in a severe state of depression;
- (2) the killing of an abuser by a battered woman who was similarly severely depressed;

⁵⁵ A Criminal Code for England and Wales (1989) Law Com No 177.

⁵⁶ The words “serious”, “very” and “severe” have been inserted as possible modifications to the wording of the Mental Health Act 1983.

⁵⁷ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), para 5.19.

- (3) a case in which a very young person has killed in circumstances suggesting incomplete moral development of mental functioning.

It needs to be kept in mind, of course, that success in the plea still leaves the defendant facing a sentence of anything up to life imprisonment.

- 6.69 A less restrictive definition might also make the outmoded separate offence of infanticide redundant. This offence is committed when a mother kills her child whilst the child is still under 12 months old, whilst the balance of the mother's mind is disturbed by reason of incomplete recovery from the effects of child-birth, or by reason of the effects of lactation consequent upon birth.⁵⁸ The NSWLRC saw considerable merit in merging infanticide with diminished responsibility:

[W]e will be recommending that the offence/defence of infanticide be abolished in New South Wales, on the basis that it reflects outmoded and unsound medical and psychiatric concepts, is out of step with the jurisprudence of gender equality, and is arbitrarily restrictive ... our recommended reformulation of the defence of diminished responsibility will be sufficient to accommodate cases justifiably falling within the existing infanticide provisions. Disorder such as depression or post partum paranoid psychosis, which may form the basis of a plea of infanticide, would be characterised under our recommended reformulation of diminished responsibility as an abnormality of mental functioning⁵⁹

- 6.70 However, there may significant drawbacks in taking this path. It is not clear that the Mental Health Act definition, drawn up for the purposes of civil law, would be appropriate for determining criminal culpability. Moreover, when laws are linked together in this way, difficult questions are always likely to arise over whether a change in one necessitates a change in the other. That does not make for certainty and predictability.

Children who kill

- 6.71 It would be appropriate to begin by citing a passage from a JUSTICE Working Party paper, in which the authors conclude:

The issue of how to deal with children who kill is an emotive one, which must seek to respect the suffering of the victim's family, maintain public confidence in the rule of law, and simultaneously demonstrate the state's responsibility to protect children and ensure their development, even though the child may have committed the most heinous of crimes. Achieving such a balance will never be easy.⁶⁰

⁵⁸ Infanticide Act 1938. The topic is considered more fully in Part 9 of this paper.

⁵⁹ NSWLRC, *Partial Defences to Murder: Diminished Responsibility* (1997) Report No 82, paras 3.40 and 3.23.

⁶⁰ JUSTICE, *Children and Homicide: Appropriate Procedures for Juveniles in Murder and Manslaughter Cases* (1996) 25.

- 6.72 Those under 17 years of age are responsible for, on average, around 30 of the 850 or so homicides – mainly murder and manslaughter – in any given year. Our main focus will be on young offenders over ten years of age (the age of criminal responsibility) but we have no fixed opinion on what the upper age limit should be for special measures (if any) that may be introduced for these offenders.
- 6.73 At present, the vast majority of those convicted of murder will, like adult murderers, serve a minimum of ten years in prison before being released on licence. Whatever changes may come about in the re-structuring of the law of homicide as it applies to younger offenders, it will be important that public confidence in the sentences given to juvenile offenders is maintained.

Reform of the partial defence of diminished responsibility

- 6.74 Section 2 of the Homicide Act 1957 does not make specific provision for children who kill. The omission is due to the fact that children's more limited capacity to know right from wrong, to understand the impact of their actions on others, to appreciate the true significance of 'killing', and so on, is explained by their very normality rather than an abnormality of mental functioning. Reduced capacity is (supposedly) reflected in the age of criminal responsibility rather than in the reach of the 'diminished' responsibility defence.
- 6.75 One argument against this robust view is that it is already the case that someone aged (say) 20, but with a mental age of ten, can plead diminished responsibility as they suffer from "arrested or retarded development of mind" under section 2 of the Homicide Act 1957. Logically, someone who is *in fact* ten years old should be able to plead that defence for the same essential reason, namely that their mental age may have substantially impaired their responsibility for the killing.
- 6.76 In permitting this to happen, the law would not be committing itself to the view that *all* those aged ten do not fully understand the consequences of what they are doing. It would simply be allowing a defendant to make this claim in particular cases when the claim was supported by medical evidence. In a previous response to the Law Commission, experts on child psychiatry have indicated that important light can be shed on children's sense of moral responsibility by clinical assessment.⁶¹
- 6.77 Another argument is that, at least in some cases, it can be hard to differentiate normal developmental immaturity from an abnormality of mental functioning. Quite conceivably, both may be factors in the commission of an offence by a child. As the American Supreme Court has recently observed, in a ruling that the execution of offenders whose capital crimes were committed when they were under 18 was unconstitutional:

⁶¹ Royal College of Psychologists, response submitted to the Law Commission, Partial Defences to Murder (2004) Law Com No 290, para 3.133: "[When] children [are] facing criminal charges ... certain assumptions are made about moral understanding. Moral development is also a crucial issue to be addressed within clinical psychology 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."

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others: *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* 701-706 (4th ed. text rev. 2000).⁶²

- 6.78 Further, the argument for dealing with any special problems posed by child defendants solely through the age of criminal responsibility only seems irresistible if one takes the view that no particular measures, such as special (partial) defences, are appropriate for murder cases. Such measures have been found appropriate in murder cases for several hundred years (as in the case of the provocation defence).
- 6.79 When we reviewed partial defences to murder, a number of our consultees said that it would be right to consider whether there is a case for special measures in the case of child defendants in murder and homicide cases, above and beyond the measures which already exist.⁶³
- 6.80 In some instances, a child's culpability may be significantly less in respect of a killing that would attract severe censure if perpetrated by an adult. As between individual children, there may also be considerable variation in the rate at which moral development occurs. Even a child who admits intending "to kill" may not have understood the full significance of killing, still less of notions such as the sanctity of life. As Professor Bailey has put it, "[y]oung children may well appreciate the difference between right and wrong but yet not understand the seriousness of some forms of irresponsible behaviour".⁶⁴
- 6.81 It may not be wrong, then, to say that young children's moral responsibility can be "diminished", in the sense that it is not as well-developed as that of a mature adult. As Professor Thomas Grisso has argued:

Even when adolescents' cognitive abilities are similar to adult capacities, theory suggests that they will deploy those abilities with less dependability in new, ambiguous, or stressful situations, because the abilities have been acquired more recently and are less well established.⁶⁵

⁶² *Roper v Simmons* (2005) 112 SW 3d 397 (affd) per Kennedy J.

⁶³ Partial Defences to Murder (2004) Law Com No 290, paras 5.102-5.105.

⁶⁴ S Bailey, "Assessment of Criminal Responsibility in Minors: A Discussion Paper" (September 2005).

⁶⁵ T Grisso and R G Schwartz, *Youth on Trial* (2000) 158-159.

6.82 Some children who kill may be psychologically disturbed in a sense already captured by section 2 of the Homicide Act 1957.⁶⁶ However, the matter may not be so simple. We were told by a highly experienced psychotherapist who works with children who have committed violent crimes that there is a link between highly aggressive behaviour and lack of capacity for self-control in such children and their failure in childhood to form strong and healthy bonds with those close to them, often through neglect.⁶⁷ She told us, further:

At the moment, no distinction is made between those who are physiologically hyper-agitated, and those who are not. In the eyes of the law, all poor controls are symptomatic of poor moral judgment, unless there is a recognisable psychiatric disease However it is possible to ascribe poor behaviour control to a hyper-aroused physiological stress response, which in turn leaves no room for an objective judgment of right and wrong. The brain becomes all consumed with the stress, leaving no room for measured judgments of situations. The hyper-aroused state is an organic brain phenomenon and can be identified through hormonal tests and enhanced imagery of the brain through brain scanning There is some suggestion that [some of] these children begin to have diminished functioning in their frontal lobe, an area for finer judgments. Instead they operate from the more primitive parts of their brain, where the currency is one of self-centred survival at the expense of all others In this way, the child who has committed an act of violence could be described as having diminished responsibility due to the impact on the capacity to control arousal and stress responses.⁶⁸

6.83 It is, of course, possible that problems of this kind may be reduced through the process of maturation and the forming of new relationships. It may be wrong, though, to ignore their influence when they are combined with the natural lack of full moral control and understanding that is characteristic of childhood.

6.84 Accordingly **we provisionally propose** that “developmental immaturity” should become in itself a ground on which a verdict of diminished responsibility can be brought in, alongside or combined with an abnormality of mental functioning.
[Question 6] [Provisional proposal 2]

6.85 If the above proposal is accepted, a question may arise over whether it should be possible to raise “developmental immaturity” as a source of diminished responsibility in the case of an adult. It can be argued that there should not be special rules which depend on a defendant’s chronological age. Against that, it could be argued that the provision that we have in mind should be primarily intended for children and young people and that extending it to adults could

⁶⁶ JUSTICE, “Children and Homicide: Appropriate Procedures for Juveniles in Murder and Manslaughter Cases” (1996) 20.

⁶⁷ Ms Camila Batmanghekidjh, Director, Kids Company. See also JUSTICE, “Children and Homicide: Appropriate Procedures for Juveniles in Murder and Manslaughter Cases” (1996) 20.

⁶⁸ See further D J Smith, “Crime and the Life Course”, in M Maguire, R Morgan and R Reiner, *The Oxford Handbook of Criminology* (3rd ed 2002).

provide too easy a partial defence to young aggressive adults who fail to control their emotions. [Question 7]

An alternative solution?

- 6.86 Some people have argued that, alternatively, the distinction between murder and manslaughter should be abolished in respect of young offenders, and a general “culpable homicide” offence should be put in their place. “Culpable homicide” would be committed whenever the defendant killed with the fault element for either murder or manslaughter.
- 6.87 The argument in favour of this solution is that it may be hard to tell whether very young offenders had a proper appreciation of the moral significance of their actions, in a way that engages the fine distinctions between murder and manslaughter. The argument is that there is likely to be a mismatch between the sophistication of the laws of homicide (both in terms of offence and defence), and the lack of sophistication of the defendant. A child must be capable of explaining the circumstances in which the crime was committed in a way that his or her lawyers can turn into an appropriate plea. That may not always be possible. As the European Court of Human Rights put it, speaking of the possibility of a fair trial for a young child:

The Court does not consider that it was sufficient for the purposes of Article 6(1) that the applicant was represented by skilled and experienced lawyers ... it is highly unlikely that the applicant would ... given his immaturity ... have been capable ... of co-operating with his lawyers and giving them information for the purposes of his defence.⁶⁹

- 6.88 These observations are backed up by research that shows that, without a developed ability to take another person’s perspective, the information given by a child may change each time an explanation for conduct is given to a person in authority. That would, of course, normally count against a suspect, ostensibly showing that they cannot be trusted. When a child is involved, this would be the wrong inference to draw. Furthermore, the child’s inability to take another person’s perspective may be equally likely to hamper his or her advisers in discovering the facts that should be relied on in making a defence.⁷⁰
- 6.89 If this alternative solution is adopted, the consequences for sentencing are likely to be considerably more marked than if our provisional proposal is adopted. As we have indicated, the overwhelming majority of young offenders serve ten years or more in prison for murder, and then, of course, remain on licence for the rest of their lives. It seems likely that if the distinction between murder and manslaughter were to be abolished, shorter determinate prison sentences, on average, would be imposed. It is very unlikely that this would be the consequence of adopting our provisional proposal, which simply involves reforming diminished responsibility, because this defence would probably only be successfully run in a very small

⁶⁹ *V v UK* (2000) 30 EHRR 121, [90]. See also M Ashford and A Chard, *Defending Young People in the Criminal Justice System* (2nd ed 2000).

⁷⁰ S. Bailey, “Assessment of Criminal Responsibility in Minors: A Discussion Paper” (September 2005), 9.

number of cases involving children. Even then, a substantial sentence of imprisonment might be imposed.

- 6.90 Moreover, it may be said that the more radical alternative tips the balance too far in favour of 'welfarist' considerations away from 'just deserts-based' considerations. This can be illustrated by considering the case of *DPP v Camplin*,⁷¹ and a variation on it.
- 6.91 In *Camplin*, the defendant (D) was a fifteen-year-old boy, who said he had been raped by the victim (V). D said that when V taunted him about the rape, he lost his self-control and killed V. It was held that the question for the jury was whether an ordinary boy of D's age might also have lost self-control and killed in the face of such a provocation. It is easy to understand how a jury might think it right to convict D of an offence less grave than "first degree murder" in such circumstances. On a 'just deserts' view, D did not *deserve* to be convicted of "first degree murder". By way of contrast, on a 'welfarist' view D is to be convicted of a lesser offence of homicide, such as 'culpable homicide', simply because he is 15 years old. On this view, just deserts are irrelevant.
- 6.92 Suppose, however, that the 15 year old boy had raped the older man, gloated about it and then intentionally killed the older man. On the deserts-based view, the boy should be convicted of "first degree murder", if he has no other defence such as diminished responsibility. On the 'welfarist' view, however, the boy's seemingly much greater culpability makes no difference to the offence. The boy is still to be convicted of a lesser offence of homicide, simply because the boy is 15 years old.
- 6.93 Supporters of the second, 'welfarist', option will say that in this example the boy's greater culpability can be reflected in the sentence received. They might also argue that hard cases should not sustain bad law, and that in general younger defendants do not commit murder in circumstances manifesting this degree of culpability.
- 6.94 A more general reform of the law along the lines of this alternative has the backing of Victim Support. Victim Support has criticised the distinction between murder and manslaughter, as the existence of defences (like diminished responsibility) that take offenders from one category to the other, "serves only to create a situation where defendants have to find adversarial 'excuses' for their intent to kill".⁷²
- 6.95 Nonetheless, we are not provisionally minded to adopt this alternative approach.
- 6.96 Suppose that anyone under the age of 18 who intentionally kills is guilty of culpable homicide, not murder or manslaughter. Under this approach someone who kills intentionally on his or her 18th birthday can be convicted of first degree murder and will receive the mandatory life penalty, but had that person committed an identical killing on the day before, they could have been convicted only of culpable homicide. That seems wrong.

⁷¹ [1978] AC 705.

⁷² Submission to the Law Commission, Partial Defences to Murder (2004) Law Com No 290. See Part 1 for further discussion.

6.97 **Our provisional proposal** is that evidence of developmental immaturity should become, in itself or in combination with evidence of abnormality of mental functioning, a potential basis for establishing a plea of diminished responsibility. **[Provisional proposal 2]**

6.98 We are asking, further, whether an upper age limit should be put on the use of the developmental immaturity ground for establishing diminished responsibility. **[Question 7]**

The role of the expert witness

6.99 Whichever side may have commissioned a particular expert, that expert's overriding duty is to the court. This is, in effect, a requirement imposed by Criminal Procedure Rule 1. Rule 1.1 states that "the overriding objective of this new code is that criminal cases be dealt with justly". Rule 1.2(1) says that "each participant, in the conduct of the case, must ... prepare and conduct the case in accordance with the overriding objective" [emphasis added].

6.100 We have been assisted by Dr Madelyn Hicks⁷³ in setting out the broad range of issues and questions on which an expert should be asked to give evidence on a plea of diminished responsibility:

- (1) The psychiatrist would explain the defendant's psychiatric and medical history and the diagnosis or diagnoses. The history would include when the defendant's conditions began, as this is relevant to the pre-existing or 'underlying' nature of the defendant's condition.
- (2) The psychiatrist would specify what information was available and the information source (for example, the patient's report; hospital records; observations by the psychiatrist; and reports from family members or hospital staff).
- (3) The psychiatrist would state what information there is in regard to the defendant's mental functioning at the time of the offence (understanding events; judging right and wrong; controlling himself). What do the clinical evidence and history suggest, if anything, about the defendant's mental functioning at the time of the event?
- (4) The psychiatrist would offer clinical opinion and historical information as to the nature and degree of the relationship between mental functioning at the time of the event and the defendant's psychiatric conditions, if there is an adequate basis on which to offer such an opinion (in some cases there may not be adequate information for a confident clinical opinion on the relationship between a mental illness and a specific event).

6.101 The main – 'ultimate' – issue on which the jury must be satisfied is whether the defendant's mental abnormality "substantially impaired" his or her responsibility for the killing. The evidence suggests that, in practice, judges are prepared to permit, and psychiatrists are prepared to give, expert evidence on this ultimate

⁷³ Consultant Psychiatrist, Honorary Lecturer, Institute of Psychiatry, King's College London.

issue.⁷⁴ This is for the simple reason that juries will lack sufficient guidance without such evidence. Too rigid an insistence that experts avoid seeking to shed light on the more-or-less substantial impairment of mental responsibility would mean, as Professor Mackay puts it, that:

the jury would have to make a finding of murder or manslaughter without the reassuring cushion of having had experts inform them that a diminished responsibility finding is appropriate.⁷⁵

6.102 In practice, most successful pleas of diminished responsibility are successful because they are accepted by the prosecution. So, it might be suggested that the role of the jury in deciding whether the defendant was suffering from diminished responsibility should be questioned. There has always been a risk that the jury will be swayed in its judgment by factors pointing to a murder conviction that are in theory extraneous, such as a case's notoriety or the manner of the killing.⁷⁶

6.103 Our provisional view, however, is that experts should be permitted to give evidence on the question as to whether the defendant's abnormality of mental functioning was a substantial cause of his or her conduct, but that the judge should continue to make it clear that the ultimate decision is for the jury. The jury hears, and takes a view on, *all* the available evidence. By way of contrast, the information available to the psychiatrist, at the time that his or her opinion is written, may be much more limited. This reflects the fact that, as Professor Eastman has explained:

Psychiatry and law can be seen as two disciplines, strictly originating at poles of a continuum but operating sometimes elsewhere on it. At one pole is psychiatry as medical science, operating through strict adherence to a scientific model and directed solely at patient welfare. At the opposite pole is law ... concerning itself with justice and due process.⁷⁷

6.104 Moreover, the timing and character of the medical examination of the defendant are dictated by the needs of the trial process. We have been informed that it can be hard to ensure proper observation and accurate diagnosis except when it is conducted over an extended period, whilst the defendant is in an environment favourable to medical observation and diagnosis. This cannot easily be done before trial, when the defendant is almost certain to be in prison. One or two prison interviews may not always prove to be a satisfactory means of reaching reliable conclusions about the defendant's mental functioning.⁷⁸ As one trial judge

⁷⁴ See the discussion in R D Mackay, *Mental Condition Defences in the Criminal Law* (1995), 192.

⁷⁵ *Ibid*, 203.

⁷⁶ See the discussion of the Sutcliffe and Nilsen cases in R D Mackay, *Mental Condition Defences in the Criminal Law* (1995), 193.

⁷⁷ Professor N Eastman, "The Ethics of Clinical Risk Assessment and Management: Developing Law and the Role of Mental Health Professionals", in N Gray, J Laing, and L Noaks, *Criminal Justice, Mental Health and Politics of Risk* (2002), 53.

⁷⁸ See the case study contained in Appendix F of this Paper.

put it, “The difficulty lies ... in the paucity of the evidence likely to be available at the time of the trial.”⁷⁹

Procedure in diminished responsibility cases

General considerations

- 6.105 Forensic psychiatrist Professor Maden has reminded us how enquiries into homicides committed by mentally ill individuals sometimes reveal how the absence of robust, ‘joined-up’ procedures may contribute to such tragedies:

[C]ommon findings from inquiries include: poor record keeping; failures of communication, between agencies or between present and former carers; a narrow view of the diagnosis of schizophrenia, so that the history is ignored if delusions or hallucinations are not present at a single interview; and delay in interviewing when relapse occurs, so that the patient becomes seriously unwell before anything is done ... the inquiries do not reveal a picture of individuals struggling with the theoretical limits of risk assessment. In many cases the risk was all too obvious, the problem being a failure to communicate that risk, or to take appropriate action.⁸⁰

- 6.106 In a 1995 joint paper, the Home Office and the Department of Health stressed the importance of the police and the Crown Prosecution Service becoming aware at an early stage of information pointing to an accused person’s mental disorder. The paper went on to say of murder cases that:

[a] medical report should be obtained before bail is granted. In the case of a defendant who is in custody, the Crown Prosecution Service will assist the court in obtaining a medical report by submitting the committal papers to the Prison Health Care Service or to a nominated doctor once committal has taken place. Any information the police have about an accused person’s psychiatric condition should be recorded in the police file which is passed to the prosecutor.⁸¹

⁷⁹ Partial Defences to Murder (2004) Law Com No 290, para 5.30.

⁸⁰ A Maden, “Risk Management in the Real World”, in N Gray, J Laing, and L Noaks, *Criminal Justice, Mental Health and the Politics of Risk* (2002), 24-25.

⁸¹ *Mentally Disordered Offenders: Inter-Agency Working* (1995), 16-17. The police may have arranged for the detained person to be medically examined under the PACE 1984 code of practice. A note of the assessment and advice ought to be in the CPS file. Under section 35 of the Mental Health Act 1983, a court may remand defendants to a specified hospital for a report on their medical condition. Section 35 can only be used if: (a) the court is satisfied by the evidence of a registered medical practitioner that the accused is suffering from a mental health problem of the kind set out in s1(2) of the Act; and (b) the court is of the opinion that it would be impracticable for a report on the accused’s mental health to be made if he were remanded on bail (an accused person can, of course, be remanded on bail with a condition of attendance at or residence in a hospital, for the purpose of medical assessment). In Home Office Circular 66/90, paragraph 10, the Home Office said that “in considering cases involving mentally disordered persons the Crown Court may wish to bear in mind its powers to obtain a medical report” by remanding on conditional bail or using s 35.

- 6.107 We would welcome views on whether such information is indeed provided in appropriate cases, on whether it is generally adequate, and on whether the system for providing it could be improved. **[Questions 8 and 9]**
- 6.108 At the present time, a number of initiatives have been undertaken to examine and improve the handling of expert evidence in trials, including criminal trials. Several such initiatives were recently identified by the Home Office's Trial Policy and Procedure Unit in the Office for Criminal Justice Reform.⁸² Within the existing adversarial framework these initiatives may well lead to improvements in the way that expert evidence is dealt with in diminished responsibility cases, improvements that may allay fears that such evidence is either inadequate for trial purposes or not used in the most appropriate manner.

The 'Queensland' model⁸³

- 6.109 Under the Mental Health Act 1974 (Qld), the question of diminished responsibility may be determined either by the courts or by a Mental Health Tribunal.⁸⁴ The Tribunal is comprised of a Supreme Court judge and two psychiatric assessors.
- 6.110 In any case where there is reasonable cause to believe that the defendant was mentally ill at the time of the offence, a relative, legal advisor, or Crown law officer can refer the case to the Tribunal. The Tribunal has the power to determine whether the accused was suffering from diminished responsibility.
- 6.111 Most controversially, if the Tribunal decides that the defendant was suffering from diminished responsibility at the time of the offence, criminal proceedings respecting a murder charge are discontinued (although proceedings respecting other offences may be continued). If the Tribunal finds that the defendant was not suffering from diminished responsibility at the time of the offence, the murder proceedings continue. The defendant will not be prevented from raising the defence of diminished responsibility at his or her trial. Evidence of the Tribunal's decision will not be admissible at the trial although medical reports submitted to it may be.
- 6.112 The NSWLRC rejected the Queensland model on the grounds that the Tribunal's power to discontinue criminal proceedings respecting the murder charge took too much power away from the jury:

In our view, the defence of diminished responsibility ought primarily to be left to the jury to consider within the trial process. The defence requires value judgements to be made regarding the extent of an accused's culpability for a very serious crime. As such, it should be

⁸² Office for Criminal Justice Reform, *Current Initiatives on Expert Witnesses* (March 2005).

⁸³ Discussed by the Law Reform Commission of New South Wales, Report 82 (1997) – *Partial Defences to Murder: Diminished Responsibility*, paragraph 3.80-3.85. The NSWLRC rejected a wholesale adoption of the Queensland Model.

⁸⁴ In a case where the defendant pleads guilty at trial, but there is evidence of mental disorder, it is also possible for the court to enter a plea of not guilty and refer the case to the Tribunal.

the jury, within a publicly conducted hearing of the usual kind, and not a specialist panel of experts, which determines culpability.⁸⁵

- 6.113 This endorsement of the jury's role in diminished responsibility cases sits uncomfortably with the reality that in most cases the prosecution, who are not a "specialist panel of experts", will accept the defendant's plea. This dispenses with the trial process altogether. Further, in cases that do go to trial, the jury is likely to be heavily reliant on expert evidence that in many cases is just as decisive as it is when the prosecution accepts a plea.
- 6.114 We accept, however, that there is likely to be little or no support for giving a Mental Health Tribunal power to discontinue murder proceedings even if the evidence of diminished responsibility is convincing. Such a power might be more defensible in cases where the defendant is unfit to plead or, more broadly, where there is evidence that the defendant was insane at the time of the offence. However, even when responsibility can be proved to have been diminished, an element of culpability remains. There must also be proof that the abnormality in mental functioning was causally relevant to the commission of the offence. Medical assessment alone is therefore not always adequate to dispose of diminished responsibility cases.
- 6.115 What remains attractive about the Queensland model is having the defendant's mental condition independently assessed by a Mental Health Tribunal, or other expert panel, prior to trial. As Dr Hicks put it to us:

It would be good for the judge to have a standing set of psychiatric assessors to provide expert opinion to the court prior to the trial, or after the trial for sentencing. The advantage to having assessors who are specifically trained and practised in offering opinions is that the opinion and report would be more specific and useful for the trial, and defendants would have a more uniform level of expertise available for their assessments. As it is, psychiatrists do not routinely know the clinical and legal issues being addressed. And defendants do not have a consistent level of expertise available to them.

- 6.116 A procedure along Queensland lines is followed in France. If the defendant's mental state is in doubt at the preliminary 'instruction', then the *juge d'instruction* can commission *une expertise*, an official examination of the defendant by one expert or by a panel of court-appointed experts. The report on the defendant is disclosed to both prosecution and defence well ahead of the trial. Each has the opportunity to procure *une contre-expertise* if they do not like the tenor of the *expertise*.⁸⁶ It is important to note, however, that in France the procedure in question is of more relevance to sentence than to liability and, therefore, can be employed in cases beyond murder. Under Article 122-1 of the French Penal Code, if it is proved that the defendant is suffering from diminished responsibility, "the court shall take this into account when it decides the penalty and determines its regime."

⁸⁵ New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report 82 (1997), para 3.84.

⁸⁶ See Appendix D.

THE RELATIONSHIP BETWEEN INSANITY AND DIMINISHED RESPONSIBILITY

6.117 The relationship between insanity and diminished responsibility remains troubling. A defendant can hope to obtain a determinate sentence, albeit perhaps one of imprisonment, by pleading diminished responsibility.⁸⁷ In theory (although rarely, if ever, in practice), the prosecution can seek an insanity verdict to extinguish that hope.⁸⁸ Ironically, of course, the prosecution's task will be hampered not only by the higher standard of proof to be met but also by the narrow understanding of insanity in English law. Arguably, the prosecution's only option should be to accept a section 2 plea or to pursue a conviction for murder. We will not, however, be pursuing this issue in the absence of a full review of the law of insanity.

PROVOCATION AND DEFENSIVE HOMICIDE

Our previous proposals

6.118 We have recently completed a comprehensive review of the partial excuse of provocation, in the course of which we considered the introduction of a partial excuse of excessive force in defence.⁸⁹ We decided not to recommend the creation of a separate partial excuse for those who kill using excessive force, but to integrate such a plea into a re-modelled provocation defence.

6.119 In short, we recommended that the partial defence of provocation should remain for those who, without acting out of a considered desire for revenge:

- (1) killed only in response to gross provocation; and/or
- (2) killed only in response to a fear of serious violence⁹⁰

in circumstances where someone of the defendant's age and of an ordinary temperament might have reacted in the same or in a similar way.

6.120 At that time, however, we could not consider the defence of provocation in the wider context of a review of murder. So, we could not consider, for example, whether the effect of a successful plea of provocation should be to reduce murder to manslaughter, as at present, or whether it would be better if provocation reduced first degree murder to second degree murder.

6.121 **Our provisional proposal** is that, if the defence of provocation is reformed along the lines set out above, the effect of a successful plea should be the same as the

⁸⁷ Hospital orders are made only in about 50% of cases in which the plea has been successful: N Lacey, C Wells, and O Quick, *Reconstructing Criminal Law: Text and Materials* (3rd ed 2003), 770.

⁸⁸ An insanity verdict in a murder case leads automatically to indefinite detention in a secure hospital.

⁸⁹ Partial Defences to Murder (2004) Law Com No 290.

⁹⁰ Such a provision can, if need be, be made sensitive to whether the person using the defensive force was him or herself responsible for provoking the threat of serious violence in the first place or unjustifiably put him or herself in a position where such threats might be made. In such circumstances, as when criminal gangs are in an armed tit-for-tat struggle for supremacy, the provision would have no application.

effect of a successful plea of diminished responsibility, namely to reduce “first degree murder” to “second degree murder”. **[Question 10] [Provisional proposal 3]**

- 6.122 We also had no cause to consider whether it would be inappropriate to retain a defence of provocation if the mental element in (“first degree”) murder was restricted to an intent to kill. It might be said that it is one thing to claim that the receipt of gross provocation can partially excuse a spontaneously executed intent to do harm the jury regards as serious. It might be considered quite another thing to claim that such provocation can partially excuse acting on an intent to *kill*.⁹¹
- 6.123 We are not minded to change our recommendations for reform of the partial defence of provocation, even if (as a result of our other provisional proposals) the defence would only come into play if it was accepted that the defendant intended to kill.
- 6.124 First, on our proposals, the offence is to be reduced only to second degree murder, and not to manslaughter. This change would do more than the present law to mark the seriousness of an intentional killing, even when it was committed as a result of gross provocation.
- 6.125 Secondly, if the reforms we proposed for provocation were to be adopted, (a) the judge would be able to withdraw the defence from the jury when no reasonable jury would acquit, and (b) even when the defence was put to the jury, they would have to find that someone of the defendant's age, and of an ordinary temperament, might have reacted in the same or in a similar way. If the defence of provocation was restricted to intent-to-kill cases, the defendant would have to point to significantly more compelling reasons to ground a provocation defence. The judge would therefore be less inclined to leave the defence to the jury, in the first place.⁹² Any jury considering the defence would, with guidance to this effect from the judge, also be less inclined than they might be at present to acquit of (“first degree”) murder, if what had to be partially excused was an intentional *killing*.
- 6.126 Thirdly, denied the defence of provocation, defendants are more likely to claim that they had no intent to kill, in that they were so provoked by something said or done that their ensuing rage blotted out all thought of the possible consequences of their actions. No doubt, in appropriate cases, the jury will reject such “lack of intent” claims as specious. That will not prevent the victim's allegedly provocative conduct being made relevant to the intent issue, however, if that becomes the only way of admitting such evidence at the trial.
- 6.127 Although defendants can make such a claim under the existing law, there is no real need to because the provocation defence itself is the normal avenue to take. Moreover, when this avenue is taken, the defendant will not be acquitted of murder unless the provocation met the criteria set out above. A claim of lack of

⁹¹ It is, of course, currently impossible to say in what proportion of provocation cases the jury accepted that the defendant intended to kill. This is because a jury need only be satisfied that the defendant intended to cause serious harm in order to convict of murder.

⁹² In due course, the Court of Appeal could issue a guideline judgment setting out the kinds of cases in which the defence should, and should not, be put to the jury.

intent, on the grounds of provocation that does not meet these criteria, is likely to met with well-justified scepticism amongst jurors.

The proposals of the Victorian Law Reform Commission

- 6.128 A modification by way of restriction to our proposals that appeals to some is restriction of the scope of the “provocation” plea, insofar as it remains called that, to limb (b) above, namely cases in which the killing was in response to a threat of serious violence. Such a proposal may seem even more appealing if the killing that must be excused was an intentional one.
- 6.129 The Victorian legislature has recently abolished its provocation defence, and substituted an offence (with a 20-year maximum sentence) below murder of “defensive homicide”.⁹³ Defensive homicide is committed when someone kills another in the belief that it is necessary to do so in order to avoid defend him or herself, or another, from the infliction of death or really serious injury, in circumstances where that belief was genuine, but *not* based on reasonable grounds. Where the grounds for such a belief are reasonable, the defendant is to be acquitted altogether.⁹⁴ The lesser offence of defensive homicide is not an available option when the defendant was responding to lawful conduct.
- 6.130 Special provisions apply if the defensive homicide takes place in the context of “family violence”. For example, in determining whether a belief in the need to use defensive force was actually held, it is stated that it may be relevant that the beliefs come to be formed in a context in which the defendant has endured a history of family violence.⁹⁵ Family violence is permitted to explain why someone who has used such force believed it to be necessary to do so, even though the harm threatened was not immediately going to be inflicted. It may also be used to explain why the defensive force used was excessive.⁹⁶ “Family member”, “family violence” and “violence” are given specific definitions.⁹⁷
- 6.131 Sophisticated though it is, we believe that the Victorian solution is liable to lead to problems in an English law context. First, the offence of defensive homicide is much harsher than any comparable offence of homicide in English law. The commission of the offence is triggered by a mere absence of reasonable grounds for believing that deadly force may be used, that is, the defendant is liable for an offence of homicide with a 20 year maximum sentence on the basis of simple negligence. In English law, that would not happen, even in theory, unless the absence of grounds for the belief was so complete as to make it grossly negligent or reckless to act on the belief. In English law, if the defendant seriously injures the victim through simple negligence the defendant is guilty of no offence at all. The contrast where death is caused would be far too extreme.
- 6.132 Secondly, under the Victorian provision, the defendant must believe that his or her conduct “is necessary” in defence of him or herself or in defence of another.

⁹³ Crimes (Homicide) Act 2005 (Vic), s 6 (new section 9AD of the Crimes Act 1958 (Vic)).

⁹⁴ *Ibid*, s 6 (new section 9AC of the Crimes Act 1958 (Vic)).

⁹⁵ *Ibid*, s 6 (new section 9AH(2) of the Crimes Act 1958 (Vic)).

⁹⁶ *Ibid*, s 6 (new section 9AH(1) of the Crimes Act 1958 (Vic)).

⁹⁷ *Ibid*, s 6 (new section 9AH(4) of the Crimes Act 1958 (Vic)).

This is what theorists call a 'justificatory' belief, a belief that one is entitled, on the facts, to act as one does. When they have time to measure their response, it may be that those using defensive force hold such a belief. When someone reacts instinctively to a sudden and grave threat, however, it is unlikely that such a belief forms part of their motivation for acting. They are likely simply to be reacting spontaneously to a fear of serious violence, involving a basic 'excusatory' belief that an attack is imminent or under way. They should still fall within the scope of the lesser offence, in such cases. We believe that limb (b) of our reformed provocation defence rightly concentrates on the plain fear of serious attack (involving the excusatory belief).

- 6.133 Thirdly, under the Victorian provisions, it is only in the context of "family violence" that special attention is directed to the fact that someone may believe that the use of force is defensively necessary, even though they are not responding to an immediate threat. It is hard to see why such special attention would not equally be warranted when two long-term neighbours have been involved in a quarrel leading to a fatality, following years of cumulative abuse and provocation. Violence used by children who have been bullied throughout their time at school may also come to be used in similar circumstances. Our proposals put all defendants who are victims of long-term abuse on an equal footing with victims of domestic violence. We believe this is the right approach.
- 6.134 It is true that the Victorian provisions say that the special attention to be paid to the history and background circumstances in cases of family violence is to be paid "without limiting the evidence that may be adduced" in other cases.⁹⁸ So, history and background circumstances may be relevant and admissible in 'neighbour' or 'bullying' cases as well. That being so, we do not believe it is justified for the legislation to concentrate on the instances where history and background circumstances have a bearing on cases involving family violence.
- 6.135 We find our view reinforced by the fact that the effect of the provisions is only to say that such evidence "*may* be relevant" (our emphasis) to whether or not defensive homicide has been committed.⁹⁹ A judge in England and Wales is already always under a duty to explain to the jury the full context in which a provoked killing has taken place, in so far as that context has emerged in evidence at the trial.¹⁰⁰ The form of this direction must be discussed with the advocates in advance, so that no potentially relevant matter is omitted.¹⁰¹ It has also been recognised for some time now that the duty to explain the full context may be especially important when there has been a long and complex history of potentially provocative conduct.¹⁰² None of this will change under our proposals.
- 6.136 More broadly, we believe that the definition of "violence" in the Act has the potential to take supposedly defensive homicide outside the realms of defence against violence, as such, and back into the realm of provoked homicide.

⁹⁸ Crimes (Homicide) Act 2005 (Vic), s 6 (new section 9AH(2) of the Crimes Act 1958 (Vic)).

⁹⁹ Crimes (Homicide) Act 2005 (Vic), s 6 (new section 9AH(2) of the Crimes Act 1958 (Vic)).

¹⁰⁰ See Judicial Studies Board, Model Directions (provocation).

¹⁰¹ Rowlands, *The Times* 12 January 2004 (CA).

¹⁰² *Humphreys* [1995] 4 All ER 1008 (CA).

6.137 For example, the Victorian provisions say that “violence”, in relation to a child, is to include:

causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.¹⁰³

6.138 When a definition of “family violence” (in response to which a killing can be described as “defensive”) has been stretched this far, there is unlikely any longer to be a sharp distinction between a response properly described as a “defensive”, and a response properly described as “provoked” by the “violence”. Acts such as permitting a child to see or to hear psychological abuse occur are likely to constitute gross provocation, provocation that may be all the grosser when it is cumulative. We believe that this will often be just as natural a way to describe the events and the defendant’s response to them.

6.139 Thus there seems to us to be no reason to distinguish sharply between the excusatory element in limb (a) (gross provocation) and the excusatory element in limb (b) (a fear of serious violence). Anger and fear are often mixed in people’s responses. In some cases, it may be almost impossible to say whether the defendant’s reaction was in essence predominantly fearful or predominantly angry. A jury should not have to distinguish between the two for the purposes of reducing first degree murder to a lesser offence.

6.140 Consequently, we are continuing to propose that the partial excuse of provocation should remain for those who, without acting out of a considered desire for revenge:

- (1) killed only in response to gross provocation; and/or
- (2) killed only in response to a fear of serious violence.

in circumstances where someone of the defendant’s age, and of an ordinary temperament might have reacted in the same or in a similar way. **[Question 11]**
[Provisional proposal 4]

THE RELATIONSHIP BETWEEN PROVOCATION AND DIMINISHED RESPONSIBILITY

6.141 At present, it is possible to plead provocation, or diminished responsibility, or both together, in seeking to reduce murder to (voluntary) manslaughter. If the partial defences are pleaded together, this may have the advantage that each plea can be evaluated by the jury in terms of the whole picture of what happened. If the defendant is relying mainly on diminished responsibility, the fact that he or she killed due to a loss of self-control may be explained by the provocation received, even if an abnormality of mental functioning was also a major causal factor. Conversely, if the defendant is relying mainly on provocation, having killed, for example, in response to persistent taunting about a mental abnormality, evidence (if any) of such an abnormality of mental functioning would shed light on the plausibility of the provocation plea.

- 6.142 We are of the view that it should continue to be possible to plead provocation and diminished responsibility together and that each, if successful, should lead to the same verdict, namely conviction of the same lesser homicide offence (“second degree murder”, under our proposals). **[Question 14] [Provisional proposal 5]** Under this scheme, juries are not asked to make a decisive choice between the defences. Indeed, this might be too much to ask in some cases. Further, the question may unnecessarily split a jury that is otherwise agreed that the defendant should not be convicted of “first degree murder”.¹⁰⁴
- 6.143 Naturally, we acknowledge that there are difficulties with this course. First, the defendant bears the burden of proof when pleading diminished responsibility but not when pleading provocation, even though each defence currently has the same effect in reducing murder to voluntary manslaughter. This is something juries may in theory find hard to understand, but we do not believe that it gives rise to significant problems in practice. Secondly, there is a risk that juries will consider medical evidence bearing on the defendant’s abnormality of mental functioning in relation to the objective condition of the defendant’s provocation plea.¹⁰⁵ The risk that evidence admitted for one purpose may be used by the jury for another purpose is hardly a new problem in the criminal trial. It is best dealt with through the way in which the prosecution presents its case, and through a clear direction from the judge.

¹⁰³ Crimes (Homicide) Act 2005 (Vic), s 6 (new section 9AH(4) of the Crimes Act 1958 (Vic)).

¹⁰⁴ See Part 2 of this Paper.

¹⁰⁵ See R Mackay, “Pleading Provocation and Diminished Responsibility Together” [1988] Crim LR 411.

PART 7

DURESS AS A DEFENCE TO MURDER

QUESTIONS AND PROVISIONAL PROPOSALS

7.1 We ask:

- (1) If “first degree murder” is confined to an intention to kill, should duress be a defence?
 - (a) If so, should duress lead to:
 - (i) a complete acquittal; or
 - (ii) a finding of “second degree murder”? (**our provisional proposal**)

[paragraphs 7.31-7.32]

- (2) Should duress be a defence to “second degree murder”?
 - (a) If so, should duress lead to a complete acquittal?
 - (b) If not, should duress be no defence, but mitigate the sentence?

[paragraph 7.33]

- (3) Should duress be a defence to attempted “first degree murder”?
 - (a) If so, should duress lead to a complete acquittal?

[paragraphs 7.60-7.62]

- (4) In a case of “first degree murder”, should the plea of duress on the part of a juvenile or young person result in more lenient treatment than it would for adults?
 - (a) If so, should duress lead to:
 - (i) a complete acquittal; or
 - (ii) a finding of “second degree murder” (as proposed for adults) but with greater mitigation in sentencing?

[paragraphs 7.72-7.73]

7.2 For reasons given in paragraphs 7.34-7.50 we are also making the following **firm proposals** concerning the plea of duress:

- (1) In deciding whether a person of reasonable firmness would have acted as the defendant did, the jury can take into account all the circumstances of the defendant including his age other than those which bear upon his capacity to withstand duress.

[paragraphs 7.36-7.43]

- (2) The defendant's view of the nature of the threat or circumstances must be one which is reasonably held.

[paragraphs 7.45-7.50]

We think that these will act as safeguards to ensure that the defence is not seen as a soft option.¹

- 7.3 Finally, insofar as duress should apply to murder or attempted murder **our provisional proposal** is that that for the plea to be successful the defendant must have been threatened with death or life-threatening harm.

[paragraph 7.44]

INTRODUCTION

- 7.4 Under the present law, duress² is a defence to all crimes except murder, attempted murder³ and possibly treason. It is a full excuse negating liability. Duress consists of an imminent threat, coming either from another person, in the form of “do-this-or-else” or from some natural source, such as an avalanche or a wild animal on the loose. We have previously expressed the view that duress should provide a defence to both murder and attempted murder.⁴ In the recent House of Lords decision of *Hasan* it was said, “[t]he logic of this argument is irresistible.”⁵
- 7.5 Below we summarise the policy arguments for and against the application of the defence to murder and attempted murder. The following hypothetical examples, however, demonstrate the potential for injustice which can result from the present position.

EXAMPLE 1: D sees her violent husband speeding towards her, waving a gun, as she is waiting in her car at the lights. She speeds off even though she realises she will crash into a pedestrian who is crossing in front of her. She realises that she will cause him serious injury. The pedestrian dies as a result of his injuries.

EXAMPLE 2: D1, a psychopathic father, compels his eleven year old son, D2, through threat of death to participate in the murder of one of D1's rivals. D2 does no more than hold his father's gun whilst his father forces open the door to the rival's house prior to the killing.

¹ These are firm proposals because they are proposals in the as yet unpublished Codification project.

² Unless otherwise stated, the term duress in this Part refers to both duress by threats and duress of circumstances.

³ *Howe* [1987] AC 417; *Gotts* [1992] 2 AC 412.

⁴ See *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218, paras 31.1-31.8.

⁵ *Hasan* [2005] UKHL 22, [2005] 2 WLR 709 [21], *per* Lord Bingham of Cornhill.

- 7.6 In Example 1 D is liable for murder and accordingly she faces the mandatory life sentence. The absence of a defence of duress of circumstances means that the law cannot take into account the fact that she was acting under threat of death or serious harm and that at the time of acting she had no realistic alternative but to speed ahead.
- 7.7 In Example 2 D1 may be convicted of manslaughter on the basis of diminished responsibility but D2 must be convicted of murder if he was aware of what his father might do with the gun.
- 7.8 A blanket rule that duress can never apply as a defence to murder can cause injustice for particular groups of defendants. There is a very strong case that juveniles and young persons, who are much less mature than adults, and hence less able to withstand a threat of death, should be able to rely on the defence.
- 7.9 Under the present rule, by which the defendant incurs liability for murder notwithstanding that he did not intend to kill but only intended really serious harm, he has no defence of duress. This is potentially unjust where the defendant has acted under threat of death to himself.
- 7.10 Injustice may also arise as a result of duress being a defence to all offences apart from murder. For example, D1 tortures D2 until D2 agrees to kill V. D2 kills V. In this scenario, D2 will have no defence of duress to a charge of murder, despite facing further torture if he refuses to kill V. In contrast, D1 will have a defence of duress to a charge related to committing torture, if D1 can show he was acting under threat of death or serious harm.⁶ Arguably, D2 should also have some sort of defence to murder, even if it is only a partial defence reducing a more serious homicide offence to a less serious one.

DURESS UNDER COMMON LAW

Duress by threats

- 7.11 In law a defendant acts under duress by threats if the answers to the following two questions are “yes” and “no” respectively:
- (1) Was ... or may ... have been, impelled to act as he did because, as a result of what he reasonably believed [the threatener] had said or done, he had good cause to fear that if he did not so act [the threatener] would kill him or (if this is to be added) cause him serious physical injury? (2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed [the threatener] said or did by taking part in the killing?⁷
- 7.12 A person who has knowingly exposed himself to the risk of the threat cannot avail himself of the defence.⁸

⁶ Criminal Justice Act 1988, s 134(4) and (5).

⁷ *Graham* [1982] 1 WLR 294, 301, *per* Lord Lane CJ.

⁸ *Hasan* [2005] UKHL 22, [2005] 2 WLR 709.

Duress of circumstances

- 7.13 The common law also recognises a defence of duress of circumstances.⁹ A defendant acts under duress of circumstances if she acts (as in Example 1 at paragraph 7.5) because she reasonably believes¹⁰ that such action is necessary to avoid death or serious injury to herself or another and the danger that she knows or believes to exist in all the circumstances is such that she cannot be expected to act otherwise. The execution of the threat which operates on the defendant need not be immediately in prospect.¹¹ An example would be a case in which a flood threatens to drown everyone sheltering in a basement as the basement fills rapidly with water. Someone has become frozen with fear on the ladder which leads to the upper floor and safety, thus preventing the others from escaping. If the defendant forcibly pushes the immobile person off the ladder back into the rising water, so that other lives can be saved, he can rely on duress of circumstances as a defence to a charge of an offence against the person. If, however, the person dies the defendant has no defence to a charge of murder.
- 7.14 Duress of circumstances presupposes that the impact of some situations of imminent peril is similar to the threats which give rise to duress. Unlike duress by threats there is no issue as to the threatener's credibility. In a duress of circumstances case the defendant must himself decide what action to take (as opposed to it being dictated by the threatener) to avoid the threat.

HISTORY OF THE LAW COMMISSION'S VIEW ON DURESS AND MURDER

- 7.15 In *Howe*¹² the House of Lords held that duress was not available to anyone charged with murder. Similarly in *Gotts*¹³ the House of Lords held by a majority of three to two that duress is not a defence to attempted murder. One consideration affecting their Lordships' decision in both of these cases was the undesirability of the judiciary undertaking reform on such a controversial issue. The view expressed by the Law Commission in 1977¹⁴ and maintained as a policy in its subsequent reports on this matter through to 1993¹⁵ was that duress should be capable of providing a defence to murder.¹⁶
- 7.16 This position had the support of the majority of respondents to consultations although a few of those in favour of the proposition had reservations.

⁹ *Willer* (1986) 83 Cr App R 225; *Conway* [1989] QB 290.

¹⁰ *Safi and Ors* [2003] EWCA Crim 1809, [2004] 1 Cr App R 14.

¹¹ *Abdul-Hussain and Ors* [1999] Crim LR 570.

¹² *Howe* [1987] AC 417.

¹³ *Gotts* [1992] 2 AC 412.

¹⁴ Criminal Law: Report on Defences of General Application (1977) Law Com No 83, paras 2.39-2.45.

¹⁵ Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218, paras 30.1-31.8.

¹⁶ The exception was cl 42(2) of the Draft Criminal Code Bill 1989, which excluded murder and attempted murder but only on the basis that, being a document of re-statement, it recognised that such a change in the law would have to be effected by legislation: Criminal Law: A Criminal Code for England and Wales (1989) Law Com 177, para 12.13.

The arguments of principle

- 7.17 The main arguments for and against extending duress to the law of murder were expounded in *Howe* and rehearsed in our Consultation Paper, *Legislating the Criminal Code: Offences Against the Person and General Principles*.¹⁷

Summary of the main arguments against extending the defence to cover murder

- 7.18 The arguments against extending the defence to cover murder were as follows:¹⁸
- (1) The principle underpinning the rule is “the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another’s life.”¹⁹ Rather than allow duress to excuse the taking of life, the law should “set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.”²⁰
 - (2) It was said that the present was not an appropriate time for change and that the law must stand firm against a “rising tide of violence and terrorism.”²¹ Terrorists and their human tools should not be able to rely on a defence of duress²² which would be easy to raise and might be difficult to disprove.²³
 - (3) In *Howe* it was said the exercise of executive discretion, by decision not to prosecute or by timely release on licence of one serving a life sentence for murder, is available to mitigate the rigours of a blanket denial of the defence.²⁴

Summary of arguments in favour of extending duress to cover murder

- 7.19 The arguments for extending the defence to cover murder were as follows:²⁵
- (1) With the enactment of a tightly defined defence the question of its application to murder can be considered on its merits, untrammelled by authority.
 - (2) Innocent life is not effectively protected by a rule of which the actor is unlikely to be aware.

¹⁷ (1992) Consultation Paper No 122, paras 18.15-18.16.

¹⁸ *Ibid*, para 18.15.

¹⁹ *Howe* [1987] AC 417, 439, *per* Lord Griffiths.

²⁰ *Ibid*, 430, *per* Lord Hailsham of St Marylebone LC.

²¹ *Ibid*, 443-444, *per* Lord Griffiths.

²² *Ibid*, 434, *per* Lord Hailsham of St Marylebone LC.

²³ *Ibid*, 438, *per* Lord Bridge of Harwich, and at 444, *per* Lord Griffiths.

²⁴ *Ibid*, 433, *per* Lord Hailsham of St Marylebone LC, and 445-446, *per* Lord Griffiths.

²⁵ *Legislating the Criminal Code: Offences Against the Person* (1992) Consultation Paper No 122, para 18.16.

- (3) It is for the jury to say whether the threat was one “which [D could not] reasonably be expected to resist”.²⁶ “The law should not demand more than human frailty can sustain.”²⁷
- (4) The defence is not available to a member of a criminal or a terrorist group.²⁸ Innocent tools of terrorists should be excused if they could not have been expected to act otherwise. They should not be denied the right to raise a true defence because others may claim it falsely.
- (5) Reliance on executive discretion is not adequate in principle or in practice. Even if a prosecutor knows of a plea of duress, he may not be able or think it proper to judge its merits; and apart from any other considerations, those responsible for considering a prisoner’s release would have to judge his claim without the benefit of a trial on the issue.

7.20 Some of the arguments against extending the defence to murder, in particular the fear that it would provide a tool for the terrorist as stated at paragraph 7.18(2), can be countered by recent developments at common law.²⁹ These are addressed at paragraphs 7.55-7.59.

The need for consultation

7.21 Although consultees have previously agreed that duress should apply to murder and attempted murder, such agreement was a relatively long time ago and there have been significant changes in the case law since we published our Report, *Legislating the Criminal Code: Offences Against the Person and General Principles*, in 1993.³⁰

7.22 In our previous report,³¹ we made recommendations for reforming the partial defence of provocation. We recommended that one “trigger” for the defence should be acting in response to a fear of serious violence. Without more, that would have included acting under duress. In addition, we recommended that the partial defence of provocation should only be available if:

- (1) a person of the defendant’s age and of ordinary temperament, ie of ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way; and

²⁶ Draft Criminal Law Bill, cl 26(4), appended to *Legislating the Criminal Code: Offences Against the Person* (1992) Consultation Paper No 122.

²⁷ *Howe* [1987] AC 417, 442, *per* Lord Griffiths.

²⁸ Draft Criminal Law Bill, cl 26(4), appended to *Legislating the Criminal Code: Offences Against the Person* (1992) Consultation Paper No 122.

²⁹ *Hasan* [2005] UKHL 22, [2005] 2 WLR 709.

³⁰ (1993) Law Com 218, paras 31.1-31.8.

³¹ *Partial Defences to Murder* (2004) Law Com No 290.

- (2) 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 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.

Had our recommendations stopped there, provocation would have encompassed cases of duress, albeit the defence would have had a more objective basis than the full defence of duress that we had recommended in our Report, *Legislating the Criminal Code: Offence Against the Person and General Principles*.³²

- 7.23 However, we were conscious of the fact that there is a body of opinion which believes that duress should not provide any kind of defence to murder or attempted murder. Therefore, we thought it inappropriate to recommend a proposal in relation to provocation, which would have had the effect of allowing duress to become a partial defence to murder³³ (if not to attempted murder) by the back door and without the benefit of consultation. Accordingly, we excluded duress from our recommended reformulation of the provocation defence.
- 7.24 Additionally there was the further complication that we had previously proposed that duress should provide a complete defence to murder whereas the recommendation in relation to provocation in our Report, *Partial Defences to Murder*, is for a partial defence.³⁴ There has not previously been support for the proposition that intentional killing under duress should be classed as manslaughter rather than murder (ie, a partial defence) and so we have in the past adhered to the view that that duress ought to be a full defence.
- 7.25 We now wish to reconsider the option of a partial defence of duress as part of a recasting of homicide law. If, as we propose, there are different degrees of homicide there is a stronger case that a successful plea of duress should be able to reduce murder to a lesser homicide offence.

OUR PROPOSED FRAMEWORK

- 7.26 In our proposals concerning the overall framework of homicide offences³⁵ we propose a 'ladder' of homicide offences as follows. Firstly, that there should be an offence of "first degree murder" covering cases where the defendant intended to kill. "First degree murder" would carry a mandatory life sentence.

³² (1993) Law Com 218.

³³ *Ibid*, paras 3.161-3.162.

³⁴ (2004) Law Com 290, para 3.168. This is also a view which we have considered previously and rejected: *Criminal Law: Report on Defences of General Application* (1977) Law Com No 83, para 2.43. In that report we stated:

... where the duress is so compelling that the defendant could not reasonably have been expected to resist it, perhaps being a threat not to the defendant himself but to an innocent hostage dear to him, it would ... be unjust that the defendant should suffer the stigma of a conviction even for manslaughter. We do not think that any social purpose is served by requiring the law to prescribe such standards of determination and heroism.

³⁵ See Part 2.

7.27 Secondly, there should be an offence of “second degree murder” encompassing cases where the defendant:

- (1) intended to cause serious harm;
- (2) killed as a result of reckless indifference; or
- (3) intended to kill but has a partial defence.³⁶

“Second degree murder” would carry a maximum sentence of life imprisonment.

7.28 Thirdly, there should be an offence of manslaughter encompassing cases where the defendant killed

- (1) through gross negligence;
- (2) through an intentional or reckless assault, or through intentional or reckless causing of, or through the attempt to cause, some harm; or
- (3) intended to kill but has a partial defence.³⁷

7.29 Manslaughter would carry a maximum determinate sentence.

7.30 Finally, there should be a number of lesser forms of homicide such as infanticide which do not fall within “first degree murder” or “second degree murder”.

THE POSITION OF DURESS WITHIN THE OVERALL STRUCTURE OF HOMICIDE

Provisional proposal that duress should be a partial defence to a charge of “first degree murder”

7.31 We feel that our revised contextual framework will make the following propositions more attractive. Having considered duress within the context of a comprehensive reform of murder, we are now minded to recommend that duress should reduce “first degree murder” to “second degree murder” and so provide a partial defence.³⁸ This will have the effect of reducing some of the injustice presently caused by the “grievous bodily harm rule”. Duress could also be a full defence to “second degree murder” or alternatively, not provide a defence but mitigate the sentence.

7.32 Therefore, **our provisional proposal** is that duress should be a partial defence to “first degree murder” which reduces the offence to “second degree murder”. Although our previous proposals were for duress to be a complete defence to murder, in the context of our revised framework for murder, we consider that it is more appropriate for duress to be a partial defence. This is for two reasons. Firstly, we are seeking to achieve consistency with the partial defences of

³⁶ Alternatively, partial defences could reduce “first degree murder” and “second degree murder” to manslaughter.

³⁷ Alternatively, partial defences could reduce “first degree murder” to “second degree murder”.

³⁸ In Victoria, Australia, Parliament recently passed an Act that provides for duress to be a complete defence to murder: Crimes (Homicide) Act 2005, s 6.

provocation and diminished responsibility, both of which would reduce “first degree murder” to “second degree murder” under our current proposals. Secondly, when a defendant pleads duress as a defence to “first degree murder”, he admits that he intentionally killed someone. Even though the defendant may have been acting under duress, he has still intentionally taken a life. This is considerably more serious than other offences committed under duress (which result in a complete acquittal). We consider that although a defendant who intentionally kills while acting under duress should not be categorised as a “first degree murderer”, nevertheless the law should recognise some degree of culpability. We consider that the appropriate category is “second degree murder”.
[Question 1]

Duress and “second degree murder”

- 7.33 According to our proposed framework, a person commits “second degree murder” if he kills when intending to cause serious harm or as a result of reckless indifference.³⁹ There are two options as to how duress could operate in relation to our proposed category of “second degree murder”. Firstly, it is arguable that duress should not be a defence to “second degree murder” on the basis that any mitigation could be taken into account in sentencing since the mandatory life sentence will not apply to “second degree murder”. Alternatively, duress could lead to a complete acquittal. The latter option accords with the current law of duress in relation to offences against the person. For example, if a person intentionally or maliciously inflicts grievous bodily harm and is charged with an offence under section 18 or 20 of the Offences Against the Person Act 1861, he can plead duress which, if successful, will result in a complete acquittal. In contrast, if duress is not a defence to “second degree murder”, then a defendant who intends to cause serious harm but actually causes the death of a person will be liable for murder. Yet this defendant had the same intention as the person who is acquitted of a section 18 or 20 offence on the basis of duress. It is therefore arguable that duress should be a complete defence to “second degree murder”.
[Question 2]

DURESS AS A PARTIAL DEFENCE COMPARED WITH THE OTHER PARTIAL DEFENCES

- 7.34 According to our proposals duress will not only be a partial defence to murder and possibly to attempted “first degree murder”, but will potentially be a complete defence to the lesser degrees of murder and to all other offences. This fact obviously distinguishes it from the other partial defences. However, it is important that insofar as it applies as a partial defence it does so on the same general objective principles as the other partial defences.

³⁹ When discussing duress as a defence to “second degree murder” we are only referring to cases in which the defendant intended to cause serious harm or acted out of reckless indifference. We are not referring to a case in which a defendant is charged with “first degree murder” and successfully pleads another partial defence such as provocation, so that the offence is reduced to “second degree murder”. Defendants can’t ‘double-dip’ by pleading one defence to “first degree murder” and then pleading duress to “second degree murder”.

- 7.35 In order to achieve consistency with the mental requirements of the other partial defence of provocation, it is necessary to adjust some of the rules which have evolved at common law thus far. Exposition requires some analysis of the mechanics of the plea at common law.

THE BASIS OF A PLEA OF DURESS

- 7.36 Whereas a detailed analysis of the defence of duress is set out elsewhere,⁴⁰ this Part merely summarises the essential requirements of the plea for the purpose of exposition of our proposals as to murder. The test for a successful plea of duress is partly objective.
- 7.37 The defence is governed by the principles set out by the Court of Appeal in *Graham*,⁴¹ as approved by the House of Lords in *Howe*.⁴² In *Graham* the Court of Appeal said that two questions had to be asked:

(1) Was ... or may ... have been, impelled to act as he did because, as a result of what he reasonably believed [the threatener] had said or done, he had good cause to fear that if he did not so act [the threatener] would kill him or (if this is to be added) cause him serious physical injury? (2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed [the threatener] said or did by taking part in the killing?⁴³

If the answer to question (1) was “yes”, and the answer to question (2) was “no”, the defence of duress is made out. The test concerning the defendant’s fear that the threat will be carried out is subjective.

Characteristics of the defendant

- 7.38 Although under *Bowen*⁴⁴ relevant characteristics of the defendant now includes recognised psychiatric syndromes or mental illnesses⁴⁵ (but not mere unusual timidity or pliability) we feel that the relevance of characteristics should be pared down in order to achieve consistency with our recommendations on the partial defence of provocation.⁴⁶

⁴⁰ As yet unpublished Codification project.

⁴¹ *Graham* [1982] 1 WLR 294.

⁴² *Howe* [1987] AC 417.

⁴³ *Graham* [1982] 1 WLR 294, 301, *per* Lord Lane CJ.

⁴⁴ *Bowen* [1997] 1 WLR 372, 380. The Court of Appeal also held that:

... the mere fact that the accused is more pliable, vulnerable, timid or susceptible to threats than a normal person is not a characteristic with which it is legitimate to invest the reasonable/ordinary person for the purpose of considering the objective test.

⁴⁵ *Emery* (1993) 14 Cr App R (S) 394.

⁴⁶ Partial Defences to Murder (2004) Law Com No 290, Part 3.

7.39 Accordingly this would mean that the defendant's age⁴⁷ and all the circumstances of the defendant other than those which bear on his capacity to withstand duress would be relevant for the purpose of the objective test in *Graham*. Factors such as mental age and recognised psychiatric syndromes will not be relevant. However, although not relevant to the capacity to withstand duress, these factors would be relevant to the subjective aspect of the *Graham* test of whether the defendant feared that the threat would be carried out.

Reasons for recommending that common law rule as to the defendant's characteristics should be altered

7.40 In our view it would be anomalous if there were to be a significant distinction between the defences of duress and provocation in terms of the relevance of the defendant's characteristics. There may well be instances where the defendant would wish to plead both defences and it would cause confusion if the jury were directed to apply different tests as to the relevance of characteristics when considering each defence.

7.41 The test which we now propose is also consistent with the Privy Council decision in *A-G for Jersey v Holley*.⁴⁸ In that case the majority of the Privy Council⁴⁹ held that in determining whether the provocation was enough to make a reasonable man do as the defendant did, the gravity of the provocation was to be assessed by reference to his particular characteristics. However, the loss of self-control was to be judged by applying a uniform objective standard of the degree of self-control to be expected of an ordinary person of the defendant's age and sex with ordinary powers of self-control.⁵⁰

7.42 Codification involves a restatement of the law and we have hitherto been obliged to follow *Bowen* in so far as our recommendations on that project are concerned. It is arguable that the decision in *Holley* will eventually mean that *Bowen* is no longer followed.

7.43 However, assuming *Bowen* represents the common law position, it follows that there is inconsistency between the relevance of characteristics apropos duress and murder and attempted murder and other offences governed by common law. This is, however, justifiable. The relevance of characteristics, such as mental illness, to a defendant's ability to resist duress in cases of murder are less significant than in cases other than murder, because the partial defence of diminished responsibility exists to accommodate such a defendant, although this is obviously not the case for a defendant accused of attempted murder. Setting aside the position with attempted murder, the absence of any general mental disorder defence means that the rule in *Bowen* remains justifiable and necessary for other lesser offences. **[Firm Proposal 1]**

⁴⁷ Age being the significant exception.

⁴⁸ [2005] UKPC 23, [2005] 3 WLR 29.

⁴⁹ The majority was 6-3. Lords Bingham of Cornhill, Hoffmann and Carswell dissented.

⁵⁰ Accordingly the majority view of the House of Lords in *(Smith) Morgan* [2001] 1 AC 146 (that in cases of provocation the jury should ask themselves whether the accused had applied the standard of self-control to be expected of someone in his situation) was erroneous. It represented a departure from the law as declared in Homicide Act 1957, s 3.

- 7.44 Insofar as duress should apply to murder or attempted murder **our provisional proposal** is that for the plea to be successful the defendant must have been threatened with death or life-threatening harm.

The need for the defendant's view of the nature of the threat to be objectively reasonable

The previous view of the Law Commission

- 7.45 The Law Commission's previous view⁵¹ departed from *Graham* to the extent that the defence of duress could be brought into play if the defendant *honestly* believed that a threat of death or serious injury would be carried out if he or she did not comply with the demand. This applied whether or not that belief was based on reasonable grounds.

The plea should be objectively based

- 7.46 We have reconsidered this question⁵² in the light of developments in the recent case law and our review of the law governing defences to murder as a whole. We do not now believe that a defendant should be able to plead duress if the plea is based solely on a wholly unreasonable belief she or he had that a threat had been made. Lord Bingham recently stated in *Hasan*: "there is no warrant for relaxing the requirement that the belief must be reasonable as well as genuine."⁵³ There must be a reasonable basis for a belief in death or life-threatening harm. If a defendant pleads duress on the basis of a mistaken belief then such a belief must have been based on reasonable grounds.⁵⁴ This does not mean that the defendant's belief cannot be subjectively assessed.
- 7.47 The reason for this insistence on an element of objectivity is that if a belief is based on prejudice, as opposed to fact,⁵⁵ it may well be honestly and firmly held. We do not believe that it should be possible to raise the defences of duress (or provocation), in cases where there is in fact no duress (or no provocation) when the defendant had no basis for mistakenly believing that duress (or provocation) had applied. This is particularly so if the defence is to apply to cases of murder where the deliberate taking of life dictates that the test as to reasonableness should be strict.

⁵¹ Draft Criminal Law Bill, cl 25, appended to *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218.

⁵² As yet unpublished Codification project.

⁵³ *Hasan* [2005] UKHL 22, [2005] 2 WLR 709 [23].

⁵⁴ The as yet unpublished Codification project proposes that clause 25(2) of the Draft Criminal Law Bill appended to *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218, be revised as follows:

A person does an act under duress by threats if he does it because he knows or *has grounds for believing and does believe ...* (our italics).

⁵⁵ For example, the prejudiced defendant who believes that someone is posing a threat just because they are black and according to him "black people are more dangerous and ruthless than white people."

Reconciling the need for reasonable grounds with the decision in Martin (David Paul)⁵⁶

7.48 Our view as to the necessity of reasonable grounds for belief in the threat is not consistent with the decision in *Martin (David Paul)*.⁵⁷ However, we question the correctness of the decision in that case. In *Martin (David Paul)* the defendant had been suffering from a schizoid-affective disorder which adversely affected his view of the threat. The Court of Appeal was concerned with the first of the two questions posed in *Graham* cited in paragraph 7.37. Whilst acknowledging that the passage in *Graham* suggested that the correct test was objective, they also observed that Lord Lane had emphasised that duress and self-defence were analogous. The test now accepted for self-defence is that “a person may use such force as is reasonable in the circumstances as he honestly believes them to be.”⁵⁸

7.49 However, it has now been said in other contexts that the proposition that duress and self-defence are analogous is not a compelling one.⁵⁹ This is largely dictated by policy reasons. The policy has governed many of the appellate courts’ decisions. It was described by Lord Simon in *Lynch*: “[y]our lordships should hesitate long lest you may be inscribing a charter for terrorists, gang leaders and kidnappers.”⁶⁰ As P R Glazebrook has pointed out:

In a case of ‘duress of threats’ there is still, even if the defendant is excused, someone else ... who has indisputably committed the offence and is liable to conviction The policy issues ... involve not just balancing the interests of the innocent victim of the crime ... against the claims to sympathy and understanding of the equally innocent victim of [the] threats, but also weighing the undoubted fact that the recognition of the excuse strengthens the arms of thugs and criminal and terrorist organizations, who would never seek to employ coerced accomplices if it did not make the accomplishment of their criminal objectives that much easier. ... A duress of threats defence will, therefore, if allowed at all, have a restricted ambit.⁶¹

⁵⁶ [2000] 2 Cr App R 42.

⁵⁷ *Ibid.*

⁵⁸ *Beckford* [1988] AC130 (PC) 145, *per* Lord Griffiths.

⁵⁹ In *Hasan* [2005] UKHL 22, [2005] 2 WLR 709 [38], Lord Bingham of Cornhill stated that analogies between duress and self-defence were inappropriate for policy reasons:

I am conscious that application of an objective reasonableness test to other ingredients of duress has attracted criticism: see, for example, Elliott, “Necessity, Duress and Self-Defence” [1989] Crim LR 611, 614-615, and the commentary by Professor Ashworth on *R v Safi* [2003] Crim LR 721, 723 But since there is a choice to be made, policy in my view points towards an objective test of what the defendant, placed as he was and knowing what he did, ought reasonably to have foreseen.

⁶⁰ *DPP for Northern Ireland v Lynch* [1975] AC 653, 688.

⁶¹ P R Glazebrook, “Structuring the Criminal Code: Functional Approaches to Complicity, Incomplete offences and General Defences” in A P Simester and A T H Smith (eds), *Harm and Culpability* (1996) 209.

- 7.50 In summary then, we do not concede that the honest but unreasonable belief test in self-defence is correct. Policy reasons govern cases of duress but not self-defence and policy dictates that any test of belief as to the nature of the threat should be objective. This justifies the distinction (insofar as it needs to be justified) between the mere honest belief necessary in cases of self-defence and our firm proposal as to the need for reasonable grounds in cases of duress. **[Firm proposal 2]**

OTHER REQUIREMENTS NECESSARY IN ORDER TO ESTABLISH A PLEA OF DURESS

The conduct of the defendant must be directly related to the threats

- 7.51 The defence is only available where the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied on. These must be threats to cause death or serious injury to the accused or another.⁶² As we have stated at paragraph 7.44, there is now to be an enhanced test of death or life-threatening injury.

The rule in *Safi and Ors*⁶³

- 7.52 In *Safi*⁶⁴ the Court of Appeal (upholding *Graham*) held that the trial judge had been wrong to rule that there must be a threat in fact, as opposed to something the defendant believed to be a threat.

Official protection

- 7.53 Clause 25(2)(b) of the Draft Criminal Law Bill provides that the threat must be, or the defendant must believe that it is, one that will be carried out immediately, or before he (or the person otherwise threatened) can obtain *effective* official protection.⁶⁵ This differs from previous drafts.⁶⁶ In 1985 the Code team, influenced by *Hudson*,⁶⁷ were of the view that a person's belief that he cannot be protected was relevant to the overall question of whether the defendant could reasonably be expected to resist the threat, and could not be ignored.⁶⁸ Notwithstanding this, however, the Code team felt unable to depart from the

⁶² Draft Criminal Law Bill, cl 25(2)(a), appended to Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218.

⁶³ *Safi and Ors* [2003] EWCA Crim 1809, [2004] 1 Cr App R 14.

⁶⁴ The Court of Appeal in *Safi and Ors* [2003] EWCA Crim 1809, [2004] 1 Cr App R 14 [9], considered the following question:

Is it sufficient, once a defence of duress is raised, for the Crown to prove in relation to the first element of that defence, that there was no threat or circumstance giving rise to duress in fact or must the Crown prove that the defendants had no belief in the existence of such threat or circumstances.

⁶⁵ Appended to Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com 218.

⁶⁶ Cl 26(3) of the Bill appended to Legislating the Criminal Code: Offences Against the Person and General Principles (1992) Consultation Paper No 122 provided that it was immaterial that the defendant believed any available official protection would or might be ineffective.

⁶⁷ *Hudson* [1971] 2 QB 202.

⁶⁸ Criminal Law: Codification of the Criminal Law – A Report to the Law Commission (1985) Law Com No 143, para 13.18.

previous formulation. Consultees supported the view that it would be unfair to deprive a defendant who in all other respects qualified for the defence just because ineffective official protection was available.⁶⁹

- 7.54 Since the House of Lords decision in *Hasan*,⁷⁰ where the trial judge's third question to the jury ("Could the defendant have avoided acting as he did without harm coming to his family? If you are sure he could, the defence fails and he is guilty.") had been modelled on the Judicial Studies Board specimen direction and was not therefore open to criticism, this whole question is likely to be construed strictly by the courts.⁷¹ In other words, it now seems that if the threat is not one which will immediately be carried out then the courts will be more ready to infer that evasive action could have been taken by the defendant.

Voluntary exposure to duress

- 7.55 The House of Lords ruling in *Hasan*⁷² has now resolved another important area which had previously been unclear by virtue of inconsistent decisions of the Court of Appeal. Prior to the publication of our Report, Legislating the Criminal Code: Offences Against the Person and General Principles, the case law had been clear in stating that a defendant was to be precluded from relying on duress if he had voluntarily exposed himself to any crime.⁷³
- 7.56 Case law which post-dated our last publication was inconsistent on the issue of voluntary exposure. Was the defendant precluded from relying on the defence only by virtue of voluntary exposure to the type of crime with which he is subsequently charged? Or was it sufficient to disqualify him, if he exposed himself to any criminality regardless of whether it could ever have been predicted that he would be coerced into committing a particular crime?

⁶⁹ Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218, para 29.6.

⁷⁰ *Hasan* [2005] UKHL 22, [2005] 2 WLR 709.

⁷¹ It should however be made clear to juries that if the retribution threatened against the defendant or his family or a person for whom he reasonably feels responsible is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged.

⁷² *Hasan* [2005] UKHL 22, [2005] 2 WLR 709.

⁷³ *Sharp* [1987] QB 853; *Shepherd* (1988) 86 Cr App R 47; *Fitzpatrick* [1977] NI 20.

7.57 In *Baker and Ward*⁷⁴ it was held that if the jury concluded that the defendant could not have neutralised the threats by seeking the assistance of the police, they should be directed to ask themselves as follows: whether it has been proved that he voluntarily put himself in a position where he was likely to be subjected to a compulsion of the kind necessary to commit the offence charged. The contrary was held in *Heath*.⁷⁵ In that case, Kennedy LJ illustrated the more general proposition that it is the awareness of risk of compulsion that matters: “[p]rior awareness of what criminal activity those exercising compulsion may offer as a possible alternative to violence is irrelevant.”⁷⁶ *Heath* was followed in *Harmer*.⁷⁷

The decision in Hasan

7.58 In *Baker and Ward* the Court of Appeal adopted the rule that the vice of voluntary association is that it renders the accused liable to pressure to commit a crime of the relevant degree of seriousness. Thus there had to be an anticipation on the part of the defendant of pressure to commit a crime of the type charged before the defence was unavailable.

7.59 However, in *Hasan* the House of Lords held *Baker and Ward* to have mis-stated the law. On the certified question of whether the trial judge had erred by directing the jury as follows: “Did the defendant voluntarily put himself in the position in which he knew he was likely to be subjected to threats? If you are sure he did the defence fails and he is guilty,” it was held that he had not:

The defendant is, *ex hypothesi*, a person who has voluntarily surrendered his will to the domination of another. Nothing should turn on foresight of the manner in which, in the event, the dominant party chooses to exploit the defendant’s subservience. There need not be foresight of coercion to commit crimes, although it is not easy to envisage circumstances in which a party might be coerced to act lawfully.⁷⁸

DURESS AND ATTEMPTED MURDER

7.60 The decision in *Gotts*⁷⁹ made it clear that, as a matter of policy, duress could not be a defence to attempted murder. However, the rationale for this policy is that the difference (if any) between the offence and the attempt is predicated on the existence of the “grievous bodily harm” rule, namely, that a defendant can be deemed to have the intention to commit murder notwithstanding that he intended to do serious (grievous) bodily harm to the victim. A greater intent (intention to kill) is therefore required for the offence of attempted murder. If, as we are minded to suggest, “first degree murder” is confined to cases where there was an intention to kill, then the argument that a greater intent is required for attempted murder than for murder is no longer sustainable.

⁷⁴ *Baker and Ward* [1999] 2 Cr App R 335.

⁷⁵ *Heath* [2000] Crim LR 109 (CA).

⁷⁶ *Ibid* quoted in *Hasan* [2005] UKHL 22, [2005] 2 WLR 709 [36], *per* Lord Bingham of Cornhill.

⁷⁷ *Harmer* [2001] EWCA Crim 2930, [2002] Crim LR 401.

⁷⁸ *Hasan* [2005] UKHL 22, [2005] 2 WLR 709 [37], *per* Lord Bingham of Cornhill.

- 7.61 Furthermore, it is arguable that even attempted “first degree murder” is not as serious as the actual offence of “first degree murder”. For example, the defendant is guilty of attempted murder as soon as he breaks into the victim’s house with intent to kill. If the house is deserted, it is still attempted murder. In other words attempts begin long before the last act done. Indeed, attempted murder itself may not have such serious consequences for the victim of the offence as an offence contrary to section 18 of the Offences Against the Person Act 1861. Yet, duress presently operates as a full defence to that offence.
- 7.62 Within our proposed structure for the law of homicide, there are two options in relation to duress and attempted murder. First, a plea of duress could lead to a complete acquittal. This would accord with the operation of duress in relation to other offences. Further, it would recognise the lesser culpability of a person who attempts murder rather than actually goes through with it, as evident in the example in paragraph 7.61. Alternatively, the current position could remain unchanged, so that duress is no defence to attempted murder. At present, the mandatory sentence does not apply to attempted murder. As the main justification for the application of the defence of duress to murder is to obviate the effect of the mandatory life sentence and given that the sentence is discretionary in the event of a conviction for attempted murder, is there any justification for duress leading to a complete acquittal? **[Question 3]**

The requisite test as to characteristics of the defendant in cases of attempted murder

- 7.63 For the sake of consistency, and in order to avoid anomalies at trial, we propose that, if duress becomes a defence to attempted murder, the same test as to the relevance of the characteristics of the defendant as applies in cases of murder also applies to attempt. We make this proposal notwithstanding that for all other purposes attempted murder is just like any other non-fatal offence.
- 7.64 Obviously if a defendant suffers from mental illness and is charged with attempted “first degree murder” then there is no opportunity for him to claim diminished responsibility as there would be if he were charged with murder. He must run the risk of being convicted and rely on mitigation in sentence. This may be seen as a disadvantage of a test as to characteristics being as narrow as the one which we propose. However, the only alternatives, namely:

- (1) to retain the *Bowen* test as to characteristics in cases of attempt; or
- (2) to say that duress should not be a defence to attempted murder,

are, in our view, both unsatisfactory. The first alternative is unsatisfactory because there would be an unjustifiable inconsistency with the requirements for the plea of provocation. This would cause anomalies at trial where a defendant relied on both defences. As far as the second option is concerned, it is arguably illogical for duress to operate as a defence to murder but not as any sort of defence to the attempt.

⁷⁹ [1992] 2 AC 412.

- 7.65 In order to avoid separate tests being applicable to separate and different counts on the same indictment we suggest that where the defendant relies on a defence of duress to any count and he is simultaneously charged on the same indictment with “first degree murder” or “second degree murder” or an attempt to commit any such offence, then the test as to the relevance of characteristics which applies to murder must apply to the other counts he faces on that indictment.

THE BURDEN OF PROOF

Our former view

- 7.66 In our Report, *Legislating the Criminal Code: Offences Against the Person and General Principles*, and in the draft Criminal Law Bill appended to that Report, we stated that the burden of proof on the issue of whether or not the defendant had voluntarily exposed himself to threats should be reversed.⁸⁰ We were also of the view that there should be a reverse legal burden on the defendant to show that he was acting under duress.⁸¹ This is still an option.
- 7.67 However, the days when it could be claimed that duress is an easy defence to raise and a difficult one to disprove are long gone. Changes in the laws governing defence disclosure mean that it is no longer necessary (and would possibly be disproportionate) to insist that the defendant bears the legal burden of proof either on this issue or on the main issue.⁸²
- 7.68 This recent legislation provides safeguards for the prosecution. Not only is advance notice of the nature of the defence a legislative requirement but the details of a genuine defence of duress are likely to be presented in interview prior to charge. Accordingly they are likely to be subject to rigorous scrutiny. The prosecution is unlikely to be taken by surprise and there will be sufficient opportunity to investigate the matter of whether or not the defendant has voluntarily exposed himself to threats. It is difficult to imagine any defendant relying on a defence of duress without giving evidence. Thus, in the normal course of events, silence in interview amounts to an evidential lacuna which will assist the prosecution.
- 7.69 The restriction which the House of Lords decision in *Hasan* has now placed upon the availability of the defence has encouraged us in the view that there is no need to place a reverse burden on the defendant. In *Hasan*, Baroness Hale of Richmond maintained the subjectivist view of the requirements of the defence on which our Report, *Legislating the Criminal Code: Offences against the Person and General Principles*, is based.⁸³ However, she stated that as long as the

⁸⁰ (1993) Law Com 218, paras 29.15-29.16, and Draft Criminal Law Bill, cl 25(4).

⁸¹ *Ibid*, paras 33.1-33.16, and Draft Criminal Law Bill, cl 25(2).

⁸² See, Criminal Procedure and Investigations Act 1996, s 5, as amended by the Criminal Justice Act 2003, s 33(1) (not yet in force); Criminal Justice and Public Order Act 1994, s 34; Criminal Procedure Rules (SI 384/2005) (in force since April 2005).

⁸³ *Hasan* [2005] UKHL 22, [2005] 2 WLR 709 [73], *per* Baroness Hale of Richmond.

burden of proof in cases of duress is not reversed,⁸⁴ then the desire to maintain the objective standards in *Graham* is understandable.⁸⁵

7.70 Many defendants seeking to plead duress in murder cases will themselves be criminals who have knowingly exposed themselves to a risk of being threatened. Given the effect of the House of Lords decision in *Hasan* together with clause 25(4) of the Draft Criminal Law Bill, they will be precluded from being able to rely on the defence. It is worth noting that the absence of a strict rule of voluntary exposure at the time of the decision in *Howe* may well have influenced the decision in that case.

7.71 Even if the defence is available in murder cases, it will always be open to the jury to reject it on the basis of *Graham*: that in the circumstances a person of ordinary firmness would not have taken part in the killing as demanded. The objective test in *Graham* (which has been approved by the House of Lords in *Hasan*) has tightened the defence in a way that is consistent with meeting policy objections to the extension of the defence to murder.

ADDITIONAL REASONS FOR MAKING THE DEFENCE AVAILABLE IN SOME TYPES OF MURDER CASES

Juveniles

7.72 Concerning juveniles and young persons, much of the potential injustice of the common law denial of duress as a defence to murder will be obviated by the aforementioned proposals. Just as age is a qualification to the objective test in our recommendations on the partial defence of provocation⁸⁶ it will apply *mutatis mutandis* to the proposed objective test for duress. Capacity to withstand duress is increased with maturity and it would be unjust to expect the same level of maturity from a twelve-year-old as from an adult. *Bowen*⁸⁷ also states that youth is a relevant characteristic for the purpose of whether or not the defendant could have been expected to resist the pressure of a threat in cases other than murder. A ten-year-old whose moral character is not fully formed should not be expected in all the circumstances to resist the temptation to kill in order to avert a threat to himself.

⁸⁴ As we explain at paras 7.67-7.69, we are no longer of the view that the burden of proof ought to be reversed in cases of duress.

⁸⁵ *Hasan* [2005] UKHL 22, [2005] 2 WLR 709 [74]. However, Baroness Hale also stated:

But it seems to me that the best counter to Lord Lane's concerns is the Fitzpatrick doctrine which is in issue in this case. Logically, if it applies, it comes before all the other questions raised by the defence: irrespective of whether there was a threat which he could not reasonably be expected to resist, had the defendant so exposed himself to the risk of such threats that he cannot now rely on them as an excuse? If even on his own story he had done so, then the defence can be withdrawn from the jury without more ado; if that issue has to be left to the jury, but they resolve it against him, there is no need for them to consider the other questions.

⁸⁶ Partial Defences to Murder (2004) Law Com No 290, para 3.110.

⁸⁷ *Bowen* [1997] 1 WLR 372.

- 7.73 For this reason, we are asking whether or not in the case of a juvenile or young person it should be permissible to rely on duress as a complete defence to “first degree murder” as well as attempted “first degree murder”. Alternatively, intentional killing by a juvenile or young person could reduce “first degree murder” to “second degree murder” (as is the case in our provisional proposal for adult defendants) where he or she successfully pleads duress. Immaturity could then go towards greater mitigation in sentencing. This has the effect of recognising that childhood immaturity reduces culpability. **[Question 4]**

Complicity

- 7.74 In Part 5 we outlined our proposals on secondary liability. These proposals have implications for a defendant who, as a result of duress, agrees to participate in a joint venture which results in a murder.⁸⁸

- 7.75 The following example illustrates this issue:

D is driving her car when a man (P1) gets in and points a gun at her head. P1 insists that D drive to a place where he tells her he will kill V. She drives there and speeds off as soon as he gets out of the car. P1 then kills V. Earlier in the day, another person (P2) has threatened P1 with death if he does not kill V.

- 7.76 Under the present common law doctrines of duress and secondary liability, P1, P2 and D will all incur liability for murder.

- 7.77 However, under our proposed statutory framework for secondary liability, an “indifferent” encourager and assister (D) will not be secondarily liable for P1’s offence (of murder) unless D was a party to the joint venture to commit murder.⁸⁹ D would only be a party to a joint venture if D “agreed” to participate or shared a “common purpose” with P1.

- 7.78 If D did not agree nor share a common purpose with P1, then D might in theory be liable for a new inchoate offence of knowingly encouraging or assisting an abstract offence of “first degree murder”. Duress is available as a defence in relation to the offence of soliciting for murder and so, as is explained in our paper on complicity,⁹⁰ *a fortiori* it should be available in relation to a charge of knowingly encouraging or assisting “first degree murder”.

- 7.79 However, if D did agree to participate or shared a common purpose with P1, then D will be liable for murder under our proposed statutory framework for secondary liability. As noted in our Part on complicity,⁹¹ this gives rise to the question: should D who agreed to participate in a joint venture with P1 as a result of duress be held to have “agreed” for the purposes of secondary liability?

⁸⁸ See Part 5, paras 5.59-5.78.

⁸⁹ See Part 5, paras 5.41.

⁹⁰ *Ibid.*

⁹¹ See Part 5, para 5.70.

- 7.80 In general, our approach to joint ventures in secondary liability cases is that “agreeing” should be given a broad meaning. However, it may seem that “agreeing” should not extend to cases in which D agrees to participate as a result of a threat to cause her or her family serious harm or death. Yet if this approach was adopted, D in the above example would not be guilty of *any* offence as she was not a party to a joint venture with P1 and duress is a complete defence to any other offence for which D may be liable. Yet P1, who was acting under the same duress as D, will at most be able to plead duress to a charge of “first degree murder”.
- 7.81 To avoid these disparate outcomes, we propose that if D gives her assent to be part of a joint venture, then D has ‘agreed’ to participate for the purposes of secondary liability, even if that agreement results from duress. In accordance with this proposal, duress would be available to both D and P as a partial defence reducing “first degree murder” to “second degree murder”. This would avoid the injustice of D and P1 being found guilty of “first degree murder”, whilst at the same time avoiding the disparate outcomes that result if D could claim that the duress vitiated her consent to participate in the joint venture for the purposes of complicity.

PART 8

KILLING WITH CONSENT AND DIMINISHED RESPONSIBILITY

QUESTIONS AND PROVISIONAL PROPOSALS

8.1 We ask:

Suicide pacts

- (1) Should killing in pursuance of a suicide pact (Homicide Act 1957, section 4) continue to be a separate, lesser offence of homicide?

[paragraphs 8.19-8.37, 8.84-8.94]

- (2) If your answer to (1) is 'yes', should that lesser offence be "second degree murder", as we are proposing for other partial defences?

[paragraphs 8.19-8.37, 8.84-8.94]

- (3) If your answer to (1) is 'no', is our reformed partial defence of diminished responsibility likely to cater adequately for the most deserving cases that currently fall within the scope of section 4?

[paragraphs 8.19-8.37, 8.56, 8.66, 8.82 and 8.84-8.94]

- (4) If your answer to (3) is 'no', what, if anything, should replace section 4 (see questions 6 and 7 below)?

[paragraphs 8.19-8.37, 8.56, 8.66, 8.82 and 8.84-8.94]

- (5) On an indictment for murder or manslaughter, should it be possible for the defendant to seek to show that he or she was guilty only of complicity in suicide (Suicide Act 1961, section 2), when the conduct that killed the victim was meant by the defendant *and by the victim* to end both of their lives?

[paragraphs 8.95-8.102]

Killing with consent, when the killer's responsibility is diminished

- (6) When someone's diminished responsibility is a significant cause of their conduct in killing, but the killing was also proved to be consensual, should that element of 'double mitigation' mean that the offence should be reduced to manslaughter, and not just to "second degree murder"?

[paragraphs 8.36 and 8.89-8.94]

- (7) Alternatively, when someone's diminished responsibility is a significant cause of their conduct in killing, should the fact that the killing was proved to be consensual simply be a factor to be taken account in sentencing, as is currently the approach when the killing under diminished responsibility was a 'mercy' killing?

[paragraphs 8.36 and 8.89-8.94]

8.2 We provisionally propose that:

- (1) Section 4 of the Homicide Act 1957 should be repealed. Deserving cases that otherwise would have fallen within it should be pleaded under section 2 of the Homicide Act 1957 (diminished responsibility). This will result in a verdict of "second degree murder" under our proposals.

[paragraph 8.93]

OUR TERMS OF REFERENCE AND THE SCOPE OF OUR CONSULTATION

- 8.3 English law regards euthanasia or 'mercy' killing as murder. Under our proposals, euthanasia or 'mercy' killing will be "first degree murder" (see Part 2). Legalisation of euthanasia, or of the provision of assistance in dying, are outside our terms of reference.
- 8.4 In theory, consideration of whether the simple fact that a killing was consensual, or was a 'mercy' killing, or both, should reduce what would otherwise be murder to a lesser offence is within our terms of reference. However, that has not persuaded us to address these issues in that simple form. Largely the same extensive range of issues that crop up in any attempt to address the question whether killing with consent or 'mercy' killing should be legalised, also crops up when the question is whether these factors should by themselves reduce "first degree murder" to a lesser offence.
- 8.5 Consequently, we have decided not to ask whether the fact that a killing was consensual, or a 'mercy' killing, or both, should, without more, reduce "first degree murder" to a lesser offence of homicide. It would not be appropriate to permit a 'right-to-die' or a euthanasia debate to take place on this issue, when we have been asked not to enter into those debates on a closely related issue (full legalisation).
- 8.6 Things are different, however, when the question is how, if at all, existing legal provisions (such as those governing diminished responsibility) should have a bearing on cases in which someone has been killed with their consent or when the killing was a 'mercy' killing. As we see it, the question then is whether:
- (1) the latter factors should remain matters solely for sentencing for "second degree murder" when there is proof of diminished responsibility;

- (2) they should take the crime one more rung down the “ladder” of seriousness, by reducing the crime to manslaughter;¹ or
- (3) whether the crime is best located even further down that “ladder”, in the form of complicity in suicide.

HOW THE ARGUMENT PROCEEDS

- 8.7 The main legal provisions under discussion in this Part are set out and briefly explained in the next section. In broad terms, the choice of provisions – sections 2 and 4 of the Homicide Act 1957 (“the 1957 Act”), and section 2 of the Suicide Act 1961 (“the 1961 Act”) – is linked to our concentration on two things. First, there is the need to recognise the importance of depression as a motivation for entering into a suicide pact or killing with consent. Secondly, there is the need to ensure that there is an adequate “ladder” of offences and defences, appropriate for accommodating different kinds of case where these events may have taken place.
- 8.8 In the section entitled ‘Should section 4 of the Homicide Act 1957 be retained?’, we consider the arguments for and against retaining this provision. Section 4 makes it manslaughter only when one person kills another in pursuance of a suicide pact. We suggest that the provision has long outlived any usefulness it had and was in any event arbitrary in scope from the outset. We suggest that deserving cases for mitigation that fall under it can be accommodated by other existing provisions if these are reformed in certain ways.
- 8.9 We then consider previous proposals for reform of this area of the law put forward, first by the Criminal Law Revision Committee in 1976, and then by a House of Lord Select Committee in 1989. We suggest that the way in which the proposals have been developed shows the need for a new focus on the way in which suicide pact killings, so-called ‘mercy’ killings and killings with consent are motivated by depression, and are hence best dealt with through reform of the defence of diminished responsibility.
- 8.10 In the section entitled ‘Depressed carers who kill: some empirical evidence’, we review the evidence concerning when, and why, suicide pacts and consensual homicides followed by (attempted) suicides take place. We suggest that the cases most deserving of mitigation are those consensual killings in which long-term carers – normally spouses – have become progressively more depressed and mentally ill, usually because of the increasing burden of care as they become older. In the section entitled ‘Murder-suicide, suicide pacts and gender differences’ we point out, however, that such cases will normally involve male carers killing their spouses and hence that there are important gender issues at stake in relation to reform of this area of law.
- 8.11 In the section entitled, ‘Expanding section 2 of the Homicide Act 1957: our proposals’, we make our case for expanding the partial defence of diminished responsibility to accommodate severely depressed carers who kill with the consent of the victim. We point out that some consultees may believe that the

¹ Under the Criminal Justice Act 2003, s 269, sched 21, even when the offender is convicted of murder, the list of factors that are to count towards reduction of the initial period to be spent in custody includes “belief by offender that the murder was an act of mercy”.

element of 'double mitigation' (diminished responsibility coupled with consent to be killed) may justify a verdict of manslaughter in such cases, rather than the "second degree murder" verdict that would, on our proposals, accompany a finding of diminished responsibility.

- 8.12 Finally, in the section entitled, 'Joint suicide and complicity in suicide', we explain why we believe some consideration should be given to reform of section 2(2) of the 1961 Act. This provision makes it possible, on an indictment for murder or manslaughter, for the jury to find that the defendant was guilty only of complicity in suicide. There may be a case for making this latter verdict a possible outcome when the act that killed the victim was intended by both defendant and victim to end both of their lives.

A BRIEF INTRODUCTION TO THE EXISTING LEGAL PROVISIONS

- 8.13 Section 4 of the 1957 Act provides that:

- (1) It shall be manslaughter and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other ... being killing by a third person.
- (2) Where it is shown that a person charged with the murder of another killed the other or was party to his ... being killed, it shall be for the defence to prove that the person charged was acting in pursuance of a suicide pact between him and the other.
- (3) For the purposes of this section "suicide pact" means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.

- 8.14 Section 4(2) provides that the accused bears the legal burden of proof.²

- 8.15 Section 2(1) of the 1961 Act made it an offence to be complicit (assisting or encouraging) in another's suicide or in their attempt at suicide. This offence carries a maximum sentence of 14 years' imprisonment compared with a discretionary life maximum for manslaughter when a section 4 plea under the 1957 Act is successful. Section 2(2) of the 1961 Act amended the law to make it possible, on an indictment for murder or manslaughter to bring in a verdict of 'complicity in suicide', if that could be proved.³

² See *A-G's Reference (No 1 of 2004)* [2004] EWCA Crim 1025, [2004] 1 WLR 2111.

³ Suicide Act 1961, s 2:

- (1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.
- (2) If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offence.

8.16 An example of a section 4 case is *Sweeney*.⁴ In *Sweeney*, the defendant was prone to depression and the victim had advanced muscular dystrophy. They took sleeping tablets and paracetamol and sat together in the front of their car after the defendant had poured petrol on and set light to the rear of the car. The intensity of the heat drove them both to attempt to escape, but only the defendant escaped (having received serious burns in an attempt to save the victim). The defendant pleaded guilty to manslaughter.

8.17 Watkins LJ said, in relation to sentence, that it is the policy of the law that even desperate people must be deterred from taking life, and those who contemplated suicide and did not achieve it in a suicide pact would be punished if the other party died.⁵ The court pointed out that sentences of two or three years' imprisonment have been upheld as appropriate in such cases,⁶ and continued:

He [D] can have escaped [death] only by a hair's breadth. However, that cannot excuse him from entering into a pact which the law forbids. The law does not allow a person to enter into a suicide pact, the consequence of which may be to bring about the death of the two people involved but which may, as happened here, bring about only the death of one. It is very much against the public interest that such as that should happen ... [E]ven people like [D] must be deterred from going to the extreme of terminating life.⁷

8.18 It is worth highlighting, first, that in this case D suffered from a depressive illness. Under our proposals for reform of the partial defence of diminished responsibility, that might bring him within the scope of that defence. Secondly, D's act was intended by both D and the victim to end both of their lives, although it killed only the victim. Under our proposals, that fact should mean that a verdict of 'complicity in suicide', contrary to section 2 of the 1961 Act, is left as a possible verdict that the jury may bring in.

SHOULD SECTION 4 OF THE HOMICIDE ACT 1957 BE RETAINED?

8.19 Section 4 of the 1957 Act is a curious provision. It may owe its existence, and its special focus on suicide, to the fact that there was a vigorous contemporary debate at that time about the legalisation of suicide. Legalisation seemed inevitable but did not come until 1961.⁸

8.20 No one has suggested that the substantive provisions of section 4 have caused significant problems in practice. That might count as an argument in favour of an 'if it ain't broke don't fix it' approach to this part of the law of homicide. Even so, section 4 may be in some instances too generous, and in some instances too severe, on those who kill with consent.

⁴ (1986) 8 Cr App R (S) 419 (CA).

⁵ *Ibid*, 421, *per* Watkins LJ.

⁶ *Archbold: Criminal Pleading, Evidence and Practice* (2005) para 19.84.

⁷ (1986) 8 Cr App R 419 (CA) 421.

⁸ Suicide Act 1961, s 1.

8.21 On the one hand, there can be no doubt that, in theory, it covers instances where it is hard to see a reason for reducing the crime below “first degree murder”:

EXAMPLE 1: D and V are involved in a shoot-out with the police. Eventually, they realise that capture is inevitable. D and V agree that D will kill V and then turn the gun on himself. D kills V, but is arrested before he can turn the gun on himself as agreed.

EXAMPLE 2: D is the leader of a fringe religious cult. He persuades his followers to meet to commit suicide together. At the meeting, with his followers’ consent, he pours a lethal poison down their throats but finds he cannot summon the courage to do the same to himself when the moment comes.

8.22 As in provocation or diminished responsibility cases, these examples involve an admittedly intentional and unjustified killing. Why should they fall within the scope of a partial excuse if the defendant was acting rationally? Section 4 relies for its legitimacy, in part, on the defendant’s ability to show that the victim consented to be killed; but that is a justification unavailable in any other kind of case where there has been an intentional killing.

8.23 Crucially, section 4 also relies for its legitimacy, in part, on there having been an understanding by the consenting victim that the defendant will him or herself be committing suicide; but that understanding has no moral force. It rests on an express or implied promise by the defendant to kill him or herself: a promise, and an act, with no intrinsic moral value.

8.24 The examples just given show how ‘thin’ a basis consent can be, by itself, as a reason for reducing a homicide offence from a more to a less serious kind, let alone for legalising the homicide itself. In our provisional view, the defendant should at the very least be required to show that he or she was suffering from diminished responsibility and that this was a significant cause of his or her conduct in killing the victim with his or her consent. We will give reasons below for thinking that this condition may well be met in the most deserving cases that are currently candidates for mitigation under section 4.

8.25 On the other hand, section 4 may be too harsh on some defendants. There is, first, an element of arbitrariness to the scope of section 4. An obvious example would be one where the defendant kills his long-term partner with her full consent, but out of concern for her feelings the defendant conceals his settled intention to take his own life immediately thereafter. He then fails in the attempt. In such a case, it may be that the defendant has been ‘punished enough’. It seems arbitrary to confine mitigation to those who agree in advance (rather than just decide in advance) to end their own lives after ending the life of their consenting partner.

8.26 Then there are the cases where the killing takes place as a result of an act intended by both participants to end in a joint suicide (a ‘die together’ pact). In such a pact the defendant and the victim jointly participate in a plan that is meant to end with them dying more or less simultaneously as a consequence of the same action or course of conduct. An example would be where the defendant and the victim count to three and then, on ‘four’, jump hand-in-hand off a bridge but the defendant survives. In at least some such cases, a manslaughter verdict,

or a verdict of “second degree murder”, may be too severe. It may be that ‘assisting in suicide’ contrary to section 2 of the Homicide Act 1961, is the offence of appropriate gravity. *Sweeney* is an example.

- 8.27 Another example is *Dunbar v Plant*.⁹ In this case, the defendant and the victim had already unsuccessfully tried to suffocate themselves whilst they both sat in a fume-filled car. The victim was subsequently killed when the defendant and the victim both jumped simultaneously from a high beam with bed sheets around their necks in the form of a noose. By way of contrast with *Sweeney*, this case was dealt with as one of assisting in suicide (the defendant had clearly assisted the victim to commit suicide by providing him with a bed sheet) and not as manslaughter under the 1957 Act.¹⁰
- 8.28 ‘Die together’ pacts are not the only kind of suicide pact. As in the recent case of *Blackburn*,¹¹ there is also the ‘you-then-me’ pact (see Examples 1 and 2 in paragraph 8.21). As the name suggests, in this pact the defendant and the victim agree that the defendant will kill the victim by an action or course of conduct separate from an ensuing action or course of conduct in which the defendant seeks to kill him or herself, as by shooting the victim and then shooting himself. In *Blackburn*, the defendant cut the victim’s wrists and then cut his own in an identical way, but his blood congealed and he did not die. The victim had asked the defendant to end her life as she was dying of cancer. She was found to have had a three kilogram tumour in her stomach.¹²
- 8.29 The Royal Commission on Capital Punishment was well aware of this distinction between ways in which suicide pacts could be executed.¹³ Where survivors of ‘die together’ pacts were concerned, the Commission thought they should not be treated as murderers. It was of the view that the possibility that evidence of pacts would be fabricated by ‘real’ murderers was no reason to maintain the status quo. It recommended that such cases should be treated as ‘aiding and abetting suicide’ with a maximum life sentence penalty.

⁹ [1998] Ch 412.

¹⁰ The Court of Appeal in *Kennedy* [2005] EWCA Crim 685, [2005] 1 WLR 2159, confirmed that where there is no break in the chain of causation between a defendant’s acts of assistance and a victim’s suicide, it is appropriate to say that the defendant may cause the victim’s death (even in ‘die together’ cases). *Kennedy* was not itself a case involving a suicide pact. The victim was a drug user. The defendant prepared a syringe containing an illegal substance which he handed to the victim. The victim then knowingly injected himself, causing his subsequent death (though not intending to do so). The defendant was convicted of manslaughter. In relation to assisting in suicide, the Court of Appeal said that it would be an abuse of process to charge *murder* against someone who had assisted in another’s suicide foreseeing that their act of assistance would be virtually certain to contribute causally to the victim’s death. Arguably, *Kennedy* notwithstanding, there *is* a break in the chain of causation when the defendant simply helps the victim to die by the victim’s own hand. In such a case, the victim’s death is the consequence intended by the victim’s own action. By way of contrast, on the facts of *Kennedy* the victim’s death was unintended, even though the victim’s action in injecting himself with a substance provided and prepared for that purpose by the defendant was a free, deliberate and informed one.

¹¹ *Blackburn* (unreported), referred to in “Suicide Pact Husband Spared Jail”, BBC News (12 January 2005) <<http://news.bbc.co.uk/1/hi/england/4174155.stm>>.

¹² The defendant pleaded guilty to manslaughter, and was spared gaol by the trial judge. It is noteworthy that the couple’s sons wrote to the court to plead for mercy for their father.

- 8.30 However, so far as ‘you-then-me’ pacts were concerned, the Commission took a different view. In the seven cases of this nature that it considered over the preceding 20 years, it considered that in only two cases had the survivor made more than a half-hearted attempt to kill himself.¹⁴ The fact that section 4 speaks of pacts in which the defendant “kill[s] the other” may be thought to suggest that it is only ‘you-first-then-me’ pacts that were meant to be covered by section 4.
- 8.31 The Government of the day, however, did not draw a formal distinction between the kinds of suicide pact and, in the course of the Parliamentary debate, there is virtually no discussion of the issue. Clause 4, which became section 4 of the 1957 Act, received almost no attention in either House. Nonetheless, the House of Commons Committee had indicated that it was pleased to see that no distinction had been drawn between the kinds of pact.¹⁵
- 8.32 There may be an objection in practice to seeking to distinguish between ‘die-together’ and ‘you-then-me’ suicide pacts, even though the latter are liable to be more culpable than the former. This is that the two kinds of pact may not be easy to distinguish in key cases or, even if distinguishable in fact, may involve no significant ethical differences.
- 8.33 In theory, in a ‘die together’ pact such as that which failed in *Sweeney*, the course of conduct (setting fire to the car) is not *meant by the defendant* to end in the victim’s death independently of his own. The course of conduct is not of the same kind as a case in which the defendant shoots the victim dead and then turns the gun (unsuccessfully) on himself. In the latter instance, the defendant cannot but intend the shooting of and killing of the victim to be an act independent of that which will kill him.
- 8.34 These are, however, relatively fine distinctions. Many people may wish to see all such cases treated in the same (lenient) way as at present.¹⁶ Further, they may wish to see them treated alike, whether or not the defendant can show that his or her action was influenced by a specific mental disorder or illness. It can simply be assumed that utter despair led the defendant and the victim to choose a course of action so extreme as a suicide pact. The existence of the pact in itself shows the kind of subjective emotional pressure under which the defendant must have acted if it is to be right to partially excuse.
- 8.35 We see the force of these arguments, but we none the less believe that section 4 is best merged with section 2 (diminished responsibility). This will have two advantages, namely excluding from the scope of mitigation possible cases such as Examples 1 and 2 in paragraph 8.21 and ending the arbitrariness of section 4’s limitations. **[Questions 1, 2, 3 and 4]**

¹³ Royal Commission on Capital Punishment, *Royal Commission on Capital Punishment 1949-1954: Report* (1953) Cmnd 8932, paras 164-176.

¹⁴ *Ibid*, para 176.

¹⁵ See the remarks of Sir F Soskice, *Hansard* (HC) 28 November 1956, vol 561, col 537.

¹⁶ Under our proposals in Part 2, if section 4 were to be retained, killing in the course of a suicide pact would become “second degree murder”, not manslaughter. This is in line with what we propose for other partial defences.

- 8.36 There remains the question whether, if the defendant can show both that diminished responsibility was a significant cause of his conduct, and that the victim fully consented to be killed, this should entitle him or her to have the crime reduced to manslaughter and not just to “second degree murder”. This is an issue on which we invite the views of consultees. **[Question 6]**
- 8.37 Before examining this issue further, we will consider previous proposals for reform. Our claim will be that the way they have developed over the years shows that it is right to regard many of the most deserving cases of killing with consent as best dealt with under section 2 of the 1957 Act (diminished responsibility).

‘MERCY’ KILLING: THE PROPOSALS OF THE CRIMINAL LAW REVISION COMMITTEE

- 8.38 Thirty years ago, the Criminal Law Revision Committee (“the CLRC”) drew up for discussion a possible new offence of ‘mercy’ killing:¹⁷

We suggest that there should be a new offence which would apply to a person who, from compassion, unlawfully kills another person who is or is believed by him to be (1) permanently subject to great bodily pain or suffering, or (2) permanently helpless from bodily or mental incapacity, or (3) subject to rapid and incurable bodily or mental degeneration. We think that there should be a requirement that the defendant had reasonable cause for his belief that the victim was suffering from one of the conditions mentioned in (1), (2) or (3).¹⁸

- 8.39 The offence was to have a maximum penalty of two years’ imprisonment.
- 8.40 The CLRC acknowledged that the definition did not refer to the state of mind of the deceased, and that there might be a case for insisting that the victim consented to be killed or at least that the killing occurred, as the CLRC put it, “without the dissent of the deceased”.¹⁹ The Committee pointed out, however, that such a requirement might give rise to difficulties, “in cases in which the deceased is unable to consent or not to dissent because he is unconscious or in the case of a young child”.²⁰
- 8.41 What is noteworthy about the CLRC’s proposal is the central place that it gives to the ‘quality of life’ justification for killing, namely the wretched state of the victim’s mental and/or physical condition. An ‘autonomy’ justification, in the shape of the victim’s consent, is not automatically included as a limiting factor, even though its force is acknowledged. This is precisely because, to include it, would automatically exclude from the reach of the offence the killing of unconscious, mentally incapable or child victims who enjoy very low quality of life.
- 8.42 Furthermore, there is little emphasis on, and no analysis of, the excusatory element, namely the requirement that the defendant act out of “compassion”. It is

¹⁷ Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976) paras 79-87.

¹⁸ *Ibid*, para 82.

¹⁹ *Ibid*.

²⁰ *Ibid*.

certainly arguable that the law has become too fixed on anger (provocation) and fear (self-defence) as excusatory motives in murder cases. It is unclear, however, that “compassion” is capable of providing a stable basis for a further category of excusatory motive in law.

- 8.43 It may be that compassion can share with fear and anger a spur-of-the-moment dimension or manifestation. A not uncommon example is where the defendant instinctively rushes to stop the victim jumping from a bridge to commit suicide, rather than ‘respecting the victim’s autonomy’.²¹ This kind of compassion can motivate intentional killing. Another example is where the victim, a soldier about to burn to death whilst trapped in a vehicle, begs a passing fellow soldier, the defendant, to shoot him dead to save him from death by fire, when it becomes clear that he (the victim) cannot be saved from the conflagration.
- 8.44 By way of contrast with cases in which fear and anger provide (partial) excuse, it would not seem to be this kind of spontaneous manifestation of compassion that is in issue in most killing-by-consent cases. These are cases in which the defendant has been caring for the victim over a long period of time, during which the victim’s condition has deteriorated to the point where an undignified and or painful death is inevitable unless the defendant kills the victim. In such cases, the view that the compassionate course of action would be to kill the victim typically emerges only over the long period – perhaps many years – during which the defendant has been caring for the victim.
- 8.45 The closest analogy is perhaps with so-called ‘slow-burn’ cases in which anger at persistent provocation builds up over a long period, finally breaking down the defendant’s power of self-restraint.²² The difficulties the courts have encountered with such cases should act as a warning that a requirement of “compassionate” action is not straight forward as an excusatory element. The difficulties are accentuated by the fact that the requirement of “compassion” does not distinguish in a clear way between lay and professional carers who kill, and hence between excusatory and justificatory reasons for killing.
- 8.46 If the killer is a member of the victim’s close family, his or her partner or a long-term friend or neighbour, the purely compassionate motive may be obvious. If, however, the killing is done by a family doctor who has come to know the victim well, things are more complex. The doctor may well have a compassionate motive. This provides an excusatory reason for killing in that the focus is on the compelling power of the emotion irrespective of whether what the defendant does is right or wrong. Such a motive might, however, be inextricably linked with a judgement that death is in the victim’s best interests. This is a justificatory reason for killing in that the balance of reasons is considered to favour killing irrespective, in theory, of how the defendant ‘feels’ about killing.
- 8.47 The CLRC thought that “[i]f it appeared from the evidence that the defendant had other reasons for killing, the jury might well not be satisfied that the killing was

²¹ The use of inverted commas indicates that, for present purposes, we remain agnostic on the question of whether someone does indeed properly respect another’s autonomy by passing by on the other side.

²² See the discussion in *Ahluwalia* [1992] 4 All ER 889 (CA).

from compassion”.²³ That seems optimistic, in that it skirts around the case in which as in the example just given, a doctor acts for genuinely mixed motives. This is problematic in the context of the present review.

8.48 As we said at the outset, we will not be considering euthanasia-based justificatory motives for killing, even in the context of discussing levels or grades of offence. We have already explained why we are adopting that stance in paragraphs 8.3-8.6.²⁴

8.49 Showing admirable flexibility in its thinking, when the CLRC came to make its final report, the suggestion for a new offence along the lines discussed was dropped as it had little support from consultees.²⁵ The reasons that consultees opposed it are worth highlighting:

[I]t was said that our suggestion would not prevent suffering but would cause suffering, since the weak and handicapped would receive less effective protection from the law than the fit and well because the basis of the suggested new offence would rest upon the defendant’s evaluation of the condition of the victim. That evaluation might be made in ignorance of what medicine could do for the sufferer. We were reminded, too, of the difficulties of definition.²⁶

8.50 This shows the unsatisfactory character of an offence, or partial defence, that relies principally on justificatory reasons for killing in its definition.

‘MERCY’ KILLING: THE NATHAN COMMITTEE REPORT

8.51 When the House of Lords Select Committee (“the Nathan Committee”) considered the issue of ‘mercy’ killing, they thought the abolition of the mandatory life sentence would adequately deal with such cases.²⁷ Implicit in the adoption of such a stance is the view that it is right to label all such cases as one of ‘murder’. On that point, we are minded to disagree.

8.52 They also, however, considered submissions from the Law Commission and Professor Leonard Leigh. These submissions departed from the CLRC proposal discussed above in two significance respects.

8.53 First, ‘mercy’ killing was to be a special defence to murder and not a specific offence.²⁸ We do not now see a huge advantage in such a step. When charged with murder, defendants might quite reasonably wish to plead both that they are

²³ Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976) para 86.

²⁴ See also the deliberations of the British Medical Association’s Working Party on euthanasia, cited in Select Committee of the House of Lords, *Report of the Select Committee on Murder and Life Imprisonment: Vol 1* (1989) para 97.

²⁵ Criminal Law Revision Committee, *Offences Against the Person* (1980) Report 14, para 115.

²⁶ *Ibid.*

²⁷ Select Committee of the House of Lords, *Report of the Select Committee on Murder and Life Imprisonment: Vol 1* (1989) para 100.

²⁸ *Ibid.*, para 98.

guilty of 'mercy' killing, and that they were suffering from diminished responsibility. As, on the view under discussion, these are entirely separate issues in law, a split jury would have to make up its mind which applied, even when they were agreed that the defendant should not be found guilty of "first degree murder". That possibility should be avoided.

8.54 Secondly, the excusatory element in the offence was sharpened up. Instead of a requirement of "compassionate" motive, the Law Commission at that time suggested that the killing must have been done "at a time when the accused was affected by severe emotional distress".²⁹ Professor Leigh suggested, along similar lines, that the defendant be required to show that his or her action was taken under "overwhelming emotional stress".³⁰

8.55 The main aim of the enhanced focus on excuse was to exclude killing by professional carers from the scope of mitigation. The assumption is that professional carers do not, in a professional capacity at any rate, take decisions to end life dictated by severe or overwhelming emotional stress. As such, as the Nathan Committee pointed out, reflecting on these proposals:

This, in effect, would amount to the extension of the defence of diminished responsibility, explicitly bringing within the defence some cases which at present are accommodated only by a straining of the concepts beyond their proper limits and others where the defendant is not so fortunate and is convicted of murder.³¹

8.56 We believe that the Nathan Committee has in this passage pointed to the direction in which reform should now be taken. Therefore, we intend that our proposed version of diminished responsibility can cover the cases of 'mercy' killing, or killing with consent, where the killing was the result of an abnormality of mental functioning (normally, severe depression) suffered by the killer. **[Question 3]**

8.57 In practice, most such cases will be one's in which the killer was in fact a relatively elderly, depressed long-term carer for the victim. It is such cases that generate most sympathy.

DEPRESSED CARERS WHO KILL: SOME EMPIRICAL EVIDENCE

8.58 Professor Barry Mitchell's work on public opinion about homicide has yielded strong support for a lenient attitude towards what can broadly be termed merciful killing by consent. We set out this evidence in our Report, Partial Defences to Murder.³² Professor Mitchell asked his sample of members of the public to grade the following scenario in terms of seriousness:

A man has 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.

²⁹ *Ibid.*

³⁰ *Ibid*, para 99.

³¹ *Ibid.*

³² Partial Defences to Murder (2004) Law Com No 290, 191-192.

- 8.59 No less than 58 of the 62 respondents placed this case in the three least serious scenarios given to them, with 47 treating it as the least serious of the ten scenarios. Thirty-five respondents thought that there should be no prosecution at all if the wife gave consent whilst *compos mentis*. Only 14 respondents favoured imprisonment and 11 of these thought the term should be measured in single figures.
- 8.60 Since the passing of section 4 of the 1957 Act, there have been between 10-15 successful suicide pacts per year, on average. A relatively recent study indicated that, for example, in the five years between 1988 and 1992, 124 people died in a total of 62 suicide pacts.³³ During that same period, there were 144 instances of homicide-suicide ('you-then-me' cases), in which 327 people died.³⁴ Many of these these will be tantamount to suicide pacts in that the victim will have consented to be killed.
- 8.61 The overwhelming majority of suicide pacts (95%) involve the use of car exhaust or medicine.³⁵ This statistic should be contrasted with the figures for homicides more generally. 62% involved shooting, the use of a sharp instrument, hitting or kicking.³⁶ It seems more likely that a victim may have consented to be killed by a less violent method, such as gassing or asphyxia, than by a violent method, such as stabbing or hitting.
- 8.62 There is strong evidence that most of those engaging in suicide pacts are, relatively speaking, older people.³⁷ Brown and Barraclough's study suggests that 73% of suicide pact participants were over 45 years of age, the average age being 56 years. This is supported by the earlier research by Cohen, who suggested that 87% were over 40 years of age.³⁸ Furthermore, in 77% of the cases studied by Brown and Barraclough, the pacts were entered into by married couples and a further 13% by close blood relatives.

³³ M Brown and B Barraclough, "Epidemiology of Suicide Pacts in England and Wales, 1988-1992" (1997) 315 *BMJ* 286.

³⁴ B Barraclough and E C Harris, "Suicide Preceded by Murder: The Epidemiology of Homicide-Suicide in England and Wales 1988-92" (2002) 32 *Psychological Medicine* 577. This figure for homicide-suicides is inevitably somewhat larger than the number of suicide pacts, because the former includes cases in which a murderer commits suicide simply in order to avoid capture. The figure would be larger still if the interval allowed for in the study between the homicide and the suicide had been greater. Barraclough and Harris looked at cases in which there was a gap of no more than three days between the homicide and the suicide.

³⁵ See M Brown and B Barraclough, "Partners in Life and in Death: The Suicide Pact in England and Wales 1988-1992" (1999) 29 *Psychological Medicine* 1299; Fishbain and Aldrich, "Suicide Pacts: International Comparisons" (1985) 46 *J of Clinical Psychiatry* 11. In a later study of murder-suicide, however, Barraclough and Harris found a lower incidence of the use of gas poisoning and a higher incidence of the use of firearms: B Barraclough and E C Harris, "Suicide Preceded by Murder: The Epidemiology of Homicide-Suicide in England and Wales 1988-92" (2002) 32 *Psychological Medicine* 577.

³⁶ C Flood-Page and J Taylor (eds), *Crime in England and Wales 2001/2002: Supplementary Volume* (2003) 9.

³⁷ In that regard, *Dunbar v Plant* [1998] Ch 412 (see para 8.27) was highly unusual, in that the pact was between young people.

³⁸ J Cohen, "A Study of Suicide Pacts" (1961) 29 *Medico Legal J* 144. In Dr Donna Cohen's study of the USA in 2000, she found the average age of homicide-suicide perpetrators was 79: D Cohen, "Homicide-Suicide in Older People" (2000) XVII(1) *Psychiatric Times* 1.

- 8.63 Suicide pacts are strongly linked with illness, both mental and physical, in one or both of the participants. Depression is the most frequently encountered mental illness,³⁹ something common to cases studied in the US.⁴⁰ That ties in with studies of individual suicide amongst older persons, which is strongly linked with physical ill health (50-60%) and mental disturbance through depression (79%).⁴¹
- 8.64 The picture is similar, in some respects, where homicide-suicide cases are concerned. 80% of cases involved one victim and one suspect while 88% of cases involved members of the same family.⁴² The vast majority of cases (over 80%) will involve an older person, probably suffering from depression, killing a chronically ill spouse or partner for whom he has been caring.⁴³
- 8.65 In that regard, Age Concern have pointed out that 24% of people die at home and these will tend to be more elderly people.⁴⁴ Unfortunately, as Age Concern goes on to indicate, it seems that the older a very sick patient is (and especially if a cancer patient is over 85 years of age), the less likely they are to receive inpatient hospice care than a younger patient with similar levels of symptom distress and dependency. That obviously places a great burden on the carer at home. This burden may be strongly associated with the onset of their depression.
- 8.66 We believe that all this evidence provides support for the view that if (as we intend), diminished responsibility can cover severe depressive illnesses, justice can be done in such cases through the scope of section 2 without the need for section 4. **[Question 3]**
- 8.67 However, before developing this argument, it would be right to highlight an important but relatively little known facet of these cases. It is the way in which they tend to involve male defendants and female victims.⁴⁵

³⁹ M Brown, E King and B Barraclough, "Nine Suicide Pacts: A Clinical Study of a Consecutive Series 1974-93" (1995) 167 *British J of Psychiatry* 448.

⁴⁰ M Rosenbaum, "Crime and Punishment – The Suicide Pact" (1983) 40(9) *Archives of General Psychiatry* 1; J E Malphurs, C Eisdorfer and D Cohen, "A Comparison of Antecedents of Homicide-Suicide and Suicide in Older Married Men" (2001) 9 *American J of Geriatric Psychiatry* 49.

⁴¹ H R Cattell, "Elderly Suicide in London: An Analysis of Coroners' Inquests" (2004) 3(4) *International J of Geriatric Psychiatry* 251.

⁴² B Barraclough and E C Harris, "Suicide Preceded by Murder: The Epidemiology of Homicide-Suicide in England and Wales 1988-92" (2002) 32 *Psychological Medicine* 577. The latter figure is almost identical to the figure for the USA, where 80-90% of homicide-suicides involve spouses or partners: D Cohen, "Homicide-Suicide in Older People" (2000) XVII(1) *Psychiatric Times* 1; D Cohen, "Caregiver Stress Increases Risk of Homicide-Suicide" (2000) 1(4) *Geriatric Times* 20.

⁴³ B Barraclough and E C Harris, "Suicide Preceded by Murder: The Epidemiology of Homicide-Suicide in England and Wales 1988-92" (2002) 32 *Psychological Medicine* 577; D Cohen, "Homicide-Suicide in Older People" (2000) XVII(1) *Psychiatric Times* 1.

⁴⁴ See Age Concern, The National Council on Ageing, *End of Life Issues* (2002) Policy Position Paper, para 3, available at Age Concern, <<http://www.ageconcern.org.uk/AgeConcern/media/EndoflifepppSept2002.pdf>>.

⁴⁵ We were warned by Rights of Women that it may sometimes be claimed that women have taken their own lives in circumstances where there was considerable pressure on them to do so from dominating male members of the family.

MURDER-SUICIDE, SUICIDE PACTS AND GENDER DIFFERENCES

- 8.68 Gender differences are at work in both suicide pact and homicide-suicide cases. These differences are of a particular concern in homicide-suicide cases where there is by definition a free and informed decision to kill (putting aside the question of mental disorder). There is some evidence that dominating and controlling male partners may be receiving unduly lenient treatment at the hands of the law. This concern has frequently been voiced in relation to provocation and diminished responsibility cases.⁴⁶
- 8.69 In England and Wales, people who commit suicide in a pact are more likely than those who commit suicide alone to be older, to be married and to be female.⁴⁷ The ratio of males to females in suicide pacts is 1:1, whereas in instances of solitary suicide it is 3:1.
- 8.70 A study in the USA has also shown that men who enter into suicide pacts or commit homicide-suicide are three times more likely to have been in a caring role than those men who commit solitary suicide.⁴⁸ The latter tend more often to have been in receipt of care themselves.⁴⁹
- 8.71 The immediate trigger for a suicide pact is normally a threat to the continuation of a relationship, such as the impending death of one party.⁵⁰ In that regard, almost all suicide pacts are likely to conform to one of two models, which have been called the 'dependent-protective' model and the 'symbiotic' model.⁵¹
- 8.72 In the dependent-protective model, the couple have been married a long time and they are highly dependent on one another. The man, who has been dominant in the relationship, fears that he will no longer be able to fulfil his role as care-giver, perhaps because of a deterioration in his own health or in his wife's health. Something like one half of those who enter into pacts suffer from psychiatric disorders and a third from physical illness.⁵² As Dr Donna Cohen puts it, "serious depression from years of caregiving, coupled with increasing isolation, produces hopelessness in the male caregiver and triggers the act".⁵³
- 8.73 The slightly less common symbiotic model involves extreme inter-dependency, usually in a much older couple. The difference from the dependent-protective model is largely one of degree. As Dr Cohen describes it:

⁴⁶ See the discussion in *Partial Defences to Murder* (2004) Law Com No 290, Appendices A and B.

⁴⁷ M Brown and B Barraclough, "Partners in Life and in Death: The Suicide Pact in England and Wales 1988-1992" (1999) 29 *Psychological Medicine* 1299.

⁴⁸ J E Malphurs, C Eisdorfer and D Cohen, "A Comparison of Antecedents of Homicide-Suicide and Suicide in Older Married Men" (2001) 9 *American J of Geriatric Psychiatry* 49.

⁴⁹ See also, D Cohen, "Homicide-Suicide in Older People" (2000) XVII(1) *Psychiatric Times* 1.

⁵⁰ B K Rosen, "Suicide Pacts: A Review" (1981) 11 *Psychological Medicine* 523.

⁵¹ D Cohen, "Homicide-Suicide in Older People" (2000) XVII(1) *Psychiatric Times* 1.

⁵² M Brown and B Barraclough, "Partners in Life and in Death: The Suicide Pact in England and Wales 1988-1992" (1999) 29 *Psychological Medicine* 1299.

⁵³ D Cohen, "Homicide-Suicide in Older People" (2000) XVII(1) *Psychiatric Times* 1.

One or (usually) both are very sick ... The husband and wife are so enmeshed in each other that their individual characteristics are blurred. The male perpetrator is often the dominant personality and the female victim is often submissive.⁵⁴

- 8.74 In cases of homicide-suicide in England and Wales, 75% of the victims were female whereas 85% of the suspects were male, a difference also reflected in the figures for the USA.
- 8.75 Even in suicide pact cases, where violent means are much less commonly adopted, there is some evidence that it is the man who tends to take the lead, with his wife co-operating.⁵⁵ Some have even argued that there is commonly an element of coercion in the decision to enter a suicide pact.⁵⁶
- 8.76 What is to be made of these differences? A common stereotype employed in explaining the rationale for section 4 of the 1957 Act is of “compassionate assistance to someone already determined to commit suicide”.⁵⁷ This was, broadly speaking, the model adopted in the scenario employed in the public opinion survey (see paragraph 8.58). The use of the stereotype can be defended as an ideal case for lenient treatment; but how true to reality is the stereotype?
- 8.77 One hypothesis to explain the figures just given might run as follows. Men cope less well, mentally, with their own illnesses: hence, their predominance in the solitary suicide cases.⁵⁸ They also cope less well, mentally, with long-term domestic caring roles: hence their predominance as perpetrators of the homicide in domestic homicide-suicide cases:

A caregiving role appears to be a significant factor associated with spousal/consortial homicide-suicide. Spousal caregiving is associated with an increased risk for depression as well as other negative health, personal, and family consequences.⁵⁹

- 8.78 Despite this mental deterioration, however, in many cases men remain ‘in control’ of decision-making within the relationship, which explains the suspicion that, in many suicide pacts cases, men are taking the lead or even using coercion. As one group of researchers puts it:

⁵⁴ *Ibid.*

⁵⁵ M Brown and B Barraclough, “Partners in Life and in Death: The Suicide Pact in England and Wales 1988-1992” (1999) 29 *Psychological Medicine* 1299. The victim may co-operate willingly, of course, even in cases where violent means, such as cutting wrists, have been used: *Blackburn* (unreported), referred to in “Suicide Pact Husband Spared Jail”, BBC News (12 January 2005) <<http://news.bbc.co.uk/1/hi/england/4174155.stm>>.

⁵⁶ D Young, C Rich and R Fowler, “Double Suicides: Four Modal Cases” (1984) 45 *J of Clinical Psychiatry* 470.

⁵⁷ A Ashworth, *Principles of Criminal Law* (3rd ed 1999) 295. See also Criminal Law Revision Committee, *Penalty for Murder* (1973) Report 12, cited by L Blom-Cooper and T Morris, *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (2004) 162.

⁵⁸ See H Cattell, “Suicide in the Elderly” (2000) 6 *Advances in Psychiatric Treatment* 102.

⁵⁹ J E Malphurs, C Eisdorfer and D Cohen, “A Comparison of Antecedents of Homicide-Suicide and Suicide in Older Married Men” (2001) 9 *American J of Geriatric Psychiatry* 49.

A dependent-protective attachment to the spouse and the need to control the relationship are known to play an important role in the chain of events leading to spousal homicide-suicide.⁶⁰

8.79 When considering the implications of homicide-suicide cases in which a defendant resorts to violence as a result of being unable to cope, the gendered nature of violence in society generally should be taken into account. Specifically, the proportion of violent offenders who are male is overwhelming. Further, 67% of victims of domestic violence are women.⁶¹ A decision by a mentally disturbed man to end the life of his (consenting) partner, whether by violence or other means, simply seems to come more easily to him than it would do to his spouse were she in his position.

8.80 This has led Cohen to conclude, in a study of homicide-suicide in older people in the USA, that the stereotype of the suicide-pact outlined in paragraph 8.58 can be misleading:

Homicide-suicides in older people are not acts of love or altruism. They are acts of depression and desperation. Approximately 40% of the perpetrators in west central Florida had depression or other psychiatric problems ...

...The men who committed suicide had significantly more health problems, but more than one-third of homicide-suicide perpetrators had a recent significant decline in health prior to the act. Indications of depression were high for both groups ...

... One common feature ... that precipitates the act is a perception by the older man of an unacceptable threat to the integrity of the relationship (such as pending institutionalisation), a real or perceived change in the perpetrator's health, or marital conflict and domestic violence⁶²

8.81 It is worth noting that in another US study, 30% of homicide-suicides were found to fall into an 'aggressive' paradigm, in which there had been a history of marital conflict or domestic violence.⁶³ It may well be that the picture is no different for England and Wales.⁶⁴

8.82 Our provisional proposal that such cases are best dealt with through reform of the defence of diminished responsibility means that the defendant must provide proof that a medically recognised abnormality of mental functioning played a significant part in his or her actions. By limiting the reach of the defence in this way, we aim to address gender-based concerns. The defence should not benefit men whose

⁶⁰ *Ibid.*

⁶¹ T Dodd, S Nicholas, D Povey and A Walker, *Crime in England and Wales 2003/2004* (2004) 73.

⁶² D Cohen, "Homicide-Suicide in Older People" (2000) XVII(1) *Psychiatric Times* 1.

⁶³ *Ibid.*

⁶⁴ M Brown, E King and B Barraclough, "Nine Suicide Pacts: A Clinical Study of a Consecutive Series 1974-93" (1995) 167 *The British J of Psychiatry* 448.

killing with consent is really a reflection of their perhaps violent and controlling, but not clinically abnormal, personalities or state of mind.⁶⁵

- 8.83 Having said that, our provisional view is that the fact that perpetrators of homicide-suicide attempts tend to be men exercising a controlling influence within a relationship should not 'trump' their right to be regarded as having committed a lesser offence if they were suffering from diminished responsibility. Severely mentally ill or disordered people should not be made to 'carry the can' for the ills of a society in which relationships tend to be unequal.

EXPANDING SECTION 2 OF THE HOMICIDE ACT 1957: OUR PROPOSALS

- 8.84 At present, killers by consent who were long-term carers of a terminally ill spouse, but who fall outside the limited scope of section 4 of the 1957 Act, are already quite commonly dealt with under section 2 of the Act as persons suffering from diminished responsibility. It is the prosecution that normally accepts the plea in such cases. In Suzanne Dell's study of the operation of section 2 in practice, she suggested that in such cases, "men in their 60s or 70s ... had reached breaking point under the continued strain of looking after wives with severe mental or physical illnesses".⁶⁶
- 8.85 Dell's suggestion accords with the evidence already considered that suggests that mental illness, and depression in particular, is a major causal factor in such cases. The theoretical problem in law is that such depression is often 'reactive' or situational and may not be regarded as fitting the requirement that an abnormality of mind stems from a disease, injury, or any other inherent cause.⁶⁷
- 8.86 It is commonly accepted that these potential problems are "swept under the carpet".⁶⁸ This happens through prosecution acceptance of a plea of guilty to section 2 manslaughter. The plea is accepted to ensure that what seems to prosecutors to be a relatively venial instance of the offence is not met with a conviction for murder.
- 8.87 Professor Mackay has suggested that since there is little prospect of a change in the law to permit spouses to perform 'mercy' killing legitimately, "might it not be better ... to craft a plea of diminished responsibility which can more readily accommodate such homicides?".⁶⁹ This broadly coincides with our provisional view. We believe that our version of diminished responsibility will be apt to cover the most deserving of such cases.
- 8.88 So long as there is clinical support for the existence of an abnormality of mental functioning contributing to the defendant's conduct at the relevant time, the

⁶⁵ We are grateful for the advice we have received on this issue from Dr Madelyn Hicks, Honorary Lecturer, Sections of Community and Cultural Psychiatry, Department of Health Services Research, Institute of Psychiatry, Kings College London.

⁶⁶ S Dell, *Murder into Manslaughter: The Diminished Responsibility Defence in Practice* (1984) 35-36.

⁶⁷ *Sanderson* (1994) 98 Cr App R 325, discussed by R D Mackay, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] Crim LR 117.

⁶⁸ Professor Ashworth's phrase: A Ashworth, *Principles of Criminal Law* (3rd ed 1999) 296.

removal of the need to show that the abnormality had a specific cause should enable severely depressed carers who kill to take advantage of the mitigation provided by the partial defence of diminished responsibility. **[Question 3]**

- 8.89 As we have indicated, the important further question is whether, when a defendant suffering from diminished responsibility can also prove there was consent to the killing (so, it was not a non-consensual 'mercy' killing), the offence should be reduced to manslaughter and not just to "second degree murder".
- 8.90 There might seem to be a strong case for such a change to mark the distinction between mentally disordered defendants who kill with and those who kill without the consent of the victim. We welcome the views of consultees on this issue but we are not ourselves taking a provisional view on it. This is because the case for drawing the distinction is counter-balanced by a problem we have raised more than once in relation to the possible proliferation of offences of and defences to homicide (see Appendix H).
- 8.91 In this context, this would be a problem if some members of the jury believed there was evidence of diminished responsibility but did not believe there was consent to be killed, and other members who believed both factors were present. All members of the jury would be agreed that the verdict should not be "first degree murder", but they would not be able to agree on the crime to which it should be reduced. Those who accepted the evidence of diminished responsibility but not of consent would in effect support a verdict of "second degree murder". Those who accepted both these factors would in effect support a verdict of manslaughter.
- 8.92 It may be possible to overcome the problems posed by such a case by making it clear that the judge can accept a verdict of guilty of "second degree murder" on the grounds of diminished responsibility notwithstanding the failure to agree on a further reduced plea of guilty to manslaughter.
- 8.93 In summary, **our provisional proposal** is that section 4 of the 1957 Act (killing in pursuance of a suicide pact is manslaughter) should be repealed. Section 2 of that Act (diminished responsibility), if reformed in the way we have suggested in Part 6, will adequately deal with deserving cases that might otherwise have fallen under section 4. In accordance with our provisional proposals in Part 2, when diminished responsibility is successfully pleaded the verdict is "second degree murder". **[Questions 1, 2, 3 and 4]**
- 8.94 We are also inviting views on the 'double mitigation' point discussed above. We are inviting consultees' views on whether the combination of diminished responsibility as a cause of the defendant's conduct and the victim's consent to the killing justifies at most a verdict of manslaughter rather than one of "second degree murder". **[Questions 6 and 7]**

⁶⁹ R D Mackay, "Diminished Responsibility and the Mentally Disordered", in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (2000) 80.

JOINT SUICIDE AND COMPLICITY IN SUICIDE

- 8.95 Almost everyone is likely to be aware that it is lawful to commit or to attempt to commit suicide. In principle, it is also lawful to commit suicide along with someone else. An example would be where two people agree to walk towards the edge of a cliff so that they fall off simultaneously. What people are less likely to realise is that the slightest act intended to assist or to encourage (expressly or impliedly) someone to commit suicide may make the helper or encourager complicit in the suicide, an offence contrary to section 2(1) of the 1961 Act.
- 8.96 In the example just given, it is unlikely that the simple act of walking towards the edge of the cliff, alongside the other person, will be found to have been an act *intended* to encourage that other's suicide (by maintaining their resolve). So, there will be no offence committed contrary to section 2 of the 1961 Act. By way of contrast, where two or more people are planning a suicide pact, such an intention will more readily be proven.
- 8.97 Even so, when carers enter into suicide pacts with those for whom they have been caring, criminal liability may necessarily be more serious than the commission of a section 2 offence. Further, it may be unexpectedly extensive by virtue of the Domestic Violence, Crime and Victims Act 2004 ("the 2004 Act"). This Act provides that other members of the household – principally, family members – may become liable for failing to prevent the death of a vulnerable adult, even if they in good conscience believed that the adult in question should be left to determine his or her own fate.⁷⁰
- 8.98 Liability may necessarily be more serious than the commission of a section 2 offence in cases where a suicide pact was of the 'die together' variety, but only if the victim was killed by the defendant's conduct. In such cases, it seems unlikely that a jury is entitled by virtue of section 2(2) to bring in a verdict of complicity in suicide.⁷¹ It seems that the only available verdicts at present are murder, manslaughter or complete acquittal. If so, that is too harsh on the defendant.
- 8.99 Section 4 of the 1957 Act applies when the defendant "kill[s] the other". Section 2 of the 1961 Act applies when the defendant "aids abets, counsels or procures the suicide of another". In some half-completed suicide pacts, such as that in *Sweeney* (discussed in paragraphs 8.16-8.18) where the intention was to die together, the defendant does in fact "kill the other". He or she sets in train a series of events that causes the victim's death. The defendant does not merely assist the victim to commit suicide although, as the Editor of *Smith and Hogan: Criminal Law* points out, the distinction between section 4 manslaughter and section 2 complicity in suicide, "may be very fine".⁷² So, it would seem that whilst

⁷⁰ Liability under the 2004 Act will hinge on whether the other member of the household is found to have failed to take such steps as could reasonably have been expected to protect the victim from the risk of the defendant's unlawful act: see s 5(1)(d). If the family member is found to have been in gross breach of a duty of care towards the victim, he or she may also be found guilty of manslaughter.

⁷¹ We have been greatly assisted in our thinking about the relationship between section 4 manslaughter and assisting suicide by the insights of the Reverend Professor Oliver O'Donovan, Canon of Christ Church, Oxford University.

⁷² D Ormerod (ed), *Smith and Hogan: Criminal Law* (11th ed 2005) 497.

a verdict of manslaughter under section 4 of the 1957 Act is available, a verdict of complicity in suicide contrary to section 2 of the 1961 Act is not.

- 8.100 This is unfair given that in 'die together' pacts there may well have been mutual assistance and support in the acts leading up to the attempt to commit suicide together.⁷³ The verdict of guilty of the (lesser) section 2 offence is unavailable simply because – perhaps by chance – the survivor was the one who performed what is taken to be the key piece of conduct causing the victim's death. The fact that he or she intended to die by this act as well does not change that.
- 8.101 Consequently, we are inviting consultees' views on whether section 2(2) of the 1961 Act should be amended. The amendment would provide that where the defendant can prove that an act or course of conduct was (with the victim's consent) intended by the defendant to end both of their lives, the judge is empowered to tell the jury that they may bring in a verdict of complicity in suicide, contrary to section 2(1) of the 1961 Act. **[Question 5]**
- 8.102 Naturally, there will still be some 'die together' cases where no mitigation is appropriate. For example, if in Example 1 (in paragraph 8.21) the two individuals agreed that the defendant would blow up the room where they were both trapped, 'to take some of the police with them', but only the victim dies, then arguably no mitigation is appropriate. A conviction for the murder of the victim would be richly merited. In such a case, the jury should be trusted to reject the 'soft' option of convicting only of complicity in suicide.

⁷³ See *Dunbar v Plant* [1998] Ch 412, 438, *per* Phillips LJ:

Where two people are driven to attempt, together, to take their lives, and one survives, the survivor will normally attract sympathy rather than prosecution. A suicide pact may be rational, as where an elderly couple who are both suffering from incurable diseases decide to end their lives together, or it may be the product of irrational depression or desperation. In neither case does it seem to me that the public interest will normally call for...prosecution... .

PART 9

INFANTICIDE

QUESTIONS AND PROVISIONAL PROPOSALS

9.1 We ask:

- (1) Should the offence/defence of infanticide be retained or abolished?

[paragraphs 9.72-9.74]

- (2) If the offence/defence of infanticide should be retained, should it be:

- (a) minimally reformed; (**our provisional proposal**)
(b) moderately reformed; or
(c) radically reformed?

[paragraphs 9.75-9.92]

- (3) If the offence/defence of infanticide is abolished, should infanticide cases be subsumed within a reformed defence of diminished responsibility?

[paragraphs 9.93-9.95]

- (4) If a biological mother of a child of one year or less is convicted of murdering that child and at trial did not raise the defence of infanticide, should the judge be empowered to order a psychiatric report on the mother with a view to establishing whether or not there is evidence that at the time of the killing the requisite elements of a charge of infanticide were present?

[paragraphs 9.97-9.106]

- (5) If so, should the judge then be able to postpone sentence and certify the conviction for appeal on the ground of fresh evidence?

[paragraphs 9.97-9.106]

- (6) Are consultees aware of any alternative reforms which could provide a way of addressing the problem which was identified in *Kai-Whitewind*?

[paragraphs 9.97-9.106]

9.2 The minimal, moderate and radical reform options are set out in detail in paragraphs 9.75-9.92.

INTRODUCTION: A UNIQUE OFFENCE

- 9.3 Infanticide is an offence in its own right.¹ It is also a defence to a charge of murder.² Notwithstanding that the offence involves deliberate killing, it routinely results in non-custodial sentences for those women who are convicted of it.³ It is also the only offence in English law for which mental abnormality is a prerequisite. The offence is infrequent. In 2000, for instance, there were only two cases in England and Wales.⁴ Recent research into the significant features or characteristics of particular cases dealt with either by the courts or the prosecuting authorities is limited.⁵ We have commissioned research by Professor R D Mackay in this area as part of the Review.
- 9.4 We will address the reform issues that arise in relation to the offence/defence of infanticide by considering in turn: (a) the historical background to infanticide; (b) the relationship between infanticide and the defence of diminished responsibility under section 2 of the Homicide Act 1957 ("the 1957 Act"); (c) an outline of possible reforms of the present offence/defence of infanticide; (d) criticisms of the existing offence/defence; (e) previous proposals for reform; (f) the current legislative context; and, finally, (g) options for reform.

HISTORICAL BACKGROUND

- 9.5 Until the seventeenth century, the law classified infanticide as murder. In 1624, the crime of concealment of the death of an illegitimate child was introduced, largely in response to the medical difficulty of proving that a dead infant had been born alive.⁶ Proven cases of infanticide continued to be classed as murder. The 1624 Act was repealed in 1803.⁷ By the mid to late nineteenth century, concerns were expressed regarding the severity of the death penalty for mothers convicted

¹ Infanticide Act 1938, s 1(1) provides:

Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of her giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

² *Ibid*, s 1(2).

³ N Walker, *Crime and Insanity in England: Volume One, The Historical Perspective* (1965) 133:

... the virtual abandonment of prison sentences as a means of dealing with a crime involving the taking of human life is one of the most striking developments in the history of our sentencing policy.

⁴ N Lacey, C Wells and O Quick, *Reconstructing Criminal Law: Text and Materials* (3rd ed 2003) 776.

⁵ Mackay relied on a sample of cases between 1982-1985 as the basis for his research in: R D Mackay, "The Consequences of Killing Very Young Children" [1993] Crim LR 21, 21. Alder and Polk reviewed cases of child homicide in Victoria, Australia, committed between 1985 and 1995: C Alder and K Polk, *Child Victims of Homicide* (2001).

⁶ An Act to Prevent the Destroying and Murthering of Bastard Children 21 James 1 c 27 1624.

⁷ Lord Ellenborough's Act 42 Geo 3 c 58 1803.

of murdering their infants.⁸ These concerns largely arose from society's increasing recognition of the social stigma and poverty experienced by mothers of illegitimate children. Sympathy for these mothers was reflected in the high acquittal rate and the large proportion of death sentences passed on such women that were commuted to imprisonment.⁹ This situation was considered to be making a "solemn mockery" of the judicial process.¹⁰

9.6 At this time, medico-psychological theories emerged which associated childbirth with increased mental vulnerability and instability.¹¹ These theories were adopted as a basis for taking a more lenient approach to infanticide cases. However, it seems that the introduction of the more lenient approach was motivated largely by the "solemn mockery" being made of the judicial process in infanticide cases.¹² Thus, although a medical basis was introduced, it appears that the tacit intention was that it would have broader application than strict cases of mental disturbance induced by the effects of giving birth or lactation.

9.7 The medical model of infanticide was first adopted in the Infanticide Act 1922 ("the 1922 Act"). It provided that a mother who killed her newly born child when "she had not fully recovered from the effect of giving birth to such a child, but by reason thereof the balance of her mind was disturbed" would be guilty of infanticide rather than murder. It soon became clear that the restriction of infanticide to "newly born" children led to arbitrary and arguably unjust results.¹³ In 1938, infanticide was extended to include children under the age of 12 months and disturbance of the mind by reason of lactation ("the 1938 Act").¹⁴ This

⁸ K O'Donovan, "The Medicalisation of Infanticide" [1984] Crim LR 259, 261; J A Osbourne, "The Crime of Infanticide: Throwing Out the Baby with the Bathwater" (1987) 6 Canadian J of Family L 47, 53; C B Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada" (1984) 34 U Toronto LJ 447, 462; T Ward, "The Sad Subject of Infanticide: Law, Medicine and Child Murder, 1860-1938" (1999) 8(2) Social and Legal Studies 163, 164-165.

⁹ K O'Donovan, "The Medicalisation of Infanticide" [1984] Crim LR 259, 261; J A Osbourne, "The Crime of Infanticide: Throwing Out the Baby with the Bathwater" (1987) 6 Canadian J of Family L 47, 53; C B Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada" (1984) 34 U Toronto LJ 447, 461.

¹⁰ N Walker, *Crime and Insanity in England: Volume One, The Historical Perspective* (1965) 130; K O'Donovan, "The Medicalisation of Infanticide" [1984] Crim LR 259, 261; K Laster, "Infanticide: A Litmus Test for Feminist Criminological Theory" (1989) 22 Australian and New Zealand J of Criminology 151, 162.

¹¹ B McSherry, "The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility" (1993) 15 Sydney LR 292, 297-298, 315; C L Meyer and M Oberman, *Mothers Who Kill their Children: Understanding the Acts of Moms from Susan Smith to the "Prom Queen"* (2001) 11.

¹² N Walker, *Crime and Insanity in England: Volume One, The Historical Perspective* (1965) 130; K O'Donovan, "The Medicalisation of Infanticide" [1984] Crim LR 259, 261; K Laster, "Infanticide: A Litmus Test for Feminist Criminological Theory" (1989) 22 Australian and New Zealand J of Criminology 151, 162.

¹³ Eg, in *O'Donoghue* (1927) 20 Cr App R 132, the Court of Appeal held that the offence could not apply to a child of 35 days.

¹⁴ Infanticide Act 1938, s 1(1).

remains the law in England and Wales today, and has been adopted by numerous common law jurisdictions.¹⁵

INFANTICIDE AND DIMINISHED RESPONSIBILITY UNDER SECTION 2 OF THE HOMICIDE ACT 1957

- 9.8 When the 1922 Act was enacted there was, of course, no partial defence of diminished responsibility in English law. So, from its inception, the offence/defence of infanticide has served the purpose of mitigating the harshness of the law of murder insofar as women who kill their infant children are concerned. The question whether or not the 1938 Act is now otiose in the light of section 2 of the 1957 Act has been rigorously examined on at least two occasions.¹⁶ There are obvious differences between the provisions of the 1938 Act and section 2 of the 1957 Act. Four of these differences are perhaps of the greatest importance.
- 9.9 First, there are different understandings of the abnormal state of mind that brings each defence into operation. Infanticide requires that the balance of the defendant's mind has been disturbed at the time she killed the infant either by failure to make a full recovery from the effects of birth, or due to effects of lactation. Diminished responsibility requires proof of an abnormality of mind (stemming from one or more of a stipulated list of causes) that substantially diminished the defendant's mental responsibility for his involvement in the killing.
- 9.10 Secondly, infanticide, unlike diminished responsibility, is an offence in its own right.
- 9.11 Thirdly, unlike diminished responsibility under section 2, the wording of the 1938 Act does not explicitly require any causal connection between the killing of the child and the necessary disturbance of the balance of the mind. The infanticidal mother need only produce evidence that at the time of the killing, the balance of her mind was disturbed either by birth or by the effects of lactation.
- 9.12 Those three differences do not constitute an insurmountable barrier to incorporating infanticide into diminished responsibility. However, such a step would still require a claim of 'diminished responsibility by reason of infanticide' to be addressed in part separately, under a reformed section 2. This is because of the fourth difference between the 1938 Act and section 2.
- 9.13 The final difference is that a plea or charge of infanticide is restricted to biological mothers of the child killed, and the child killed must have been under 12 months old at the time. The restriction of the plea or charge to biological mothers hinges on acceptance that an extreme or abnormal form of postpartum

¹⁵ For example, similar provisions exist in the Australian states of Victoria (Crimes Act 1958, s 6), New South Wales (Crimes Act 1900, s 22A) and Tasmania (Criminal Code Act 1924, s 165A), as well as various other common law countries.

¹⁶ The Butler Committee and the Criminal Law Revision Committee (CLRC) both examined the point: *Report of the Committee on Mentally Abnormal Offenders* (1975) Cmnd 6244 (The Butler Report); Criminal Law Revision Committee, *Offences Against the Person* (1980) Report 14, Cmnd 7844. The former resolved that those cases with which the 1938 Act was concerned could just as well be dealt with under section 2 of 1957 Act whereas the CLRC came to a different conclusion.

depression can, in rare but genuine cases, generate a murderous impulse in new mothers. We will not seek to challenge this assumption, but we will explore the evidence in its favour. The significance of this restriction may make it right to retain the offence/defence of infanticide, albeit in a modified form.

RETAINING BUT REFORMING THE OFFENCE OF INFANTICIDE: MINIMAL, MODERATE AND RADICAL REFORM OPTIONS

- 9.14 If postpartum depression is experienced only by new (biological) mothers, then there is a case for retaining the offence/defence of infanticide as dealing with a unique situation, although in theory it could be a sub-division or category of diminished responsibility. Diminished responsibility is not gender-specific. Still less is it confined to persons who were in a particular relationship to the victim. On the assumption, then, that the offence/defence of infanticide remains, what are the options for reform?
- 9.15 We will consider the possible medical foundation for infanticide in the next section. A minimal programme of reform would involve abolishing the long-explored theory that “the effect of lactation” is a cause of postpartum depression, and perhaps to relax somewhat the age restriction for the child victim (see paragraphs 9.75-9.78).
- 9.16 What of the restriction of the offence/defence to children under 12 months? The restriction is clearly, albeit perhaps necessarily, arbitrary. It means that a mother who kills her child because she is suffering from postpartum depression when the child is 365 days old must, if charged with murder, plead diminished responsibility. Even if successful in this plea, she may well receive a harsher sentence than she would have received had she done the same act for the same reason when the child was 364 days old, and then successfully pleaded or been charged with infanticide.
- 9.17 Some countries have a lower age limit, some a higher one.¹⁷ The Victorian Law Reform Commission heard evidence that most infanticide cases occur within two years of birth.¹⁸ So, a minimal expansion of the offence/defence could involve extending the age limit to two years. This has been the course adopted in the Crimes (Homicide) Act 2005 in Victoria, Australia,¹⁹ following the recommendations of the Victorian Law Reform Commission.²⁰
- 9.18 A more moderate reform approach could build on the minimal approach by including disturbance of the mind arising from circumstances consequent upon birth, as well as the effects of birth (see paragraphs 9.79-9.86). Similarly, it could require a causal link between the disturbance of the mother’s mind and the act or omission of killing.

¹⁷ Under the Malaysian Penal Code, the child must be “newly born” (s 309A), whereas in New Zealand the offence of infanticide applies to children under ten: Crimes Act 1961 (NZ), s 178. Under New Zealand law there is no defence of diminished responsibility

¹⁸ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) para 6.39.

¹⁹ Crimes (Homicide) Act 2005, s 5.

²⁰ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) para 6.37-6.41.

- 9.19 A more radical reform would involve, first, abandoning the age limit of the child victim. The jury would be left to decide the question whether, given the (more advanced) age of the child, the killing was really caused by postpartum depression. Secondly, the offence/defence could be extended to persons in a caring relationship with the child at the time of the killing other than the biological mother. This possibility is explored in paragraphs 9.87-9.92.

CRITICISMS OF THE OFFENCE

The psychiatric basis of the offence

- 9.20 The most common criticism of the 1938 Act is what is often claimed to be the unsubstantiated psychiatric premise on which it is based. Those who would seek to abolish the offence argue that it medicalises a condition in order to absolve the actor from moral blame. Professor Walker has characterised the Act as a process of “myth-making by legislation.”²¹ In other words, it has created a link between childbirth and infanticide that would not otherwise have existed.
- 9.21 There is rarely any direct biological link between childbirth and mental imbalance. Neither is there any clear medical support concerning the effect of lactation on the balance of the mind. A medico/psychiatric focus has had the effect of distorting the reality of child killing. Indeed, if Walker’s theory that the infanticide legislation created the link between child-birth and infanticide is right, then it raises questions as to whether the Act should remain gender specific.
- 9.22 The fact that the offence is necessarily gender specific, coupled with the uncertain psychiatric basis which underlies it, has continued to fuel debate. According to Ussher, the origin of the nineteenth-century image of women as “infirm and labile” leading to biological vulnerability can be traced as far back as the misogynistic works of the fifteenth-century witch hunters Sprenger and Kraemer.²² For the purposes of legal discourse, a concept of biological vulnerability presents women as irrational and unable to take responsibility for their actions.
- 9.23 Some critics have claimed that the 1938 Act exemplifies a wider pattern of neutralising female guilt, responsibility and dangerousness, to obviate the need for punitive or custodial sanctions.²³ For many critics this has undesirable consequences. The privileges it affords women are said to be bought at the expense of making “legal invalids of women, of excluding them from their full status as legal subjects and of perpetuating their social and legal subordination”.²⁴

²¹ N Walker, *Crime and Insanity in England: Volume One, The Historical Perspective* (1965) 136.

²² J Ussher, “Reproductive Rhetoric and the Blaming of the Body” in P Nicolson and J Ussher (eds) *The Psychology of Women’s Health and Health Care* (1992) 34-35.

²³ H Allen, “Rendering Them Harmless” in P Carlen and A Worrall (eds) *Gender, Crime and Justice* (1987).

²⁴ Edwards (1985) cited in H Allen, “Rendering Them Harmless” in P Carlen and A Worrall (eds) *Gender, Crime and Justice* (1987).

- 9.24 Postpartum depression has, however, been the subject of a great deal of psychiatric research. Postpartum psychosis remains central to perinatal psychiatry, despite uncertainty over its nosological status.²⁵ In 1987, Kendall attempted to assess the impact of childbirth on maternal mental health by cross-linking case registers of maternity and psychiatric admissions. Mental illness was shown to be far more common in women after childbirth than at any previous time.²⁶
- 9.25 There is also a close relationship between postpartum psychosis and major affective disorder. Although the actual mechanism by which this occurs is unknown, it is believed that the hormonal changes following childbirth trigger affective disorder in women who are genetically vulnerable to such illnesses. In 1995, Cooper and Murray were able to identify a group of women who became depressed after childbirth but not after other life events.²⁷
- 9.26 Notwithstanding criticism of the psychiatric basis of the offence/defence of infanticide, some have argued that the policy of mitigation for mothers who kill their infants embodied in the 1938 Act can be justified in psychiatric terms.²⁸ Maier-Katkin and Ogle analyse the existence of several different postpartum psychiatric conditions, which can range in severity from the mild to the moderate. As many as half of all new mothers are affected by the “baby-blues”. Most people, however, at some point in their lives experience transient depression, especially in response to a prolonged situation of stress. That means it is hardly surprising that researchers find that new mothers also experience depression.
- 9.27 As to this last point, it has been observed that childbirth differs from most of the other events which are known or suspected to contribute to the aetiology of psychiatric disorders, “in occurring at a precise time, in affecting only one person and in having its occurrence routinely recorded for the population as a whole.”²⁹ These unique advantages make it easier to calculate relative risks more accurately than is possible for other significant life events.
- 9.28 The most severe postpartum psychiatric illnesses are puerperal psychosis and psychotic depression. These are characterised by agitation, confusion, marked disturbance of sleep, hallucinations, delusions and violent behaviour. Postpartum psychotic depression combines the qualities of puerperal psychosis with those of

²⁵ L Appleby, C Kumar and R Warner, “Editorial: Perinatal Psychiatry” (1996) 8 *International Review of Psychiatry* 5, 5.

²⁶ *Ibid.* See also, R E Kendall, J C Chalmers and C Platz, “Epidemiology of Puerperal Psychoses” (1987) 150 *British J of Psychiatry* 662.

²⁷ P J Cooper and L Murray, “Course and Recurrence of Postnatal Depression. Evidence for the Specificity of the Diagnostic Concept” (1995) 166 *British J of Psychiatry* 191, cited in L Appleby, C Kumar and R Warner, “Editorial: Perinatal Psychiatry” (1996) 8 *International Review of Psychiatry* 5, 5.

²⁸ D Maier-Katkin and R Ogle, “A Rationale for Infanticide Laws” [1993] *Crim LR* 903, 905-09.

²⁹ R E Kendall, J C Chalmers and C Platz, “Epidemiology of Puerperal Psychoses” (1987) 150 *British J of Psychiatry* 662, 671. Kendall, Chalmers and Platz further state:

It is possible, therefore, though we ourselves do not think it likely, that technical differences of this kind may be responsible for the striking difference in the magnitude of the relative risks associated with childbirth and other stressors.

severe depression. It has been said to affect 6.8 mothers per 1000 births.³⁰ Psychiatrists seem unable to agree, however, about the nature and aetiology of these psychoses during the postpartum period. One school maintains that biological changes associated with pregnancy have a role in precipitating the illness, whereas the other claims that puerperal psychosis is not a single illness but a collection of types of illnesses that manifest themselves during a period of vulnerability.³¹

- 9.29 There is at present, however, no official diagnosis of postpartum illness. The term was taken out of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association in the earlier part of the twentieth century and in 1972 the World Health Organization also took it out of its International Classification of Diseases.³² It would, however, be misleading to say that the link between childbirth and mental illness is mythical, as the existence of psychoses during the postpartum period is still referred to in diagnostic manuals.³³
- 9.30 Legal theory as to whether there is a valid psychiatric basis for the offence continues to be polarised accordingly.

The Act only applies to the biological mother

- 9.31 The limitation of the offence/defence of infanticide to biological mothers is clearly based on the psychiatric assumptions underlying the Act. However, such a constraint precludes fathers and other primary carers such as adoptive, foster and step-parents (whether male or female) all of whom may be affected by the stress and environmental factors (that the Criminal Law Revision Committee was prepared to recognise)³⁴ from being able to rely on the defence.
- 9.32 Studies of homicide cases where the victim was under the age of one year have shown that women are consistently treated more leniently than men.³⁵ Wilczynski and Morris have also concluded that “mothers were less likely than fathers to be

³⁰ D J Power and D H D Selwood, *Criminal Law and Psychiatry* (1987) 140.

³¹ F Kane “Postpartum Disorders” in *The Comprehensive Textbook of Psychiatric Disorders* (4th ed 1985) 1343-48, cited in D Maier-Katkin and R Ogle, “A Rationale for Infanticide Laws” [1993] Crim LR 903, 908.

³² D Maier-Katkin and R Ogle, “A Rationale for Infanticide Laws” [1993] Crim LR 903, 908.

³³ The World Health Organization’s ICD-10 Classification of Mental and Behavioural Disorders refers to “Mental and behavioural disorders associated with the puerperium, not elsewhere classified”: World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (1992) 195.

³⁴ See paras 9.60-9.61.

³⁵ M N Marks and R Kumar, “Infanticide in England and Wales” (1993) 33 *Medicine, Science and the Law* 329, cited in R D Mackay, *Mental Condition Defences in the Criminal Law* (1995). Marks and Kumar’s study found that:

... Home Office statistics revealed that from 1982-8 214 children under one year were victims of homicide. Of those, 45% were neonaticides and in each case the mother was the chief suspect. The majority of these mothers (29) were not indicted while the others with the exception of one acquittal and one finding of diminished responsibility, were all convicted of infanticide and received probation. When compared to the fathers, ... fathers were convicted of more serious offences ... [and] received stiffer penalties.

convicted of murder or to be sentenced to imprisonment and were more likely to be given probation and psychiatric dispositions".³⁶ If, as has been suggested, it is the consequences of early parenting and the social factors surrounding this which cause depression or other impairment of responsibility in parents of small children,³⁷ then perhaps the law should explicitly recognise this instead of maintaining a fiction that factors consequent on the birth only affect the biological mother?

9.33 *Doughty*³⁸ provides an example of a case in which a father killed an infant. In that case, the Court of Appeal held that the persistent crying of a seventeen-day-old baby could in theory amount to provocation (although they fully expected a jury to reject it on the merits).³⁹ This case provides an interesting contrast to infanticide cases. The father, who was said to be "caring and affectionate", had attempted to silence the child by covering his head with cushions and kneeling on them, thus killing him. He had his conviction for murder quashed and one of manslaughter substituted. He received a sentence of five years' imprisonment.

9.34 Why did he not receive a much lower sentence, as would a mother convicted of infanticide in similar circumstances? One possibility is that the circumstances in which mothers kill their infants differs from that of men (and possibly other carers) who kill infants. This difference may justify a disparity in treatment. According to Marks and Kumar, "[f]athers kill their infants more violently than do mothers, suggesting that there may be differences in male and female psychopathology with respect to this crime".⁴⁰ Similarly, Australian research indicates that most parental or in loco parentis child killers are male.⁴¹ Further, the Australian Federation of Community Legal Centres has suggested that:

While men kill to control or punish their children or their partner, women kill children because they cannot cope with the extreme difficulties they encounter in trying to care for their children.⁴²

9.35 This conclusion is supported by an Australian study of child homicides committed in Victoria between 1985 and 1995 conducted by Christine Alder and Kenneth

³⁶ A Wilczynski and A Morris, "Parents Who Kill their Children" [1993] Crim LR 31, 35.

³⁷ Eg, Ussher states that:

The term 'postnatal depression' may be a misnomer if it implies that the woman herself is ill, that her unhappiness is *caused* by an internal dysfunction resulting from childbirth. For is it not the social reality of caring, of mothering, which may be depressing? Men who rear children suffer from depression, as do men and women caring for elderly or sick relatives.

J Ussher, "Reproductive Rhetoric and the Blaming of the Body" in P Nicolson and J Ussher (eds) *The Psychology of Women's Health and Health Care* (1992) 51.

³⁸ *Doughty* (1986) 83 Cr App R 319.

³⁹ The decision has been criticised not least because the crying of an infant should not amount to provocation anymore than snoring or bad weather.

⁴⁰ M Marks and R Kumar, "Parents who kill their infants" (1995) 3(5) *British J of Midwifery* 249, 251.

⁴¹ Heather Strang, *Children as Victims of Homicide* (1996) 3.

⁴² Cited by the Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) para 6.30.

Polk.⁴³ Alder and Polk state that: “[w]ithin the context of family child homicides, the content of the case studies indicated clear differences in situations where women were the offenders, in contrast to men.”⁴⁴ For example, men were more likely to kill when they flew into a rage and assaulted the child, particularly if they were not the biological father. Biological fathers were more likely to kill children in the context of a separation from the mother or threat of separation. Alder and Polk state that: “[t]hreats to the man’s control and possession of his wife in particular, and in some cases children, appear to be trigger events in many of these scenarios.”⁴⁵

9.36 However, Alder and Polk also note that there are “similarities in terms of the material circumstances of the men and women who committed these offences.”⁴⁶ They conclude that “these are men and women with limited economic and social resources ... most often they are at the lower end of the socio-economic spectrum ... they are also often people who feel personally and socially isolated.”⁴⁷

9.37 Apart from the disparity between the treatment of biological mothers and other carers, the fact that the law only applies to the biological mother of the child can lead to apparent arbitrariness. Consider the case of the new mother whose mind is disturbed by the effects of giving birth, who in killing her own infant simultaneously kills someone else’s infant for whom she is caring at the time. In such circumstances, there would be a presumption that her disturbed balance of mind had caused her to kill her own infant, and she could plead or be charged with infanticide. In relation to the other infant, however, she would be forced to rely on the defence of diminished responsibility.⁴⁸ Under the current law this would be complicated by the fact that diminished responsibility must be raised and proved by the defendant.

The age limit of the victim

9.38 As indicated in paragraph 9.16, the age limit of 12 months is arbitrary. Some might argue that it should be less than 12 months, as in Malaysia.⁴⁹ In support of this view, psychiatric research has suggested that 90 days is probably the most realistic time between childbirth and psychiatric presentation during which an illness should be designated puerperal, the highest rate of psychiatric admission being during the first 30 days after birth.⁵⁰ Thus, insofar as there is any

⁴³ C Alder and K Polk, *Child Victims of Homicide* (2001).

⁴⁴ *Ibid*, 28. See also, chs 3, 4 and 5.

⁴⁵ *Ibid*, 88.

⁴⁶ *Ibid*, 87.

⁴⁷ *Ibid*.

⁴⁸ The Royal College of Psychiatrists has previously recommended that the age limit should be extended to five years provided that the youngest victim was under 12 months as it has been found that cases where a mother kills all her children at once are not uncommon. See P T d’Orban “Women Who Kill Their Children” (1979) 134 *British J of Psychiatry* 560, 564, cited in R D Mackay *Mental Condition Defences in the Criminal Law* (1995) 212.

⁴⁹ Penal Code (Malaysia), s 309A.

⁵⁰ R E Kendall, J C Chalmers and C Platz, “Epidemiology of Puerperal Psychoses” (1987) 150 *British J of Psychiatry* 662, 666.

psychiatric justification for the defence, it is arguable that the present age limit of the victim should be lowered. Having said that, in support of the status quo, it is worth noting that in a 1998 psychiatric study of suicide and other causes of mortality after postpartum psychiatric admission in Denmark, it was found that suicides and deaths from all unnatural causes were most likely to occur in the first year after childbirth.⁵¹

9.39 There may well be deserving cases where the culpability of the mother is genuinely reduced but the victim is older than 12 months. Similar potential for illogicality arises where a woman, perhaps through the same action or course of conduct, kills two children, one of whom is under 12 months and the other is older, or is under 12 months but is not her own child. In such cases, the accused must rely on diminished responsibility. The prosecution could accept a plea to manslaughter by reason of diminished responsibility, but if this course is not taken the defendant will bear the burden of proving that an abnormality of mind with one of the stipulated causes substantially diminished her responsibility for the killing.

9.40 In New Zealand the offence of infanticide applies where the mother kills any of her children under the age of ten⁵² and infanticide has been interpreted there as capable of applying to a child who was not the biological child of the accused.⁵³ However, as has been pointed out by Mackay,⁵⁴ it should be borne in mind that there is no diminished responsibility plea in New Zealand. In Victoria, Australia, Parliament is currently considering a Bill to extend the age limit of the victim to two years, pursuant to a recommendation of the Victorian Law Reform Commission.⁵⁵ However, like New Zealand, there is no diminished responsibility defence in Victoria.

The morally unsustainable mitigation of child killing

9.41 There is an argument that the offence/defence of infanticide should simply be abolished. For abolitionists, the 1938 Act unjustifiably enables a defendant who is guilty of murder to escape a conviction. After all, so the argument runs, the 1957 Act gives her⁵⁶ the opportunity of pleading diminished responsibility, provocation,

⁵¹ L Appleby, P B Mortensen and E B Faragher "Suicide and Other Causes of Mortality after Post-partum Psychiatric Admission" (1998) 173 *British J of Psychiatry* 209, 209:

Although postnatal women as a whole appear to have a low rate of suicide, severe post-partum psychiatric disorder is associated with a high rate of deaths from natural and unnatural causes, particularly suicide. The risk is especially high in the first postnatal year, when suicide risk is increased 70-fold.

⁵² Crimes Act 1961 (NZ), s 178.

⁵³ *P* [1991] NZLR 116.

⁵⁴ R D Mackay, *Mental Condition Defences in Criminal Law* (1995) 213.

⁵⁵ Crimes (Homicide) Act 2005, s 5; Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) paras 6.38-6.41.

⁵⁶ Writing about infant homicide Marks and Kumar state:

Contrary to popular belief, mothers *and* fathers are equally likely to have killed a child and, unlike neonaticidal mothers, those who commit infant homicide are likely to be married, or both parents cohabiting, and both parents are the biological parent of the child.

or both together. By providing a special offence/defence of infanticide, the law devalues the life of the infant, implying that his or her life is more expendable, and his or her killing less serious, than that of a person over the age of 12 months.

- 9.42 Against this position, is the argument that the existence of the offence/defence of infanticide does not imply that the law devalues the lives of infants. Mothers found guilty of infanticide are still held accountable for a serious offence. However, like the defences of provocation and diminished responsibility, the offence/defence of infanticide recognises that the circumstances of the killing (in particular, the disturbance of the mother's mind) justify the provision of a lesser offence than murder. In the words of the Law Reform Commission of Victoria, the offence/defence of infanticide recognises that infanticide is a "distinctive kind of human tragedy" which calls for a distinctive response.⁵⁷ Further, the case of *Doughty* demonstrates that infanticide is not the only defence that can apply in cases of child homicide.⁵⁸

Degrees of child killing

- 9.43 In their study of child homicide, Alder and Polk identify five classifications of child homicide.⁵⁹ These are: neonaticide (killing of an infant within 24 hours of his or her birth), fatal physical assault, attempted suicide or suicide by a parent accompanied by child killing, exceptional psychiatric disturbance of a parent leading to child killing, and distinctive cases which fall outside the previous classifications.⁶⁰ Given the different circumstances in which children are killed, even within the first 12 months of life, it may be appropriate to recognise different degrees of culpability and limit the offence/defence of infanticide accordingly.
- 9.44 In particular, it is arguable that there is a difference in culpability between cases classed as infanticide which involve neonaticide and many other cases of infant homicide. Often the abnormal mental state which precipitates the killing tends to be of considerable duration. According to Marks and Kumar, in cases of neonaticide the infant's mother is almost always the perpetrator; fathers are rarely implicated and the death is more likely to result from inaction amounting to neglect than the violent action which causes the killing of older infants. Neonaticidal mothers are likely to be young (under 20) and single, living at home with their parents. Frequently their pregnancy has been denied. This state of affairs being the consequence of an unconscious belief that if you don't think about it, it will disappear. In other cases women had failed to acknowledge even

M N Marks and R Kumar, "Parents Who Kill their Infants" (1995) 3(5) *British J of Midwifery* 249, 251.

⁵⁷ Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, (1988) Discussion Paper No 14, 69, quoted in Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) at para 6.19.

⁵⁸ (1986) 83 Cr App R 319. See paras 9.33-9.34.

⁵⁹ C Alder and K Polk, *Child Victims of Homicide* (2001).

⁶⁰ *Ibid*, 29.

to themselves that they were pregnant. They give birth alone in painful and frightening circumstances.

- 9.45 *Sainsbury*⁶¹ was one such case. In that case the appellant, a woman aged seventeen, pleaded guilty to infanticide. She had fallen pregnant at the age of fourteen as a result of a relationship with a boyfriend. She did not tell anyone and eventually gave birth without any medical assistance in the bathroom of her boyfriend's flat. The baby was disposed of in a river. It was not known whether it was alive or dead at the time. The Court of Appeal reduced a sentence of 12 months detention to one of probation. *Lewis*⁶² was a similar case in which (for reasons which are not clear) the defendant pleaded guilty to diminished responsibility and the Court of Appeal imposed the same sentence as in *Sainsbury*.
- 9.46 Given this difference in culpability, it is arguable that the offence/defence of infanticide should be limited to cases of neonaticide, or at least "newly born" as it was originally in the 1922 Act. However, this would constitute a significant narrowing of the current offence/defence of infanticide, and one that is not necessarily justified by the psychiatric evidence noted in paragraphs 9.20-9.30. Further, the expansion of the offence/defence to infants under 12 months in the 1938 Act indicates that the legislators at the time believed that the limitation to newly born infants led to injustice.
- 9.47 The recent Australian case of *Azzopardi*⁶³ is an example of a very young, but not newly born, baby being killed by her mother whilst she was suffering from post-natal depression. The baby was five weeks old. Significantly, the defendant had wrestled with the symptoms of post-natal depression for some time prior to the killing. She had been unable to breastfeed and on being kept awake at night she had sat up ruminating upon what she saw as her inability to be a good mother. One expert described her as suffering from "significant depression, characterised by sleep disruption, loss of appetite, ruminations about guilt and worthlessness, together with a sense of hopelessness."⁶⁴ To exclude this case from the offence/defence of infanticide on the basis that the mother did not kill the child within 24 hours of its birth may appear arbitrary and may lead to injustice.

SUMMARY OF PREVIOUS PROPOSALS FOR REFORM

The common factors

- 9.48 The law has recently been described by the Court of Appeal as "unsatisfactory and outdated."⁶⁵ Previous proposals for reform suggest that there is a need to reform the law of infanticide. The proposals share the following:

⁶¹ *Sainsbury* (1989) 11 Cr App R (S) 533.

⁶² *Lewis* (1989) 11 Cr App R (S) 577.

⁶³ *Azzopardi* [2004] VSC 509.

⁶⁴ *Ibid*, [20].

⁶⁵ *Kai-Whitewind* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31, [139], *per* Lord Justice Judge.

- (1) a desire to rid the Act of the unsubstantiated and outdated reference to lactation;
- (2) a desire to make the law accurately reflect the fact that it can be the *circumstances* consequent upon the birth of the infant which affect the balance of the defendant's mind as opposed to a specific psychiatric condition;
- (3) acknowledgement of the benefit of being able to charge a particular defendant with a specific offence other than murder; and
- (4) restriction of the law to biological mothers.

The Butler Report

- 9.49 Problems with the link between mental illness and female biology would undoubtedly have been addressed by some of the earlier proposals for reform of the 1938 Act. In its Report on Mentally Abnormal Offenders in 1975, the Butler Committee addressed the issue of infanticide in conjunction with that of diminished responsibility.⁶⁶ The Committee described it as an offence based on the concept of diminished responsibility, for the purpose of avoiding a conviction of murder or manslaughter. The Committee recommended the abolition of the 1938 Act. It is important to bear in mind that this was in the context of the proposed abolition of the mandatory life sentence and that, accordingly, it was envisaged that each case would attract appropriate and individualised penalties. There was not a rejection of the underlying purpose of the Act and there was no criticism of the sentences that the judiciary had been imposing.
- 9.50 The Committee noted that, “[a]lthough the maximum penalty on conviction of infanticide is imprisonment for life, in practice the mother who has killed her child is almost invariably treated very leniently.” It was also noted that it would have been unlikely that the Act would ever have been conceived if the defence of diminished responsibility had been recognised.⁶⁷ The reason for this was that the defence of diminished responsibility is so widely interpreted that it would, in practice, cover all cases of infanticide by a woman whose balance of mind is disturbed. The Committee was of the view that the mental disturbance necessary for a conviction under the 1938 Act would fit comfortably into the meaning of section 2(1) of the 1957 Act.
- 9.51 The Committee noted that the medical principles that underpinned the 1938 Act, “may no longer be relevant”.⁶⁸ The Committee report stated:

⁶⁶ Report of the Committee on Mentally Abnormal Offenders (1975) Cmnd 6244 (The Butler Report) para 19.3:

An earlier and limited example of a special provision for reduced responsibility and the possibility of a lesser penalty (while not necessarily exempting altogether from punishment) is to be found in the Infanticide Act 1938.

⁶⁷ *Ibid*, para 19.22.

⁶⁸ *Ibid*, para 19.23.

The theory behind the Act was that childbirth produced a hormonal disorder which caused mental illness. But puerperal psychoses are now regarded as no different from others, childbirth being only a precipitating factor. Minor forms of mental illness following childbirth are common, but psychoses, which usually occur in the first month, are much less so (between 1 and 2 per 1,000 deliveries). The danger to the infant in the acute stages is well recognised and guarded against in the provisions made for the care of such cases. Mental illness is probably no longer a significant cause of infanticide. Dr DJ West, who studied cases where married women had killed their children, found no particular association with this period. The operative factors in child killing are often the stress of having to care for the infant, who may be unwanted or difficult, and personality problems; to some extent these affect the father as well as the mother and are not restricted to a year after the birth.⁶⁹

- 9.52 The Committee's criticism of the 1938 Act also focussed on the fact that the Act does not extend to the woman who does not succeed in killing her child, but merely injures it. Further, the Committee pointed out, as we already have, that the Act does not prevent a woman from being charged and convicted of the murder of a child who is over one year old who is killed at the same time as the baby.
- 9.53 The Committee acknowledged, however, that the 1938 Act offered the following two advantages over diminished responsibility. Firstly, as is observed above, it allows the prosecution to charge infanticide as opposed to murder. Conversely, there is no provision enabling the prosecution to charge manslaughter by virtue of diminished responsibility. Rather, the prosecution is forced to wait for the accused to rely on diminished responsibility as a defence. Secondly, by charging infanticide the prosecution thereby concedes the issue of mental disturbance, obviating the need for the defendant to prove it.⁷⁰
- 9.54 The Committee's recommendation as to abolition was predicated on the recommendation:
- (1) that the mandatory life sentence for murder should be abolished, as should the provision for diminished responsibility which would then be unnecessary; or
 - (2) that there should be some revision of section 2 of the 1957 Act. The burden of proving "diminished responsibility" should be removed from the defendant, who should have only to adduce evidence to raise the issue. The present practice by the courts of accepting a plea of guilty to manslaughter where there is sufficient medical evidence supporting "diminished responsibility" should continue. It should be open to the prosecution, if the defence agrees, to charge manslaughter in the first instance where they have evidence to show that a case for diminished responsibility can be made out.

⁶⁹ *Ibid.*

⁷⁰ *Ibid*, para 19.26.

- 9.55 The recommendation in (2) above was said to have the advantage of removing the stigma of a conviction for murder and of enabling the prosecution to charge manslaughter by reason of diminished responsibility which, in turn, incorporates one of the main advantages of the 1938 Act into the wider defence. The mental element would thereby be accepted from the outset.

The Fourteenth Report of the CLRC

- 9.56 In 1980, the Criminal Law Revision Committee (CLRC) revisited the law of infanticide and departed significantly from the proposals of the Butler Committee.⁷¹ In its fourteenth report the CLRC referred to the fact that the Butler Committee had proposed the abolition of the 1938 Act, but stated that following the publication of the CLRC working paper many informed bodies were persuaded that the Act ought to be retained.⁷² The CLRC was of the opinion that the offence of infanticide should be retained.
- 9.57 The CLRC's opinion was supported by the Royal College of Psychiatrists, in the absence of the abolition of the mandatory life-penalty. The Royal College's view was that the medical basis for the 1938 Act was not proven. However, they were of the opinion that the balance of the mind after the birth may be disturbed by reason of the effects of psychological and environmental stress and incidental mental illness as well as true puerperal illness.
- 9.58 The CLRC's main objection to the proposal of the Butler Committee was that a redefined section 2 of the 1957 Act would prove too restrictive and would exclude some cases that were dealt with as infanticide under the Act. Further, there would be a danger of diagnostic disputes which did not arise under the Act.⁷³ Finally, infanticide was an offence for which imprisonment was rarely an appropriate sentence, and for which a life-sentence, the maximum for manslaughter, was never imposed.⁷⁴

⁷¹ Criminal Law Revision Committee, *Offences Against the Person* (1980) Report 14, Cmnd 7844.

⁷² *Ibid*, para 101. These bodies included the Police Federation, the Law Society, the Mothers' Union, The Women's National Commission, the National Council of Women of Great Britain and the Senate of the Inns of Court and the Bar.

⁷³ *Ibid*, para 103.

⁷⁴ *Ibid*, para 104. The CLRC was satisfied that the maximum penalty for infanticide should be no more than 5 years.

9.59 The CLRC proposed amendments to section 1(1) of 1938 Act which were designed to reflect contemporary medical evidence. Thus, the CLRC recommended that the reference to, “the effect of lactation” be removed as there could no longer be said to be any medical connection between lactation and mental disorder.⁷⁵

9.60 Relying on submissions from the Royal College of Psychiatrists, the CLRC identified four types of circumstance which were capable of leading to an imbalance/disturbed balance of mind which, although not falling within the definition provided by section 4 of the Mental Health Act 1959, could and should continue to justify an infanticide verdict. Each circumstance could be said to arise from a mental disturbance following childbirth but not necessarily “by reason of [the mother] not having fully recovered from the effect of giving birth.” They were:

- (1) overwhelming stress from the social environment being highlighted by the birth of a baby with the emphasis on the unsuitability of the accommodation etc;
- (2) overwhelming stress from an additional member of a household struggling with poverty;
- (3) psychological injury, and pressures and stress from a husband or other member of the family from the mother’s incapacity to arrange the demands of the extra member of the family;
- (4) failure of bonding between mother and child through illness or disability which impairs the development of the mother’s capacity to care for the infant.⁷⁶

9.61 In consequence, the phrase, “by reason of not having fully recovered from the effect of giving birth” was considered to be too restrictive. It was therefore suggested that the statute would more accurately reflect the existing practice of the courts if it specified the offence as being committed when, at the time of the act or omission, the balance of the woman’s mind was disturbed by reason of the effect of giving birth or circumstances consequent upon that birth. The CLRC report stated:

In cases now dealt with as infanticide it is a matter of human experience that the mental disturbance is connected with the fact of the birth and the hormonal and other bodily changes produced by it, even when it is related primarily to environmental or other stresses consequent upon the birth; but we think that the connection, where it is indirect in this sense, might be difficult to establish by medical evidence if expressed in a modern statute as a direct consequence of the birth.⁷⁷

⁷⁵ *Ibid*, para 105.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

- 9.62 Two members of the CLRC dissented from the proposition that the offence should be widened so as to encompass such problems likely to be precipitated by environment.⁷⁸ Their main objection was that there would be no logical reason why, if factors of environment disturbed the balance of mind, this should be limited to infanticide as opposed to minimising the penalty for any criminal offence. Secondly, the lack of bonding, relied on as the basis for the proposal, could not be said to exclude cases of child cruelty and neglect which did not result in death. It was said that there would be a real danger of defendants being artificially brought within the ambit of the offence because of the conflation of factors relating to birth and adverse social conditions contributing to imbalance of mind.
- 9.63 In response to the point that infanticide is available only in a case of child *killing*, it may be pointed out that this relates to the special concern the law has to confine narrowly, to the most culpable killers, the label 'murderer'. What about the influence of environmental factors on the defendant's mental condition? We indicate in our discussion of diminished responsibility that, so long as the defendant proves the influence – with the backing of expert evidence - of the relevant mental disturbance or disorder on his or her conduct, the precise cause of that mental disturbance or disorder in him or her should not be relevant, as a matter of substantive law. The cause of the mental disturbance or disorder should have only an evidential relevance, that is, going to whether or not the mind was disturbed or disordered. That permits such evidence to evolve, as accepted diagnostic medical practice evolves.
- 9.64 Other proposals made by the CLRC included the retention of the 12 months age restriction,⁷⁹ as well as provision for an offence of attempted infanticide. They also recommended that the burden of proof on the defendant in infanticide should only go to adducing sufficient evidence to raise the issue.⁸⁰ This was consistent with the recommendation as to the burden of proof in cases of diminished responsibility.⁸¹

The Law Commission: Draft Code

- 9.65 The views of the CLRC informed the Law Commission's Draft Code proposals on Infanticide. Clause 67 provides:

⁷⁸ See the views of Sir David Napley and Lowry LJ: *ibid*, Annexes 6 and 7.

⁷⁹ However it should be noted that in its working paper the CLRC had tentatively considered the possibility of extending the offence to cover the killing of an older child if done so within 12 months of the birth of a younger child killed at the same time. This was abandoned in the light of the proposals, which were designed to continue to accommodate existing practice: *ibid*, para 106.

⁸⁰ *Ibid*, para 106.

⁸¹ *Ibid*, para 94.

- (1) A woman who with the fault specified in section 56 or section 57(1)(c), kills or is a party to the killing of her child by an act done when the child is under the age of twelve months and when the balance of her mind is disturbed by reason of the effect of giving birth or of circumstances consequent upon that birth, is not guilty of murder or manslaughter but is guilty of infanticide.
- (2) A woman who in the circumstances specified in subsection (1), attempts or is a party to an attempt to kill her child is not guilty of attempted murder but is guilty of attempted infanticide.
- (3) A woman may be convicted of infanticide (or attempted infanticide) although a jury is uncertain whether the child had been born and had an existence independent of her when his death occurred (or, in the case of an attempt, when the act was done).

9.66 Infanticide would therefore operate as a defence to a charge of murder, manslaughter or attempted murder, or as an offence with which a woman could be charged. The clause makes clear that a woman who is a party to a homicide committed by others may be convicted of infanticide, with the defendant bearing an evidential burden.

9.67 Subsection (3) is intended to provide for a case where a jury is satisfied that the defendant charged with infanticide is guilty either of infanticide or child destruction but that it is not possible to say which, because it is not clear whether at the material time, the child had actually been born and had a life independent of its mother. Infanticide, being punishable with a maximum sentence of five years' imprisonment (as recommended by the CLRC) is the less serious offence under the Code. If the jury were not satisfied that the child had been born, the defendant would have to be acquitted notwithstanding that the defendant would be guilty of child destruction, because it would be wrong to allow conviction for an offence punishable by life imprisonment on a charge of an offence punishable with only five years' imprisonment.

THE PRESENT LEGISLATIVE CONTEXT: DOMESTIC VIOLENCE, CRIME AND VICTIMS ACT 2004

9.68 A comprehensive review of infanticide cannot be considered without looking at recent legislative changes on domestic violence. Section 5 of the Domestic Violence, Crime and Victims Act 2004 creates an offence of non-accidental death of a child. It provides:

- (1) A person ("D") is guilty of an offence if-
 - (a) a child or vulnerable adult ("V") dies as a result of an unlawful act of a person who-
 - (b) was a member of the same household as V, and
 - (c) had frequent contact with him,
 - (d) D was such a person at the time of that act,

- (e) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and
 - (f) either D was the person whose act caused V's death or-
 - (g) D was or ought to have been, aware of the risk mentioned in paragraph (c),
 - (h) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and
 - (i) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.
- (2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.
- (3) If D was not the mother or father of V-
- (a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused V's death;
 - (b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.
- (4) For the purposes of this section-
- (a) a person is to be regarded as a "member" of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;
 - (b) where V lived in different household at different times, "the same household as V" refers to the household in which V was living at the time of the act that caused V's death.
- (5) For the purposes of this section an "unlawful" act is one that
- (a) constitutes an offence, or
 - (b) would constitute an offence but for being the act of:
 - (i) a person under the age of ten, or
 - (ii) a person entitled to rely on a defence of insanity.

Paragraph (b) does not apply to an act of D.⁸²

⁸² Domestic Violence, Crime and Victims Act 2004, s 5(7) provides for a maximum term of imprisonment of up to 14 years or a fine or both.

- 9.69 One obvious implication of this Act is that it leaves the partner or another relative (including an older child) of a woman who commits infanticide because of post-natal depression exposed to the possibility to a section 5 charge. That possibility arises when that other member of the household fails to see the risk that the mother may harm her child when they should have done.
- 9.70 It is also possible that, should the offence of infanticide be abolished, a women suffering from postpartum depression who has killed her child could be charged with the offence of non-accidental death of her child, contrary to section 5. That might seem to be a more humane way of dealing with such cases. It would also both open the lesser offence in section 5 up to carers other than the biological mother, and dispense with the arbitrary age limit of 12 months for the victim.
- 9.71 However, as against that, it must be conceded that section 5 was not designed to deal with infanticide cases, but with cases where a child has been unlawfully killed and it is not possible to say which of two or more members of the household perpetrated the deed. Further, one must keep in mind the special evidential provisions in section 6 of the Act, provisions that arise from this special focus in the Act. These provisions broaden the evidentiary basis for convicting. The defendant's silence at trial may provide the sole basis for convicting the defendant, as an exception to the normal rule in section 38(3) of the Criminal Justice Act 1994, not only on a section 5 charge but also when the defendant is additionally charged with murder or manslaughter in the same case.

OPTIONS FOR REFORM

The abolitionist position

- 9.72 The abolitionist position is predicated on the view that there is no psychiatric basis for the offence/defence of infanticide. Alternatively, the abolitionist position holds that if such a basis does exist, then infanticide can and should be accommodated within the defence of diminished responsibility (see paragraphs 9.93-9.95).
- 9.73 The abolitionist position is supported by the argument noted in paragraphs 9.41-9.42 that categorising the killing of infants merely as "infanticide" may seem to be devaluing the life of the most vulnerable in society. Whatever the cause, infanticide is a form of domestic violence. However, the sentencing pattern which has emerged over the last fifty years in infanticide cases means that the death of a child under the age of one year contrasts sharply with sentencing under other legislation. For example, schedule 21 of section 269 of Criminal Justice Act 2003 imposes a minimum sentence on a convicted child-killer of 25-30 years' imprisonment, subject to a number of conditions.⁸³ In contrast, the court in *Sainsbury* noted that "of 59 cases of infanticide recorded ... between 1979 and 1988, not one has resulted in a custodial sentence. There have been 52 orders either of probation or supervision, six hospital orders, one of which was restricted."⁸⁴

⁸³ This minimum sentence applies when the murder involved abduction of the child, or sexual or sadistic motivation: Criminal Justice Act 2003, s 269, Sched 21, para 4(2)(b).

⁸⁴ *Sainsbury* (1989) 11 Cr App R (S) 533, 534.

- 9.74 The abolitionist position is also supported by criticisms of the limitation of the offence/defence of infanticide to biological mothers, noted in paragraphs 9.31-9.37. The disparity between the treatment by the criminal justice system of biological mothers and other carers, particularly fathers, who kill their children, is arguably discriminatory and may lead to injustice. For example, as noted in paragraph 9.32, research by Morris and Wilczynski has shown that in general women who kill their children are more likely to be treated with greater lenience than men.⁸⁵ **[Question 1]**

The minimal reform position

- 9.75 The minimal reform position holds that the offence/defence of infanticide should be retained, subject to minor amendments. Those in favour of minimal reform not only believe that there is a psychiatric need to preserve infanticide as a separate category of killing, but use psychiatric evidence to justify the disparity in the way that child-killings are treated by the courts. For example, according to Kendall et al the risk of mental illness after childbirth varied according to the length of time that had elapsed since child-birth, and the nature of the illness: the risk of psychotic illness was increased 35 fold in the first 30 days after delivery.⁸⁶ On this view, however, the 'lactation' theory should be consigned to history, as it has been shown to be unfounded.
- 9.76 On the minimal reform view, there is a case for raising the age limit of the victim to, say, two years, which would catch almost all instances of child-killing influenced by postpartum depression. This is the approach incorporated in the Crimes (Homicide) Act 2005 in Victoria, Australia, in line with the recommendations of the Victorian Law Reform Commission.⁸⁷
- 9.77 Thus, the minimal reform position would retain the offence/defence of infanticide in its current form, but remove the reference to lactation, and raise the age limit of the child to two years.
- 9.78 Our **provisional proposal** is to amend the law of infanticide in accordance with the minimal reform position. **[Question 2(a)]**

The moderate reform position

- 9.79 The starting position for this option would be to expand the present law on the basis proposed by the CLRC, noted in paragraphs 9.59-9.61.
- 9.80 The CLRC's proposal would widen the ambit of infanticide, by making factors consequent upon the birth extraneous to the defendant's psychology, but capable of affecting it, relevant to whether she was suffering from disturbance of the

⁸⁵ A Wilczynski and A Morris, "Parents Who Kill their Children" [1993] Crim LR 31, 35.

⁸⁶ See R E Kendall, J C Chalmers and C Platz, "Epidemiology of Puerperal Psychoses" (1987) 150 British J of Psychiatry 662, 665. It is worth noting that when Kendall et al attempted to identify the obstetric and social factors which are associated with an increased risk to the mother in the puerperium it was found that puerperal psychoses are more common in unmarried mothers: see Kendall et al, 669.

⁸⁷ Crimes (Homicide) Bill 2005, s 5; Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) para 6.37-6.41.

mind.⁸⁸ An alternative formulation of this approach is noted by the Court in *Kai-Whitewind*.⁸⁹ Rather than “circumstances consequent upon birth”, the Court used the phrase “circumstances subsequent to the birth, but connected with it”.⁹⁰

- 9.81 If social and environmental factors consequent upon the birth of the child are accepted as capable of affecting the balance of the accused’s mind, that attenuates the link to female biology, and hence answers to some extent those critics who maintain that the offence has the effect of pathologising those women whom it is designed to assist. It is no longer assumed that postpartum depression is wholly driven by raging hormones, or something of that kind.
- 9.82 Logically, however, such a development means that it is necessary to consider whether the offence can justifiably be restricted in application to the biological mother of the victim. Given the fact that fathers have an increased and often an equal role in caring for young children in modern society there is a question as to whether or not they too should be allowed to rely on a reformed law of infanticide, if their minds are disturbed by the same social or environmental factors.
- 9.83 Against this proposition is the research of Alder and Polk, which shows that the circumstances in which women kill their children is notably different to that in which men kill their children.⁹¹ This difference arguably justifies the continued limitation of the offence/defence of infanticide to biological mothers, while at the same time incorporating circumstances consequent upon birth as part of the offence/defence. This is supported by the fact, that although the psychiatric evidence is uncertain, the “disturbance of the mind” that may lead to mothers killing their infant children appears to be linked the mother’s post-natal condition, whether due to the effects of birth, or circumstances consequent thereon. Further, fathers and other carers would still be able to put forward a plea of diminished responsibility, or possibly even provocation.⁹²
- 9.84 Although as indicated in paragraph 9.63 the causes of mental disturbance or abnormality should be of only evidentiary significance to the existence of a disturbed balance of mind, the moderate reform position would require that the defendant’s act or omission which caused the death of the infant must be causally connected to the ‘disturbance of mind’. Otherwise, a defendant could potentially make a successful plea of infanticide on the basis that her mind was disturbed, even if that disturbance was not the cause of the act or omission that resulted in the infant’s death.⁹³ Such an amendment would bring the offence/defence of infanticide in line with the defence of diminished responsibility in section 2 of the 1957 Act.

⁸⁸ As noted in paragraph 9.63, the causes of mental disturbance or abnormality should be of only evidentiary significance to the existence of a disturbed balance of mind, and not requirements of substantive law.

⁸⁹ [2005] EWCA Crim 1092, [2005] 2 Cr App R 31.

⁹⁰ *Ibid*, [139].

⁹¹ C Alder and K Polk, *Child Victims of Homicide* (2001) 28. See paras 9.34-9.36.

⁹² Eg, *Doughty* (1986) 83 Cr App R 319.

⁹³ See para 9.11.

9.85 Finally, like the minimal reform position, the moderate reform position would remove the reference to lactation, on the basis that it is ill-founded and possibly raise the age limit of the infant of two years.

9.86 Thus, the moderate reform position would:

- (1) incorporate either “circumstances consequent upon birth” or “circumstances subsequent to the birth, but connected with it” into the offence/defence of infanticide, in accordance with the CLRC’s recommendations;
- (2) require that the “disturbance of the mind” of the mother is causally connected to the act or omission by the mother which resulted in the infant’s death;
- (3) raise the age limit of the child to 2 years; and
- (4) remove the reference to lactation. **[Question 2(b)]**

The radical expansionist position

9.87 The radical expansionist position builds upon the moderate reform position. Like the moderate reform position, the radical expansionist position holds that “circumstances consequent upon birth” should be incorporated into the offence/defence of infanticide. However, for the reasons canvassed in relation to the moderate reform position, the radical expansionist position would extend the defence to fathers and possibly other carers.

9.88 On the radical expansionist view, it is thus possible that someone such as the father in *Doughty*⁹⁴ would be able to rely on the defence, if he could produce evidence of mental disturbance influencing his actions at the time of the offence. This might be repugnant to many people. However, schedule 21 of section 269 of the Criminal Justice Act 2003 mentions as mitigating factors lack of premeditation and mental disorder, along with provocation, especially in the form of prolonged stress.

9.89 The radical expansionist position would, like the moderate reform position, require that the act or omission by the mother resulting in the infant’s death be causally connected to the “disturbance of mind”.

9.90 The radical expansionist view would not merely raise the age limit for the victims, but would dispense with any age limit altogether. According to the radical expansionist position, such a reform would not be abused as the older the victim, the less likely it may be that postpartum depression was at work in leading the defendant to act as she (or he) did; but that will be a matter for the jury.

9.91 Finally, the radical expansionist position would remove the reference to lactation.

9.92 Thus the radical expansionist position would:

⁹⁴ See paras 9.33-9.34.

- (1) extend the offence/defence of infanticide beyond biological mothers to fathers and possibly to other carers;
- (2) require that the “disturbance of the mind” of the carer is causally connected to the act or omission by the carer which resulted in the infant’s death;
- (3) remove the restriction on the age limit of the victim; and
- (4) remove the reference to lactation. **[Question 2(c)]**

Merger with diminished responsibility

9.93 Whatever the preferred option, the future of the offence cannot be viewed in the absence of whatever is proposed for reform of diminished responsibility. The relationship between, and potential merger of, infanticide and diminished responsibility is discussed in paragraphs 9.8-9.13. One problem with a ‘merger’ solution may be, if true, the claim that: “Postnatal depression is frequently undetected and therefore untreated in clinical practice, partly because women do not report their symptoms to health professionals.”⁹⁵ If that is true, it may be difficult for the defendant to discharge the burden of proof under a revised section 2 of the 1957 Act, through supporting medical evidence. Further, there would be a danger that the tendency to impose compassionate and lenient sentences in cases of infanticide may be erased when such cases are subsumed into the generality of diminished responsibility sentencing.

9.94 At present, there are so few cases of infanticide that it does not seem worth countenancing the perhaps unforeseeable changes that would result from an insistence that such cases be dealt with under section 2.

9.95 However, if infanticide is widened in terms of its applicability to carers other than the biological mother and the 12 month limit in relation to the age of the victim is removed or increased (as has been recommended in other jurisdictions)⁹⁶ then there are likely to be considerably more cases where infanticide is pleaded as a defence. In such circumstances, a ‘merger’ solution may be more appropriate.

[Question 3]

⁹⁵ M E Briscoe and P Williams, “Emotional problems in the clients of health visitors” (1985) 58 *Health Visitor* 197 and A Whitton, R Warner and L Appleby, “The pathway to care in postnatal depression: Women’s attitudes to post-natal depression and its treatment” (1996) 46 *British J of General Practice* 427, both cited in L Appleby, G Koren and D Sharp, “Depression in Pregnant and Postnatal Women: An Evidence-based Approach to Treatment in Primary Care” [1999] *British J of General Practice* 780, 780;. See also, T Byron, “Postnatal Depression” *The Times* 18 July 2005, 9:

[Postnatal depression] affects at least one new mother in ten, although research indicates that only 1 in four will seek help – often because many feel ashamed, as they think they are bad mothers (they aren’t) and are frightened that their child will be taken away (it won’t).

⁹⁶ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) para 6.42 recommended:

- Extending the offence to cover the killing of an infant aged up to two years; and
- Applying the offence to the killing of older children as the result of the accused not having recovered from the effect of giving birth or any disorder consequent on childbirth.

Application to “first degree murder” and “second degree murder”

- 9.96 The present offence/defence of infanticide applies to cases that, if not for the 1938 Act, would constitute murder. If our proposed statutory framework for the law of homicide is adopted,⁹⁷ we make the firm proposal that the offence/defence of infanticide would apply to cases that would otherwise be “first degree murder” or “second degree murder”. We make this proposal for two reasons. Firstly, the offence/defence of murder infanticide was introduced in part to avoid labelling mothers who commit infanticide murderers. Secondly, if the offence/defence of infanticide was limited to cases that would otherwise be “first degree murder”, then this would lead to the unjust result that a mother who intended to kill would plead infanticide, whereas a mother who merely intended serious harm or acted recklessly would be classed as a second degree murderer. To avoid this anomaly, the offence/defence of infanticide must apply to both first and second degree murder.

Charging and procedure at Trial

- 9.97 In the recent case of *Kai-Whitewind*, the Court of Appeal highlighted two areas of concern in relation to the offence/defence of infanticide.⁹⁸ The first was whether as a matter of substantive law infanticide should extend to circumstances subsequent to the birth, but connected with it, such as the stresses imposed on a mother by the absence of natural bonding with her baby.⁹⁹ Clearly this is something which could readily be dealt with by the moderate reform option. The second area has not been a feature of previous proposals for reform. It was described as when the mother who has in fact killed her infant is unable to admit it:

This may be because she is too unwell to do so, or is too emotionally disturbed by what she has in fact done, or too deeply troubled by the consequences of an admission of guilt on her ability to care for any surviving children. When this happens it is sometimes difficult to produce psychiatric evidence relating to the balance of the mother’s mind. Yet, of itself, it does not automatically follow from denial that the balance of her mind was not disturbed: in some cases it may help to confirm that it was.¹⁰⁰

- 9.98 It is easy to see how cases which should be dealt with as infanticide are actually dealt with as murder with the catastrophic consequences that this entails. If someone is in denial then it becomes impossible, in an adversarial system, to obtain and present psychiatric evidence. This problem is also manifest in some cases which ought to be dealt with by way of diminished responsibility but which cannot be, as the denial of the accused (a) prevents diagnosis and so the

⁹⁷ See Part 2.

⁹⁸ [2005] EWCA Crim 1092, [2005] 2 Cr App R 31.

⁹⁹ *Ibid*, [139].

¹⁰⁰ *Ibid*.

evidence is not available at trial, and/or (b) prevents legal representatives from exploring or raising the issue.¹⁰¹

9.99 When this has arisen in cases which, it is claimed on appeal, ought to have been dealt with by way of diminished responsibility, the Court of Appeal has consistently held that the defendant must put her entire defence at trial. She cannot attempt to have two trials by referring to evidence on appeal which could have reasonably been introduced at the time of trial. However, when it is the case that there is psychiatric evidence that (i) the defendant was ill and it was the illness itself which prevented her from making disclosure to doctors and instructing legal representatives as to her mental condition, and (ii) the evidence is unopposed by the respondents,¹⁰² then it will be in the interests of justice for such evidence to be received for the purpose of section 23(2)(d) of the Criminal Appeal Act 1968.¹⁰³

9.100 As we have seen earlier, there are considerable differences between diminished responsibility and infanticide, not the least of which is the fact that infanticide can be charged as an offence. In practice, infanticide is probably only ever charged when the defendant admits the killing. In cases where an accused mother initially denies the killing but it later becomes apparent that her mental condition prevented her from admitting responsibility, it could be argued that a simpler and more relaxed procedure for introducing fresh evidence post conviction would be one way of ensuring that justice is achieved. On the basis of the authorities cited

¹⁰¹ *Kooken* (1982) 74 Cr App R 30; *Martin (Anthony)* [2001] EWCA Crim 2245, [2003] QB 1, [54]-[78]. See also Appendix F.

¹⁰² In the event of a diagnostic dispute however the Court of Appeal would have to decide whether and to what extent the evidence should be accepted in order to determine the safety of the conviction. *Martin (Anthony)* [2001] EWCA Crim 2245, [2003] QB 1 appears to be singular in that the Court of Appeal felt unable to determine whether the psychiatric evidence for the appellant or the respondent should be preferred.

¹⁰³ Section 23(2) provides:

The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to –

- (a) whether the evidence appears to the Court to be capable of belief;
- (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
- (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
- (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

See also, *Weekes (Stephen)* [1999] 2 Cr App R 520; *Gillfillan* (1999) GWD 21-998; and *Borthwick* [1998] Crim LR 274. In *Borthwick*, the appellant had been examined by a psychiatrist prior to the trial. The appellant denied the offence and resisted analysis of his history, personality and relationships. There was evidence to suggest that he had underlying personality problems but, as he was pleading not guilty, the question of diminished responsibility did not arise. The appellant was tried claiming that he had not killed the deceased and was convicted. He was reassessed by the same psychiatrist a month later whereupon he admitted responsibility for the offence and maintained that the death was accidental. After three further interviews the psychiatrist concluded that the appellant was suffering from a psychotic mental illness which could amount to paranoid schizophrenia. The fresh evidence was admitted notwithstanding that the Crown argued that the evidence of impairment was not “overwhelming” or clear in terms of diminished responsibility.

in paragraph 9.99, this is already possible. Yet it is problematic. The difficulty with such an approach is that it may be inefficient.

9.101 In cases where the defendant may have grounds for an infanticide defence, but denies having killed the child, as was the case in *Kai-Whitewind*, some would like to see a situation where the jury were automatically given the option of considering infanticide. This is not possible. Although a trial judge has the power to leave the option of a verdict for a lesser offence on the indictment, he can only do so where there is some evidence which could go to support such a verdict, on the case as presented by the prosecution.¹⁰⁴ For this to apply to infanticide there would need to be evidence of mental imbalance at the time of the killing. The possibility of the trial judge ordering an independent psychiatric report in order to see if such evidence is available is not a feasible one. This is notwithstanding that provision already exists for a judge to remand an accused to hospital in order that a report on the accused's mental condition is prepared.¹⁰⁵ Without the co-operation of the defendant, medical examination is not possible. The procedure would derogate from the right against self-incrimination. Such a procedure would also interfere with the integrity of the adversarial process and militate against whatever defence was being put leading to grounds for appeal in the event of a conviction for either murder or infanticide.¹⁰⁶

9.102 One possibility for easing the problem identified in *Kai-Whitewind* is as follows. In those limited circumstances where infanticide is not raised as an issue at trial and the defendant (biological mother of a child of one year or less) is convicted by the jury of murder, the trial judge should, within the conclusion of 28 days from conviction, have the power to order a thorough medical examination of the defendant. This would be with a view to establishing whether or not there is evidence that at the time of the killing the requisite elements of a charge of infanticide were present. If so, then the trial judge should be able to postpone sentence and the fixing of the minimum term.¹⁰⁷ Rather he would be empowered to certify the murder conviction for appeal.¹⁰⁸ This would be done following a hearing in open court. The procedure amounts to recognition of the very exceptional circumstances of this type of case.¹⁰⁹ This would obviate the need for an appellant to apply to the single judge of the Court of Appeal for leave. It is

¹⁰⁴ *Von Starck v The Queen* [2000] 1 WLR 1270 (PC).

¹⁰⁵ Mental Health Act 1983, s 35. This order must be made on the basis of the oral or written evidence of a registered medical practitioner that there is reason to suspect that the accused is suffering from a mental illness, psychopathic disorder, severe mental impairment or mental impairment, and the court is of the opinion that it would be impracticable for a report on his medical condition to be made if the accused were remanded on bail.

¹⁰⁶ In *Coutts* [2005] EWCA Crim 52, [2005] 1 WLR 1605, the Court of Appeal held that to leave manslaughter to the jury at the appellant's trial for murder would not have been in the interests of justice. This is because the only basis on which he could have been convicted of manslaughter was factually wholly different from the prosecution case and both the prosecution and the defence thought that it would not serve the appellant's interest in a fair trial for manslaughter to be left on the indictment.

¹⁰⁷ Criminal Justice Act 2003, s 269.

¹⁰⁸ Criminal Appeal Act 1968, s 1(2)(b). At present such a power exists only in relation to a matter of law or in very exceptional circumstances.

¹⁰⁹ It would be an exception to the general rule that an appeal takes place after the conclusion of the Crown Court Proceedings.

designed to ensure a hearing before the full court on the basis of fresh evidence. Where a certificate for leave to appeal is granted by the trial judge, bail pending appeal may also be granted by the Crown Court.¹¹⁰ The Court of Appeal would then consider whether to admit the fresh evidence and, if it did, whether the jury's verdict was unsafe. It would have the power to substitute a verdict of infanticide for murder.¹¹¹

- 9.103 The defendant could not and would not be compelled to undergo such an independent medical assessment and it may well be the case that she would not wish to take advantage of the procedure. Indeed, in circumstances where there are likely to be grounds of appeal against conviction it is entirely conceivable that she would be advised not to. However recent public endeavours to prevent the repetition of miscarriages of justice¹¹² in cases where mothers have been wrongly convicted of murdering infants, as in the cases of *Clark*¹¹³ and *Cannings*,¹¹⁴ may contribute to greater vigilance in the gathering, disclosure and admission of expert evidence. Accordingly, it is to be hoped that cases where biological mothers are wrongly convicted and rightly maintain their innocence will be fewer. Short of a referral by the Criminal Cases Review Commission, there can only be one appeal against conviction in any particular case.¹¹⁵ In the event of defence counsel advising of the existence of additional grounds of appeal against the murder conviction, leave would have to be sought in the usual way from the single judge.
- 9.104 It should not be forgotten that the procedure depends on credible expert evidence that the defendant was suffering from an imbalance of mind. We do not believe that the proposal will create an incentive for a defendant to undergo trial and rely on a the trial judge's power to certify the case in the event of a conviction. We do feel that if a defendant is genuinely in denial about what is, to all intents and purposes, infanticide to the extent that she has not been able to admit it at trial, then the reality of her conviction for murder may enable her to begin to come to terms with her illness and its consequences.
- 9.105 Why would such an innovation apply exclusively to those defendants who, bar the denial, would have been able to plead infanticide, and not, for example, to cases where a defendant may be suffering from diminished responsibility? Diminished responsibility is always for the defendant to raise. Infanticide is not

¹¹⁰ Supreme Court Act 1981, s 1(f).

¹¹¹ This has the advantage of being consistent with some of the mitigating factors adumbrated in schedule 21(11) of section 269 of the Criminal Justice Act 2003, in particular "(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957) lowered his degree of culpability, and (d) the fact that the offender was provoked (for example by prolonged stress) in a way not amounting to a defence of provocation." Thus even if the appeal fails and the defendant is remitted back to the Crown Court for sentence there may be substantial factors which can be taken into account in fixing the minimum term.

¹¹² *Sudden Unexpected Death in Infancy: A Multi-agency Protocol for Care and Investigation* (2004), the report of a working group convened by The Royal College of Pathologists and the Royal College of Paediatrics and Child Health.

¹¹³ [2003] EWCA Crim 1020, [2003] 2 FCR 447.

¹¹⁴ [2004] EWCA Crim 1, [2004] 1 WLR 2607.

only a rare offence but one which the prosecution would be able to charge and would no doubt wish to do so in the circumstances under discussion, had there been any evidence of mental disorder. Neither does the success of a plea of diminished responsibility always ensure a lenient disposal. A psychopath may be guilty of manslaughter by virtue of diminished responsibility and still receive a life sentence. In contrast, a plea or finding of infanticide rarely even results in a custodial sentence. In the sort of cases contemplated, the chasm between the disposal which is appropriate and the one which the judge is forced to impose under the present law is vast.

- 9.106 Our **provisional proposal** is that in circumstances where infanticide is not raised as an issue at trial and the defendant (biological mother of a child of one year or less) is convicted by the jury of murder, the trial judge should have the power to order a thorough medical examination of the defendant with a view to establishing whether or not there is evidence that at the time of the killing the requisite elements of a charge of infanticide were present. If so, then the trial judge should be able to postpone sentence until after appeal against conviction and certify the conviction for appeal on the ground of fresh evidence. **[Questions 4-6]**

¹¹⁵ *Pinfold* [1988] QB 462.

PART 10

LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

- 10.1 We set out below a summary of our provisional proposals and questions on which we invite the views of consultees. We would be grateful for comments not only on the matters specifically listed below, but also on any other points raised in this paper. It would be very helpful if, when responding, consultees could indicate either the paragraph of the summary that follows to which their remarks relate, or the paragraph of this paper in which the issue was raised.

THE STRUCTURE OF HOMICIDE OFFENCES

Provisional proposal

- 10.2 We provisionally propose that the structure of a reformed law of homicide should comprise three general homicide offences supplemented by specific offences:
- (1) “first degree murder” (mandatory life sentence);
 - (2) “second degree murder” (discretionary life sentence);
 - (3) manslaughter (fixed term of years maximum sentence); and
 - (4) specific homicide offences, such as assisting suicide and infanticide (fixed term of years maximum sentence).

[paragraph 2.7]

Questions

- 10.3 Do consultees agree that the framework that we are proposing for grading and labelling offences would be an improvement on the existing structure of the law of homicide?
- 10.4 Whether the answer is “yes” or “no”:
- (1) do respondents believe that there is a better framework than the one that we are proposing?
 - (2) If so, what would that framework be?

THE GENERAL HOMICIDE OFFENCES THAT WE ARE PROPOSING

“First degree murder”

Provisional proposal

- 10.5 We provisionally propose that all unlawful killings committed with an intention to kill should be “first degree murder” unless the defendant has a partial defence, namely provocation, diminished responsibility or duress.

[paragraph 2.2(2)]

The sentence for the offence should be imprisonment for life.

Questions

10.6 We ask consultees whether they agree that:

- (1) “first degree murder” (and the mandatory life sentence) should be confined to unlawful killings committed with an intention to kill;
- (2) an unlawful killing committed with an intention to kill should be “first degree murder” irrespective of whether the killing was premeditated;
- (3) an unlawful killing committed with an intention to kill should be “first degree murder” irrespective of the status of the victim.

“Second degree murder”

Provisional proposals

10.7 We provisionally propose that:

- (1) all unlawful killings committed with an intention to cause serious harm should be “second degree murder”;

[paragraph 3.2(2)]

- (2) all unlawful killings committed with reckless indifference to causing death should be “second degree murder”;

[paragraph 3.2(3)]

- (3) all unlawful killings committed with an intention to kill should be “second degree murder” if the defendant has a partial defence, namely provocation, diminished responsibility or duress.

[paragraphs 6.2(1) and (3) and paragraphs 7.1(1)(a)(ii)]

The maximum sentence for the offence should be imprisonment for life.

Questions

10.8 We ask whether consultees agree that:

- (1) the law should draw a distinction between “first degree murder” and second degree murder”;
- (2) an unlawful killing committed with an intention to cause serious harm, but without an intention to endanger life, is sufficiently blameworthy to be “second degree murder”;
- (3) an unlawful killing committed with reckless indifference to causing death is sufficiently blameworthy to be “second degree murder”;

- (4) provocation and diminished responsibility should have the same effect, namely to reduce “first degree murder” to the same lesser offence of “second degree murder”, so that the jury is not forced to choose between them when they are pleaded together;
- (5) provocation and diminished responsibility should reduce “first degree murder” to “second degree murder” rather than manslaughter;
- (6) provocation and diminished responsibility should not be partial defences to “second degree murder”;
- (7) the maximum sentence for “second degree murder” should be life imprisonment.

10.9 We invite views as to whether consultees would favour the following restricted definition of “serious harm”:

Harm is not to be regarded as serious unless it is harm of such a nature as to endanger life or to cause, or to be likely to cause, permanent or long term damage to a significant aspect of physical integrity or mental functioning.

10.10 If so, we ask whether an intention to cause serious harm, so defined, would be most appropriately placed within the definition of “first degree murder” or “second degree murder”.

10.11 We invite views as to whether “second degree murder” on the basis of acting with reckless indifference to causing death should be restricted to cases in which the reckless indifference arose from the commission or attempted commission of a serious crime.

Manslaughter

Provisional proposals

10.12 We provisionally propose that conduct causing another’s death should be manslaughter if: a risk that the conduct would cause death would have been obvious to a reasonable person in the defendant’s position, the defendant had the capacity to appreciate the risk and the defendant’s conduct fell far below what could reasonably be expected in the circumstances.

[paragraph 3.2(4)]

10.13 We provisionally propose that it should be manslaughter to cause another person’s death by a criminal act intended to cause physical harm or by a criminal act foreseen as involving a risk of causing physical harm.

[paragraph 3.2(4)]

Questions

10.14 We ask whether consultees agree that:

- (1) killing through gross negligence should result in a conviction of manslaughter;
- (2) manslaughter through gross negligence should be confined to cases where the defendant's conduct involved an obvious risk of death (as opposed to serious harm);
- (3) killing through "reckless stupidity" should result in a conviction of manslaughter rather than "second degree murder";
- (4) it should be manslaughter to cause death by a criminal act intended to cause some, but not serious, physical harm;
- (5) it should be manslaughter to cause death by a criminal act foreseen as involving the risk of causing some harm even if the harm foreseen was not serious and death was neither foreseen nor could have been foreseen.

THE MEANING OF INTENTION

10.15 We invite views on the respective merits of the two Models that we identified in Part 4.

The First Model

- (1) Subject to the proviso set out below:
 - (a) A person acts "intentionally" with respect to a result when he or she acts either:
 - (i) in order to bring it about, or
 - (ii) knowing that it will be virtually certain to occur; or
 - (iii) knowing that it would be virtually certain to occur if he or she were to succeed in his or her purpose of causing some other result.
- (2) Proviso: a person is not to be deemed to have intended any result, which it was his or her specific purpose to avoid.

The Second Model

10.16 The Second Model is based on codification of the common law:

- (1) A person is to be regarded as acting intentionally with respect to a result when he or she acts in order to bring it about.
- (2) In the rare case where the simple direction in clause (1) is not enough, the jury should be directed that:

they are not entitled to find the necessary intention with regard to a result unless they are sure that the result was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.

- (3) In any case where the defendant's chance of success in his or her purpose of causing some other result is relevant, the direction in clause (2) may be expanded by the addition of the following phrase at the end of the clause (2) direction:

or that it would be *if he or she were to succeed in his or her purpose of causing some other result*, and that the defendant appreciated that such was the case.

COMPLICITY IN "FIRST DEGREE" MURDER

Provisional proposals

10.17 We provisionally propose that where a person ("D") provides the perpetrator ("P") with encouragement or assistance in relation to P's offence of "first degree murder", D should be guilty of "first degree murder" if:

- (1) D intended that "first degree murder" should be committed;
- (2) D was a party to a joint venture with P to commit "first degree murder"; or
- (3) D was a party to a joint venture with P to commit another crime and D foresaw that P might commit "first degree murder" in the course of that venture.

[Paragraph 5.1(1)]

10.18 We provisionally propose that D should be able to rely on duress as a partial defence to "first degree murder".

[Paragraph 5.1(3)]

10.19 We provisionally propose that D should be guilty of "complicity in an unlawful killing" (alternatively, manslaughter) instead of "first degree murder" if D:

- (1) was a party to a joint venture with P to commit a crime;
- (2) D intended or foresaw that harm (or the fear of harm) might be caused by a party to the venture; and
- (3) it would have been obvious to a reasonable person in D's position that someone might be killed as a result of the venture.

[Paragraph 5.1(4)]

Questions

10.20 We ask whether consultees agree that:

- (1) D should be guilty of “first degree murder” if D was a party to a joint venture with P and D foresaw that P might commit “first degree murder”;
- (2) D should not have a partial defence to “first degree murder” simply on the basis that he played a peripheral role in the murder;
- (3) D should be able to rely on duress as a partial defence to “first degree murder”; and
- (4) D should be guilty some form of homicide offence instead of “first degree murder” if D was a party to a joint venture with P to commit a crime, D intended or foresaw that harm (or the fear of harm) might be caused by a party to the venture and it would have been obvious to a person in D’s position that someone might be killed as a result of the venture.
- (5) If so, whether it be labelled “complicity in unlawful killing” or manslaughter.

THE DEFINITION OF THE PARTIAL DEFENCE OF DIMINISHED RESPONSIBILITY

Provisional proposal

10.21 We provisionally propose that the definition of the defence of diminished responsibility should be reformulated as follows:

- (1) A person who would otherwise be guilty of “first degree murder” is not guilty of “first degree murder” if, at the time of the act or omission causing death, that person’s capacity to
 - (a) understand events; or
 - (b) judge whether his or her actions were right or wrong; or
 - (c) control him or herself
 was substantially impaired by an abnormality of mental functioning arising from an underlying condition or developmental immaturity, or both; and
- (2) the abnormality of mental functioning or the developmental immaturity or the combination of both was a significant cause of the defendant’s conduct in carrying out the killing.
- (3) “Underlying condition” means a pre-existing mental or physiological condition.

[paragraph 6.2(2)]

Questions

10.22 We ask consultees:

- (1) whether the current definition of diminished responsibility in section 2 of the Homicide Act 1957 should be replaced;

- (2) if so, whether it should be replaced by the definition that we are provisionally proposing or by a different definition;
- (3) whether, if the definition was to remain broadly as it is under section 2, it should at least be reformed to the extent of removing the need to show that an abnormality of mind had to arise from one of the causes stipulated in the section;
- (4) whether, whatever the definition, “developmental immaturity” should be added as a possible source of diminished responsibility, irrespective of whether the accused’s development was “arrested or retarded”;
- (5) if so, whether “developmental immaturity” should be confined to persons under a particular age at the date of committing the offence and, if so, what the age limit should be;
- (6) whether the expert evidence provided in diminished responsibility cases is satisfactory and, if not, whether the system for providing it can be improved.

THE PARTIAL DEFENCE OF PROVOCATION

Provisional proposal

- 10.23 We provisionally propose that the principles that should govern the partial defence of provocation are those that we recommended in our report *Partial Defences to Murder*.¹

[paragraph 6.2(4)]

Questions

- 10.24 We ask whether consultees agree that the principles that should govern the partial defence of provocation are those that we recommended in our report *Partial Defences to Murder*.
- 10.25 We invite views as to whether, if provocation is a partial defence to “first degree murder” but not “second degree murder”, it should be confined to cases where the accused killed because he or she acted in response to a fear of serious violence.

DURESS

Provisional proposal

- 10.26 We have already provisionally proposed that duress should be a partial defence to “first degree murder”.

¹ *Partial Defences to Murder* (2004) Law Com No 290, para 1.13.

- 10.27 We provisionally propose that for a plea of duress to succeed as a partial defence to “first degree murder” (and to “second degree murder” and to attempted murder were we subsequently to recommend that the defence applied to those offences) the defendant must have been threatened with death or life threatening harm.

[paragraph 7.3]

Questions

- 10.28 We ask whether consultees agree that:
- (1) duress should be a defence to “first degree murder”;
 - (2) if the answer to (1) is “yes”, that it should be a partial but not a full defence;
 - (3) if the answer to (2) is “yes”, that it should reduce “first degree murder” to “second degree murder” rather than manslaughter
- 10.29 We ask whether consultees agree that to be a defence to “first degree murder”, the threat must be one of death or life-threatening harm.
- 10.30 We invite views as to:
- (1) whether duress should be a defence to “second degree murder” and attempted murder; and
 - (2) if so, whether should it be a full or a partial defence;
 - (3) whether duress if successfully pleaded as a defence to “first degree murder” by a child or young person should result in more lenient treatment than it would for an adult.

KILLING WITH CONSENT AND DIMINISHED RESPONSIBILITY

Provisional proposal

- 10.31 We provisionally propose that section 4 of the Homicide Act 1957 (killing pursuant to a suicide pact) should be repealed.

[paragraph 8.2]

Questions

- 10.32 We ask whether consultees agree that:
- (1) killing in pursuance of a suicide pact should not in itself justify conviction of a lesser offence than “first degree murder” and that accordingly section 4 of the Homicide Act 1957 should be repealed;
 - (2) killing in pursuance of a suicide pact or, if there is no suicide pact, killing the victim with his or her consent, should only result in conviction of a lesser offence than “first degree murder” if the defendant at the time of the killing was suffering from an abnormality of mental functioning which was a significant cause of his or her conduct in carrying out the killing;

- (3) if so, the lesser offence should be “second degree murder”;
 - (4) our proposed reformulation of the definition of the partial defence of diminished responsibility will cater adequately for the deserving cases that currently fall within section 4 of the Homicide Act 1957 and will exclude undeserving cases that currently fall within section 4.
- 10.33 We invite views as to whether in cases where the defendant’s diminished responsibility was a significant cause of their conduct in killing the victim **and** the victim consented to the killing, the presence of both diminished responsibility and consent should reduce the offence to manslaughter rather than “second degree murder”
- 10.34 We invite views as to whether on an indictment for murder or manslaughter, it ought to be possible for the defendant to seek to show that he or she is guilty only of complicity in suicide (under section 2 of the Suicide Act 1961) if the conduct that killed the victim was meant by the defendant and the victim to end both of their lives.

INFANTICIDE

Provisional proposal

- 10.35 We provisionally propose that the offence/defence of infanticide should be retained but that section 1(1) of the Infanticide Act should be amended:
- (1) to delete any reference to the “effect of lactation consequent upon the birth of the child”, and
 - (2) to substitute two years for 12 months (the relevant age of the child).

[paragraph 9.1(2)(a)]

Questions

- 10.36 We ask whether consultees agree that:
- (1) the offence/defence of infanticide should be retained;
 - (2) it should be reformed in the way that we propose.
- 10.37 We invite views as to whether:
- (1) If the offence/defence of infanticide were to be abolished, infanticide cases should be subsumed within a reformed defence of diminished responsibility;
 - (2) if a biological mother of a child of one year or less is convicted of murdering that child and at trial did not raise the defence of infanticide, the trial judge should be empowered to order a psychiatric report on the mother with a view to establishing whether or not there is evidence that at the time of the killing the requisite elements of a charge of infanticide were present;

- (3) the trial judge on receipt of the psychiatric report (assuming the report reveals evidence capable of supporting a verdict of infanticide) be able to postpone sentence and certify the conviction for appeal on the grounds of fresh evidence;
- (4) there are any other ways in addressing what the Court of Appeal in *Kai-Whitewind*² identified as a problem, namely where the mother may have grounds for pleading the infanticide offence but denies having killed the child.

² [2005] EWCA Crim 1092, [2005] 2 Cr App R 31.

APPENDIX A

REPORT ON PUBLIC SURVEY OF MURDER AND MANDATORY SENTENCING IN CRIMINAL HOMICIDES*

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INTRODUCTION – OUTLINE AIMS AND METHODOLOGY

- A.1 This is a report of a short public survey carried out between 1 and 28 September 2005 on mandatory sentencing in criminal homicides. The central aim of the survey was to determine whether there appears to be any evidence of the likely support amongst members of the public for mandatory sentencing of persons convicted of unlawful homicide, (probably murder). Further, the survey sought to identify (1) the kinds of offence characteristics in which mandatory sentencing is favoured, and (2) the reasons which underpin participants' views (for or against mandatory sentencing).
- A.2 Fuller details of the methodology and the participants in the survey are set out at the end of this report. In essence, the survey was conducted by convening five groups of people who were drawn from different parts of England, with one each from the north, south, east, west and midlands. Each group met on two occasions, with a week between meetings. In total, 56 participants attended both meetings.¹ The first meetings concentrated on discussing different kinds of homicides so as to encourage and enable participants to think about the different kinds of circumstances in which homicides might occur and then to identify variations in the seriousness of homicides – how individual factors (offence characteristics) might affect their perceptions of the seriousness of the killing. During the week between meetings participants were free to talk about the issues with family, friends, colleagues and neighbours etc., if they so chose but were not asked to do so. Discussions in the second meetings focussed on the sentencing of convicted killers – were there any kinds of homicides in which participants favoured some form of mandatory sentencing. Whatever the responses, participants were invited to articulate the reasons for their views.

* I should like to formally record my thanks for the assistance and advice received in carrying out this survey. Natcen in London, and especially Lucy Dillon, offered some very constructive advice on the methodology, and in particular the way in which the issues were examined in the group meetings. PH Research in Oldham, especially Janet Ralphs, provided considerable help in setting up and organising the group meetings which ran very smoothly. Of course, the participants in the groups gave up their time to consider the issues and express their opinions. Finally, my employer, Coventry University has enabled me to organise my time in order to undertake this survey.

¹ One person was unable to attend the second meeting.

TWO “CAVEATS”

- A.3 Whilst the general public are aware that criminal homicides are committed and offenders prosecuted and sentenced in the courts,² it is extremely unlikely that any of them will have examined the issues in any depth: this survey was almost certainly the first time that they will have been encouraged to do so. Moreover, one of the main reasons for holding group discussions (as opposed to individual interviews) was to provide an opportunity for participants to listen to the views of others and to consider different and sometimes opposing arguments. Thus, it is possible that some participants might change their mind whilst considering and reflecting on the issues. Similarly, they might contradict themselves in the course of the discussion. In addition, not every participant responded in detail on every issue, but tended to indicate a general agreement or disagreement with what had been said by someone else. Indeed, as criminal lawyers are only too well aware, some of the issues here are extremely complex, calling on moral, ethical and legal analyses, and so it was not surprising that occasionally participants felt unable to express a view on a point. In consequence it is not possible to produce a definitively quantitative set of results.

OPINIONS

Bad homicides and mandatory sentencing

- A.4 Support for mandatory sentencing seemed to vary quite considerably between groups. In group 1, at least six and up to eight of the eleven participants spoke in support of mandatory sentencing – two appeared to vary in their views at different times in the discussion. It is worth noting that in the latter stages of their discussion several members of this group, including some who had earlier indicated support for mandatory sentencing, appeared to favour a different approach, namely the creation of a set of guidelines for different kinds of circumstances (such as battered spouse homicides, killing in self-defence, killing during pub or club fights, gangland killings etc.) within which judges should sentence. The principal reasons were that cases inevitably varied from one another and there would usually be some, albeit minimal, element of mitigation which might affect the sentence. Even relatively small adjustments in sentencing were thought to be desirable. Similarly, in group 2, up to eight of the twelve participants thought there were some instances where the trial judge should have no choice as to sentence, but one (of these eight) was less than sure about this. In groups 3 and 4, the corresponding figures were seven and six out of twelve respectively, but in the final group only one person advocated mandatory sentencing. Thus, taking account of the slight uncertainty, between 48.2 and 53.6% of the participants felt that in some kinds of homicides the sentence should be fixed by law.
- A.5 Predictably, each group felt that homicides would vary in their seriousness because there would almost inevitably be a mixture of aggravating and mitigating characteristics. The obviously crucial issue is the extent to which this recognition of a cocktail of aggravation and mitigation might lead participants away from mandatory sentencing. Indeed, the kinds of homicides which were identified as

² This is apparent from previous public surveys carried out by the author; see, for example, Barry Mitchell, “Public Perceptions of Homicide and Criminal Justice”, *British Journal of Criminology* (1998) 38(3) 453-472.

deserving a mandatory sentence is (unsurprisingly) of potential significance here. In the first group three participants identified premeditated killings, three more referred to serial killings, whilst other individuals mentioned murders in the course of rape and gangland killings. Interestingly, in contrast to the other groups, no-one in this group referred at this stage to the general category of killing children as especially serious, although there was widespread agreement that certain notorious offenders warranted the toughest penalties because they had killed children. In the first meeting of this group, the majority of participants expressed the view that killing multiple victims through a single act (such as detonating a bomb or setting fire to a building) was particularly bad, as was a killing where the offender inflicted torture or made the victim endure additional suffering as well as death. This latter point substantiates the opinion expressed during the second meeting of the group that murder in the course of rape is very serious; in each instance there is an additional element of (serious) harm and accompanying fault. At the first meeting, participants had suggested that killing not only a child but also the elderly or the handicapped was very serious. On the other hand, there was some disagreement in the group about killing a police officer, or anyone else in a “vulnerable occupation”.³

- A.6 In the second meetings of group 2, at least two participants identified homicides in the course of acts of terrorism as warranting a mandatory sentence, four mentioned hired or professional killers, two spoke of premeditated killing, and four referred to different kinds of child killing (adults killing children, children killing children, adults committing sexual killings of children, and parents killing their own children), as calling for a mandatory sentence. As with all five groups, there was unanimous agreement during the first meeting that killing a child or an elderly person or a handicapped person was likely to be regarded as one of the more serious homicides, although there was no apparent support for treating the killing of those in vulnerable occupations as unusually bad.
- A.7 In all the first meetings and in some of the second meetings of all groups there was apparent agreement that premeditation, in the form of nothing less than an intent to kill,⁴ is likely to indicate a particularly serious homicide, subject to there being no “good motive” – the most obvious example of the latter being a mercy killing. Further, the means by which death is caused was recognised as possible circumstantial evidence of the killer’s intent, and there was widespread opinion in the groups that the use of a gun (and perhaps a knife) indicates an intent to kill – though it depends on which part of the victim’s body the weapon is aimed. On the other hand, hitting someone on the arm with a wooden club with the intent to cause serious harm but not to inflict any life-threatening injury was seen as less serious. If the victim in these latter cases subsequently died, perhaps in the course of treatment for a broken arm, participants frequently suggested that this should not be viewed as murder because death was “accidental”, since the offender’s act carried no apparent risk of death.

³ Those who rejected the suggestion that killing someone in a vulnerable occupation did so on the ground that all human life should be treated as of equal value.

⁴ At some stage in either or both meetings, each group spent some time emphasising the importance of premeditation in the sense of an intent to kill. Some participants in groups 3 and 4 in particular talked of cases where the offender set out armed to kill as deserving a mandatory sentence.

- A.8 Similar unanimity was expressed regarding homicides where the victim was tortured in some way before being killed,⁵ and in cases where the offender demonstrated a “total disregard for human life”. An example of the latter is the Russian-roulette player, in which the killer fires a gun containing one bullet rather than a full complement of six. The killer acts in order to expose his victim to the risk of death.⁶ As indicated earlier, the first group associated the killing of more than one individual – either through serial killings or by a single act - with the worst homicides. Three of the other groups took the same view, but the fourth group seemed to regard them as not especially serious.
- A.9 The reasons given for either favouring or rejecting mandatory sentencing were foreseeable. Those who supported it pointed to the sheer gravity of the wrongdoing, and they were keen to ensure that judges should not be allowed to pass an unduly lenient sentence. Indeed, in all groups there was clear evidence of concern that judges can “have an off day”, or that some simply are “too soft” or “out of touch” with the views and standards of ordinary people. Several participants talked generally about inconsistencies in sentencing practice, and suggested that this might be alleviated by mandatory sentencing. Requiring the judge to impose the death penalty or “natural life imprisonment” would provide better protection for the public and effect greater deterrence. Conversely, those against mandatory sentencing felt that the circumstances of a homicide would, as in other forms of criminality, vary from case to case and thus felt the judge should be able to reflect these variations when determining the appropriate punishment. They did not feel that judges are so out of touch with contemporary society; rather judges are aware of the relevant principles of sentencing law and policy, and of the facts of the case and are therefore in a good position to decide the most appropriate sentence. Any possible errors – especially unduly light sentences – can and should be corrected by appeal.
- A.10 Finally on this point, in all group discussions, regardless of their personal preference for or against mandatory sentencing, participants came to appreciate the importance of the definition of offences, of ensuring that offenders are convicted of the “right offences” – not so much for reasons of fair labelling, but more to ensure that they received the appropriate sentence. In this respect, they appeared to be echoing the comments of senior judges that the current definitions – for example, of murder – are not as accurate as they should be.⁷ Cases resulting in murder convictions vary so considerably in moral culpability that they should not all be classified in the same way.

⁵ At least two participants in the third group cited murder in the course of rape as especially serious.

⁶ An interesting analysis of the Russian-roulette killer’s culpability can be found in William Wilson, “Murder and the Structure of Homicide”, in Andrew Ashworth & Barry Mitchell (eds) *Rethinking English Homicide Law* (2000) Oxford University Press, at 41, 42.

⁷ See, for example, “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 hole 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”, *R v Howe* [1987] 2 WLR 568, 581 *per* Lord Hailsham.

Specific sentences

- A.11 Of the 56 participants, 25 (44.64%) expressed their clear support for the availability of the death penalty in certain kinds of homicides, and a further three were undecided on what should be the maximum or mandatory sentence. (Not all of these 25 favoured mandatory sentencing.) Those who were against capital punishment felt that offenders convicted of the worst homicides should be sentenced to life imprisonment, by which they meant that they should serve the rest of their natural lives in prison. Indeed, it is important to record here the very strong criticism by participants of the current system whereby life sentence prisoners are likely to be released into the community on licence after serving the first part of the sentence in custody. Participants thought that this did not merit the description “life imprisonment”.

Other ways of controlling judicial sentencing decisions

- A.12 Regardless of the specific opinions on mandatory sentencing, there was a good deal of support for controlling the extent to which judges should be able to determine the punishment through the use of upper and lower limits. Although they were not encouraged to be clear about how many separate offences they would like the law to recognise and how they should be defined, several participants thought that there should be a range of sentences available for the different categories of homicide, so that there was a much greater likelihood that the “punishment would fit the crime.” What was being advocated here seemed to be broadly analogous to the guidelines set down in Schedule 21 of the Criminal Justice Act 2003 which indicate the length of time to be spent in prison before first release on licence according to specific offence characteristics. Allied to this, there was considerable support for the idea of having the sentence determined by a panel of judges, so that if one judge had an “off day” or wanted to be unduly lenient, the other judges could redress this and thereby ensure a more justifiable penalty.

The perennial problem of mercy killing

- A.13 In both meetings the groups considered the familiar question of how the criminal justice system should regard and respond to mercy killing. It was invariably accepted that provided there is clear evidence of the victim’s desire to die, such cases are amongst the least serious of homicides. Where there is no such evidence, opinions were less clear, and that meant that where the victim is unable to indicate a desire to die participants found it more difficult to express a view on the gravity of the killing, even assuming the killer was motivated solely by compassion. In general, they thought that the homicide would be more serious, though not necessarily amongst the most serious. Participants said it would obviously be vital to know whether the case was a “genuine mercy killing” – had the victim truly and freely wanted to die, and was the killer’s motive a “good” one? It was this that concentrated participants’ minds most of all. Virtually all suggested that there ought to be some form of official enquiry into what had happened, and that a formal prosecution or police investigation might serve this purpose. Where the case was one of genuine mercy killing, the most punitive suggestion was for a short period of imprisonment, and many participants felt that a community-based disposal, with the emphasis on counselling for the killer, would be appropriate.

MISCELLANEOUS FURTHER ISSUES

A.14 In addition to the above issues which were addressed by all groups, there were various other points which naturally came out of the discussions by some participants in one or two groups but which were not raised in others.

- (1) Motorists who know they have been drinking and ought not to drive but nonetheless do so and kill another road-user – for example, by driving too fast or failing to negotiate a bend safely – were condemned by several participants, (literally) one or two of whom advocated mandatory sentencing by, at least as part of the punishment, automatic disqualification from driving indefinitely.
- (2) In an effort to ensure that “the punishment fits the crime”, some participants suggested that the jury should explain the factual basis of their verdict to the judge so that there could be no doubt in his mind as to the nature of the homicide of which the defendant had been convicted.
- (3) Some participants thought it would be helpful to have a lawyer retire with the jury so that (s)he could (a) advise or guide them on any legal issues which they did not understand and (b) might (again) then make the judge aware of the basis of the jury’s verdict.
- (4) The first group meetings were held at about the time when it was announced through the media that consideration might be given to the deceased’s next of kin – the secondary victims – having the opportunity to be formally involved in the legal process. Several participants commented on this and it was recognised that such involvement might, theoretically at least, take two forms. Secondary victims might be allowed to suggest an appropriate sentence, but this possibility received a mixed and usually critical response with many participants fearing that the victims would be unable to be sufficiently objective about something so serious and comparatively recent. Alternatively, secondary victims could talk about the impact of the homicide on them, about their pain and suffering, and thereby provide the court with more (precise) evidence of the harm caused by the offence. This possibility was treated less critically by participants but it is unclear just how far they would positively support its introduction.
- (5) Whilst many participants, especially in the latter stages of the discussions, spoke favourably about minimum sentencing and sentencing ranges for different categories of homicides, there was also a recognition of the potential injustice that these could bring about because individual cases might fit a general description but contain an additional factor which required them to be treated differently when sentence was passed.
- (6) Participants’ primary concerns when passing sentence on convicted killers were to give the defendant his just deserts and to protect the public. In relation to those who commit homicides which are not amongst the most serious but which merit a fixed term of imprisonment, some desire was expressed for the time in custody to be used constructively, to

rehabilitate the offender and help him re-establish himself in the community.

- (7) At the same time, a number of those who rejected capital punishment felt that execution would be “too easy” for the killer who should, instead, be made to suffer through spending the rest of his life in prison.

IMPLICATIONS

A.15 Obviously, this survey is based on a small number of participants, but in view of the methodology employed the views expressed can be regarded as providing further valuable evidence of how the public would like the criminal justice system to respond to criminal homicides.

A.16 The principal implications of these discussions might be presented thus:-

- (1) The survey appears to confirm the findings of previous studies that members of the public share the law’s view that there are important variations in the seriousness of homicides – that any unlawful homicide is a serious matter, but some are worse than others – and that these variations should be reflected in the law.⁸
- (2) This research supports the findings of another recent public survey that there does not appear to be a clear swell of opinion in favour of mandatory sentencing for what are regarded as the most serious homicides.⁹
- (3) There are variations in the kinds of homicides in which mandatory sentences are favoured.
- (4) There seems to be clearer support for adopting alternative means of controlling the use of judicial discretion in sentencing convicted killers, namely by substituting judicial panels for single judges, and/or by formally recognising sentencing ranges for different categories of homicides – though there would have to be a degree of flexibility to avoid injustice.

METHODOLOGY

A.17 The survey is based on the views expressed during meetings of five groups of participants in different parts of England. In an attempt to provide a broad range of backgrounds, men and women who had reached adulthood with a variety of educational experiences and religious affiliations were recruited by PH Research. The participants in the five groups were drawn from the north, south, east, west

⁸ It was clear from the group discussions that although the issue was not addressed in depth, participants favoured some separation of offences – e.g. “I’d call that manslaughter, not murder”.

⁹ In a survey carried out between August and October 2003, the author reported that 39 of 62 (62.9%) of respondents would not advocate mandatory sentencing in murder cases; see Law Commission Law Com No 290, *Partial Defences to Murder* (2004) London: TSO, Appendix C, para 68.

and centre of England. Each group met – in rooms hired in local hotels¹⁰ - on two occasions with exactly seven days in between.¹¹ The meetings took place between 7.00 and 9.00 pm¹² and the discussions were tape-recorded. Participants were recompensed for their time and travel expenses.

A.18 The personal characteristics of the participants were as follows:-

- (1) There were 26 men and 30 women.
- (2) Ages ranged from 21 to 68.
- (3) Nearly two-thirds (36 out of 56) regarded themselves as Christians; there were six Muslims; three Hindus; one Jew; one agnostic; eight atheists, and one who had “no religion”.
- (4) There were 16 (28.6%) graduates; 14 (25%) who had no formal education qualifications, and the remainder had GCSEs, A levels, HNCs etc.

A.19 In addition, a short screening questionnaire was used to gather further background data on participants and this revealed that:-

- (1) Two-thirds (37 of the 56) lived in a town; four lived in a city, and 15 in a village.
- (2) Over 80% (45 of the 56) lived with their family; three lived with friends, and the other eight lived alone.
- (3) Just over two-thirds (38) had children.
- (4) Four participants had themselves been a victim of a crime of violence; 10 said that other members of their family had been victims of violent crime; a relative of one participant had been unlawfully killed; two participants had had property offences committed against them, and two more were related to victims of property crimes.
- (5) Seven had served on a jury in a criminal trial.

A.20 The first meetings were devoted to encouraging participants to think about the different kinds of circumstances in which homicides take place and to consider how and why they regarded the seriousness of the different cases. It was stressed that they should put aside whatever they knew or thought about the current law, and concentrate instead on their own personal opinions with a view to formulating ideas about how they would like the criminal justice system to respond to unlawful homicides. One of the devices used in this process was to

¹⁰ In each case a room was hired so that the participants would not be disturbed but could focus their attention on the issues.

¹¹ It was felt that this would provide sufficient opportunity for participants to reflect on the first discussions whilst simultaneously maintaining continuity between the two meetings.

¹² It was felt that two hours was the maximum time that participants could reasonably be expected to engage in each discussion. Inevitably, the amount of time available effectively limited the range of issues which could be addressed.

present participants with three brief scenarios and invite them to (1) consider how serious they regarded them, and why; and (2) to change individual factors in the scenarios in order to see how, if at all, that affected their view of their seriousness.

A.21 The scenarios are as follows:-

- (1) John found out that David, aged 11, had been bullying his daughter Julie (also 11). John kidnapped David and locked him in a remote disused shed. After torturing him there for three days, John shot David dead.
- (2) Two men, Mike and Peter, were members of a local amateur football team. Their team was doing very poorly and they were arguing about which of them had been more responsible for the team's poor performances. As the argument became more heated, Mike punched Peter in the face, causing him to lose his balance and fall over. As he did so, Peter hit his head against a brick wall, fracturing his skull, and he later died from his injuries.
- (3) Sue was suffering from a terminal illness and was constantly in considerable pain. The doctors were unanimous that there was no hope of recovery, and they were able to give her very little pain relief. For several months she had regularly begged her husband Graham to "put her out of her misery". He had always refused to do so and had tried to comfort her. Eventually though, he gave in and gave her a fatal overdose of tablets.

A.22 In view of the nature and purpose of the survey the discussions were loosely structured, to permit time and opportunity for the discussions to follow individual responses and consider the various arguments and counter-arguments. At the same time the discussions were conducted so that each group addressed the same broad set of issues. Each group was invited to think in particular about what they regarded as the most serious homicides and how the presence or absence of individual factors might affect their views. In the light of previous surveys on the subject, regardless of their immediate responses, participants were invited to comment on the impact of the following potentially aggravating features:- the significance of premeditation (in contrast to spur of the moment killings); killing multiple victims (either by a series of attacks or by a single act); killing vulnerable victims such as children, the elderly or the handicapped, or alternatively those in vulnerable occupations such as police officers); killing combined with torture of victims; and finally cases where the killer shows a contemptible disregard for life, such as the Russian-roulette killer. The potentially mitigating features addressed were: a less morally culpable state of mind on the part of the killer, ranging from no more than an awareness of the risk of doing minor harm to an intent to seriously (but not fatally) injure; and the presence of what might be regarded as a "good motive" such as mercy or self-defence.

A.23 At the end of the first meeting participants were told that they were free to discuss the issues between then and convening for the second meeting, if they chose to do so.

A.24 The second meeting was devoted to discussing how participants thought that convicted killers ought to be sentenced, and especially whether there were any

kinds of homicides in which they felt that the judge should have no choice but be required by law to impose a specific penalty. Whichever view they adopted, they were also encouraged to indicate the reasons for their opinions. The loose structure of the discussions enabled the participants to examine other issues apart from the stark choice between mandatory versus discretionary sentencing.

APPENDIX B

SUMMARY OF FINDINGS OF SURVEY OF CROWN PROSECUTORS

- B.1 To assist in its review of the law of murder, the Law Commission sought the views of prosecutors on potential reforms to the law of murder in relation to the definition of murder, diminished responsibility and charging decisions. To this end, the Law Commission sent a questionnaire to each branch of the Crown Prosecution Service (CPS). This appendix provides a quantitative and qualitative analysis of the CPS responses.

METHODOLOGY

- B.2 The Commission sent the Chief Crown Prosecutor of each branch of the CPS (42 in all) a questionnaire titled "Murder Project: Prosecution Decisions in Homicide Cases". The questionnaire consisted of three sections, which covered the definition of murder, diminished responsibility and charging decisions. The Commission received 27 responses. Of those responses, some Chief Crown Prosecutors answered the questionnaire alone, whereas other CPS branches appeared to have considered and answered the questionnaire as a group.
- B.3 Each section of the questionnaire provided background information on each issue and reasons for reform. Each section then asked specific questions, seeking a mixture of yes and no answers, rankings and general comments.
- B.4 The following sections of this appendix set out a quantitative and qualitative analysis of the responses. The quantitative analysis was complicated by the following factors:
- (1) The responses did not always provide answers to all the questions asked.
 - (2) The questionnaire did not always ask for a yes or no response to particular questions. Consequently, determining whether a response was for or against a proposal sometimes required an assessment of the general comments provided.
 - (3) If the comments did not clearly favour or reject a proposal, the response was generally classed as 'mixed' in the quantitative data.
 - (4) Many responses qualified their approval or disapproval of a particular proposal. Therefore, although a response may have been classed as for or against a proposal for the purposes of quantitative analysis, it is necessary to read the quantitative results in the context of the qualitative analysis.
- B.5 Given these complications and qualifications, the quantitative data should be treated as indicative only, rather than as a precise assessment of the prosecutors' views.
- B.6 A copy of the questionnaire sent to prosecutors is included at the end of this Appendix.

QUANTITATIVE ANALYSIS

- B.7 The three tables below provide a quantitative analysis of CPS responses to the Commission's questionnaire. The tables set out each question asked and the corresponding percentages of those responses which answered yes or no, for or against etc.
- B.8 In each table, 'n' refers to the number of responses to a particular question. In most cases 'n' includes only those responses which provided an answer to that particular question (as noted above, not all prosecutors answered all questions). Any variation to or qualification of this approach is noted in the table.
- B.9 When assessing the quantitative data, it is important to read it in the context of the information included in the questionnaire and the qualitative analysis. For example, when considering alternative definitions to murder, prosecutors were not informed that on option the Commission was considering was the creation of an intermediate grade of homicide ("second degree murder") which would include cases of unlawful killing where the defendant had intended to effect grievous (serious) bodily harm (the 'GBH rule'). Consequently, prosecutors may have assumed that the GBH rule might be abolished or included in the manslaughter category. The possibility of including the GBH rule in "second degree murder" was only raised in the final question on the questionnaire. Therefore, any assessment of the responses needs to take this factor into account.
- B.10 Finally, to reiterate, the percentages should be treated as indicative only, not as absolute.

The Definition of Murder				
Alternatives: Comments on each definition of murder.				
	For	Against	Mixed	
1. D is guilty of murder if he intended to kill, or if he intended to cause what he realised at the time might be a life-threatening injury. (n=25)	4%	80%	16%	
2. D is guilty of murder if he intended to kill, or if he intended to cause harm the jury regards as inherently life-threatening at the time it was done. (n=25)	12%	64%	24%	
3. D is guilty of murder if he intends to kill, or is recklessly indifferent at the time to the causing of death. (n=25)	16%	60%	24%	
Scenario: Based on the scenario outlined, which of the above definitions is likely to focus on what are the significant issues?				
	Most likely	Less likely	Least likely	Equally likely
Current law (n=21)	52%	19%	5%	24%
Alternative 1 (n=20)	15%	30%	45%	10%
Alternative 2 (n=20)	25%	40%	10%	25%
Alternative 3 (n=23)	30%	26%	30%	13%

Diminished Responsibility			
Proposals/Questions	Yes	No	Mixed
1. Retain diminished responsibility (DR) as a partial defence to murder. A successful plea of DR or provocation would reduce the crime to “second degree murder” not to voluntary manslaughter. ‘Manslaughter’ would be reserved for ‘involuntary’ manslaughter. (n=23)	83%	13%	4%
2. The Commission is concerned that the ability of D to run provocation and DR defences together may lead to unwarranted acquittals because as a result of the decision in <i>Smith</i> [2001] 1 AC 146, separation of the issues relevant to each defence at trial is difficult. The PDM Report recommended reforming provocation to make separation easier. An alternative would be to create a separate offence of ‘DR killing’, leaving provocation alone as a partial defence to murder.			
(a) Can you see the advantages of this approach? (n=22)	50%	50%	
(b) Can you see the disadvantages of this approach? (n=22)of this approach? (n=22)	50%	50%	
3. The Commission is concerned about the adequacy of the procedure for assessing whether D’s responsibility is diminished. In the French system, the judge can commission an examination of D by court-appointed medical experts whose written reports are disclosed to both sides well before trial.			
(a) Are the procedures for assessing D’s mental state prior to and/or at the trial adequate? (n=23)	30%	57%	13%
(b) In what way, as through adoption/variation of the French system, could the procedures be improved? (n=15)*	73%	7%	20%
* The percentages given are of those responses that indicated approval, disapproval or a mixed response regarding the French system or a system like it. It does not include responses which did not directly comment on the French system or a system like it.			

Charging Decisions	
Questions	Comments
<p>1. In what circumstances is it right to accept a plea of guilty to manslaughter?*** (n=27)</p> <p>** The percentages given are not mutually exclusive.</p>	<p>Out of 27 responses, the following number thought that it may be appropriate to accept a plea of manslaughter:</p> <ul style="list-style-type: none"> • 15 (56%) in DR cases. • 11 (41%) in provocation cases. • 4 (15%) involuntary manslaughter (no intent) cases. • 2 (7%) excessive self defence cases. <p>Almost all responses emphasised that accepting such a plea only occurred rarely and in the clearest cases.</p>
<p>2. How would it affect charging decisions if there was an intermediate grade of homicide – say “second degree murder” – between murder and manslaughter, with a discretionary life sentence, that encompassed killings where the D’s intent was to do only serious harm?*** (n=18)</p> <p>*** The percentages given are of those responses that gave a better/worse/no change response. It does not include responses which did not comment directly on whether such a change would be an improvement, be worse or have little impact.</p>	<ul style="list-style-type: none"> • 3 (17%) thought this would be better at the charge stage. • 5 (28%) thought that this would be worse at the charge stage. • 10 (56%) thought that this would have little impact at the charge stage. <p>Many responses were mixed. Many thought that such a change would lead to many pleas of “second degree murder”. Views were split as to whether this was a good thing.</p>

QUALITATIVE ANALYSIS

- B.11 The following sections analyse the CPS responses to each question, drawing out themes, qualifications and suggestions. The qualitative analysis aims to assist the interpretation of the quantitative data and to provide a broader understanding of the responses.

The Definition of Murder

- B.12 The first section of the questionnaire focused on the definition of murder. The preface to the section set out the current definition of murder.¹ It then explained that the Law Commission sought prosecutors' views on three alternatives to the current law (in particular, modification of the GBH rule) which were designed to reach a fairer outcome, without making the process of prosecution unduly complex.
- B.13 In assessing these responses, it should be noted that the questionnaire participants were not told at this point that the Commission was considering whether to provisionally propose that the GBH rule become "second degree murder". This may have influenced the prosecutors' responses.

First alternative

- B.14 The first alternative definition of murder provides that:

D is guilty of murder if he intended to kill, or if he intended to cause what he realised at the time might be a life-threatening injury.

- B.15 A large majority of responses (80%) were against this alternative. Only one prosecutor was in favour of it. The remainder (16%) were mixed.

- B.16 The reasons given for objecting to this alternative are as follows:

- (1) Many prosecutors thought that the subjective requirement that the defendant realised at the time that the injury he intended to cause might be life-threatening was problematic on two grounds:
 - (a) First, whether a defendant realised that the harm he intended to cause might be life-threatening would depend on the defendant's knowledge of medical science, and so would vary depending on factors such as age and low intelligence. It may also be affected by drugs or alcohol.
 - (b) Secondly, proving that the defendant realised that the harm he intended to cause might be life-threatening would be very difficult. Whether something is life-threatening is more specific than proving a realisation that it may cause an unspecified serious injury. Therefore, it would be much harder to infer this realisation in the face of a denial by the defendant.

¹ Definition of current law: "Murder may be committed when a killing stemmed from either an intention to kill or from an intention to inflict grievous bodily harm."

As a consequence of 1(a) and 1(b), many prosecutors were concerned that this alternative would lead to too many acquittals because the threshold for intent was too high. A high number of acquittals would undermine public confidence in the judicial system and be unjust to victims. A number of prosecutors thought this alternative moved too far in favour of the defendant at the expense of victims and their families.

- (2) Many prosecutors questioned whether a jury is qualified to determine whether an injury was life-threatening. One asked whether it would be enough proof that the victim died; whether other considerations like haemophilia would be accounted for; and whether expert evidence would be necessary on this issue. Such questions were considered to be likely to lead to significant legal argument, especially if expert evidence was required. One response pointed out that the jury would not only have to determine the degree of injury (as they already do in relation to serious injury), but also the likely effect of such of injury (ie whether it was life-threatening). (Arguably, this objection is stronger in relation to the second alternative in which the jury is asked to decide whether the injury was in fact life-threatening, rather than whether the defendant realised it might be life-threatening.)
- (3) One prosecutor thought this alternative would overcomplicate the role of juries by requiring them to decide whether the defendant intended to kill, to cause life-threatening injury, to cause serious bodily harm or something else.
- (4) One prosecutor argued that it was difficult to establish the meaning of 'might'. For example, did the likelihood of death have to be 'very likely' or 'pretty likely'?

B.17 Overall, a typical negative response to this alternative was:

Our view is that this would narrow the scope of murder and rather than simplifying it would present further difficulty in that argument will ensue over the meaning of "life-threatening". Also one would have to consider the question of the level of understanding that a D had regarding the consequence of injury. For these reasons we think that this is not a viable option in the sense of leading to a fairer outcome.

B.18 A small number of responses were mixed (16%). These mixed responses made their acceptance of this definition conditional upon modification to deal with some of the problems noted above.

B.19 Only one prosecutor (4%) thought that this alternative was a good idea without modification. This prosecutor argued that such a serious offence carrying a mandatory life sentence should focus on intent. The prosecutor noted that:

Some people might be concerned that the subjectivity that's built into this alternative might result in unjust acquittals. I would not agree; the trial process is well equipped to deal with spurious "I didn't think that my stabbing (or stamping/shooting/kicking/burning) might have put X's life in danger" defences!

B.20 In summary, this was the least popular alternative by a considerable margin.

Second Alternative

B.21 The second alternative definition of murder provides that:

D is guilty of murder if he intended to kill, or if he intended to cause harm the jury regards as inherently life-threatening at the time it was done.

B.22 A large majority of responses (64%) were against this alternative. However, there were more in favour of it (albeit most with some caution) (12%) than were in favour of the first alternative. There was also a greater proportion of mixed responses (24%).

B.23 Prosecutors raised the following objections and concerns regarding the second alternative:

- (1) The most recurrent concern was that a jury is not qualified to make an assessment of whether an injury might be 'life-threatening'. This would necessitate the use of expert evidence, which would lead to added complexity and significant legal argument. As one response put it: "This is better [than the first alternative] but open to expert evidence, statistics on survival rates, quality of care, etc. Do not like it."
- (2) Many responses criticised the use of the word 'inherently' as meaningless. One suggested that the fact that the victim had died would surely lead the jury to infer that the injury was life-threatening. This would be potentially unfair in cases of minor injuries that result in death, which are currently covered by manslaughter. In contrast, others thought that the narrowness of the test would lead to unjust acquittals and thus a lack of justice for the victim.
- (3) One response considered that the mixture of the defendant's intention and the jury's objective view would lead to unnecessary complexity similar to that which arises in provocation cases. This would lead to injustice.
- (4) Other responses criticised the test as too subjective in terms of varying views among jurors as to what injuries are inherently life-threatening. One response thought this might lead to more "hung" juries. Another queried why what the jury regards as life-threatening was relevant rather than the view of the 'reasonable person'.
- (5) Finally, the response that favoured the first alternative was uneasy about the objective element in this alternative on the basis that such a serious offence with a mandatory life sentence should focus on intent. This response considered that the second alternative might lead to injustice in cases in which the defendant lacks mental capacity but falls short of diminished responsibility. Another response also criticised the use of an objective test, stating:

The difficulty here is that this approach imparts a wholly objective assessment (akin to the 'reasonable man') upon the severity of the harm, regardless of whether the defendant foresaw the likely consequences of his actions. The Courts have shrunk from this construct since *DPP v Smith* (1961).

This response further noted that the subjective approach was also supported in relation to recklessness in *R v G&R* (2003) HL.

- B.24 In the mixed responses, a number of prosecutors approved of the use of an objective standard in this alternative, rather than the subjective approach in the first alternative. However, many still thought that the use of 'life-threatening' would lead to extra argument.
- B.25 Three responses (12%) had a generally favourable view of this option. One thought it would "probably be easier to prove and arguably fairer" (though it was unclear whether this was in comparison to the current law or to the first alternative). Another thought that juries would find this approach easier to apply and would lead to more appropriate verdicts.
- B.26 In summary, the second alternative was more popular than the first alternative. However, the majority of responses were against this as an alternative to the current law. Many believed that the second alternative would lead to greater complexity (particularly in relation to the question of what was 'life-threatening') and was an inappropriate question for a jury to answer.

Third Alternative

- B.27 The third alternative definition of murder provides that:

D is guilty of murder if he intends to kill, or is recklessly indifferent at the time to the causing of death.

- B.28 This was the most popular of the three alternatives, though support was still low (16%). The majority of responses were against it (60%), and a significant proportion gave a mixed response (24%).
- B.29 The most frequent criticism made by prosecutors of this alternative was that it lacks precision. A common sentiment was: "The concept of "recklessness" has bedevilled the criminal law. ... We cannot seriously consider using this." A number of responses argued that it would encroach on the law of involuntary manslaughter and so would lead to confusion. One response queried what "at the time" meant. Many prosecutors thought that it would be difficult to direct the jury adequately on the precise terms of the offence. This difficulty would result in a range of outcomes. In contrast, another response stated: "this would be the easiest definition for a jury to understand and for a judge to direct upon." Another thought this alternative would assist the jury.

- B.30 A number of responses considered that the third alternative broadened the current scope of murder. Some saw this as a positive, others as a negative. One prosecutor argued that the third alternative would be more likely to capture cases where a defendant “takes a highly culpable risk, but without foreseeing death or life-threatening injury as virtually certain.” This prosecutor believed that the third alternative would capture arsonists who believe the premises to be unoccupied or the terrorist who issues a warning. Others criticised the broadening of murder on the basis that it would capture those who we would not necessarily wish to classify as murderers.
- B.31 A number of responses thought that an offence of such seriousness should not be based on recklessness but rather on intent, especially given the Government’s commitment to the mandatory life sentence. One response argued that although a conviction might be easier, it would be less fair. Further, the mandatory life sentence did not sufficiently differentiate between different offenders’ culpability. One thought that if murder was extended to include recklessness, then the mandatory life sentence should be replaced by a maximum sentence.
- B.32 In contrast, a number of responses believed that the third alternative narrowed the current test and was too restrictive. One response thought that it would lead to more unjust acquittals as the defendant could simply deny that he had turned his mind to the possibility of causing death. Similarly, another thought that the definition was too restrictive and that the GBH rule should be retained instead.
- B.33 Of the mixed responses, most suggested some sort of modification to or clarification of this alternative. For example, one stated that “indifferent” should require that the defendant appreciated that more than merely trivial harm may result which he disregarded, rather than a total failure by the defendant to consider the possibility of any harm resulting. One response thought that this alternative would be closer to the public’s perception of what ought to constitute murder.
- B.34 A small number of responses thought without qualification that this was a good approach. One response thought that this alternative would bring the law of England and Wales into line with the European states. Another response stated:
- This is the most favoured approach, as it provides “just deserts” for the D who acts totally unreasonably. Why should someone who could not care less about the consequences and does not bother to think about them escape prosecution for murder? This approach provides justice for V in these circumstances.
- B.35 Overall, prosecutors were generally against this approach, though many preferred it to the other alternatives. The comments were mixed and some were directly contradictory. The main criticism focused on the imprecision of the notion of recklessness and the confusion that was likely to result.

Scenario

- B.36 To help prosecutors assess the three alternative definitions of murder, the questionnaire provided a scenario involving a defendant who kills his wife after he loses his temper in an argument during which he believes his wife confessed to adultery. The wife died of complications after the defendant stabbed her, the knife penetrating 3 inches into her stomach. The defendant admits to the killing, but refuses to plead provocation. Instead he claims he lacked the mental element for murder.
- B.37 The questionnaire asked prosecutors which legal definition of murder (including the current law) is most/more/less/least likely to focus on what are, in the respondent's view, the significant issues (answer: 'most likely'/'less likely'/'least likely'/'equally likely').
- B.38 In answering this question, a number of respondents only ranked some but not all of the alternatives. Some respondents created their own categories or placed two alternatives in the same category. Some respondents ignored this question entirely, or argued that it was the wrong question to ask. Another respondent changed the scenario and gave an alternative ranking based on the new scenario. Not all respondents who ranked the alternatives gave any further comments as to their reasons. A number of respondents reiterated the reasons they gave for and against the alternatives noted above. These reasons have not been repeated below. The figures noted below (and in the table) should be taken as indicative only, given the variety of responses outside the set categories.
- B.39 The most popular definition of murder was the current law (ranked 'most likely': 55%). The least popular definition was the first alternative (ranked 'least likely': 45%, and 'less likely': 30%. A minority ranked it 'most likely': 15%). The second and third alternatives fell in the middle in terms of popularity. One prosecutor felt so strongly against all three alternatives, the response stated: "I would not wish to validate these options by ranking them."
- B.40 Of the majority who favoured the current law, the general feeling was that the current definition worked well and that the GBH rule should be retained. (As noted above, the questionnaire did not at this point raise the possibility of a revised GBH rule being moved to "second degree murder").
- B.41 A number of responses noted that while it would be possible to prove intent to cause serious harm in this scenario, it would be more difficult to prove intent to cause life-threatening injury in the first and second alternatives. It would also be difficult to direct the jury on life-threatening harm. One response, which favoured the second alternative, suggested that an extra category of "second degree murder" should be created if the defendant only intended serious harm.
- B.42 A number of responses thought that the defendant could be convicted under the third alternative, though some questioned whether murder should extend to recklessness at all. Some argued that the third alternative would be complex for the jury. One stated: "3rd alternative will tie the jury in knots."

- B.43 The third alternative attracted the most extreme responses, either for or against it. Prosecutors' reluctance to include recklessness in the definition of murder was reflected in the high number who ranked this alternative in the 'least likely' category (30%). However, there was an equally high number (30%) who thought that recklessness was a good option, ranking it as 'most likely'.
- B.44 The second alternative attracted less extreme responses, with 40% categorising it as 'less likely'. The number of responses who ranked it as 'least likely' (10%) was considerably lower than in respect of the third alternative. However, the number who ranked it as 'most likely' (25%) was also lower than in respect of the third alternative.
- B.45 A number of responses took issue with the question itself. One response argued that each of the alternatives would be equally likely to focus on the significant issues. What would differ is the likelihood of conviction. Another argued that 'the issue' would differ depending on which definition was applied.
- B.46 Many responses thought that the likelihood of acquittal (or conviction for manslaughter) in the scenario was higher if any of the three alternatives were applied compared to the current law. Most disapproved of this outcome. One thought this would send the wrong message to violent offenders to tailor their defence to secure acquittals.
- B.47 Overall, the current definition of murder was preferred by the majority on the basis that it was easier to apply and was likely to result in just convictions. The response to the three alternatives was mixed. However, the first alternative was the least favoured.

Diminished Responsibility

- B.48 The second part of the questionnaire explained that the Law Commission would be considering the partial defence of diminished responsibility in some detail. Accordingly, the questionnaire contained three questions on diminished responsibility.

Question 1

- B.49 The questionnaire noted that the Commission was considering the retention of the partial defence of diminished responsibility in its current form (as a partial defence to murder). However, rather than diminished responsibility and provocation reducing the offence to voluntary manslaughter, it was likely that the Commission would suggest that these partial defences reduce murder to "second degree murder". The respondents were asked if they supported this proposal. The questionnaire provided for a yes or no response, without space for comments. 83% of responses supported the proposal.

B.50 Although the questionnaire did not ask for comments, a number of responses included comments. One response did not support the introduction of “second degree murder”, but instead suggested that involuntary manslaughter become culpable homicide. Another rejected the Law Commission’s proposal on the basis that it would be a change in terminology only, unless the penalty was different to manslaughter. In contrast, a number of responses supported a change in labelling on the basis that it would be more acceptable to victims’ families. One response thought the fact that a mandatory life sentence would not apply is less significant for victims’ families. This response stated: “Grief will often be fuelled by headlines in the press stating that the offender “got away with murder”.” Similarly, another response stated: “The family of the victim always finds it difficult to understand how a ‘diminished responsibility killing’ becomes manslaughter.”

Question 2

B.51 Question 2 was prefaced by the following:

The Commission is concerned that the ability of persons accused of murder to run provocation and diminished responsibility together may lead to unwarranted acquittals, because it is no longer possible adequately to separate the issues relevant to each defence at trial (*R v Smith* [2001] 1 AC 146). The Commission has already recommended that provocation be reformed to make such separation easier (Law Com 290, *Partial Defences to Murder*). Another approach would be to create a separate offence of ‘diminished responsibility killing’, leaving provocation alone as a partial defence to murder.

B.52 The questionnaire participants were asked whether they could see the advantages of this approach (yes or no) and the disadvantages of this approach (yes or no). They were asked for further comments.

B.53 It should be noted that the questionnaire was distributed prior to the Privy Council decision in *A-G for Jersey v Holley*.² A number of responses argued that *Holley* sufficiently differentiated provocation from diminished responsibility, so the problem identified by the Law Commission was no longer an issue. Those responses that noted the impact of *Holley* took this into account when answering yes or no to the questions noted in paragraph B.52. In contrast, many other responses did not refer to *Holley*, nor did they appear to take it into account when answering these questions. Consequently, it is difficult to draw any significant conclusions from the answers. This is complicated by the fact that a number of responses made no further comments so did not indicate whether they had taken account of *Holley* when answering yes or no. Other responses did not answer the questions at all.

B.54 Of those who did respond:

- (1) 50% could see the advantages of introducing a separate offence of diminished responsibility killing.

² *A-G for Jersey v Holley* [2005] UKPC 23, [2005] 3 WLR 29. See also *Mohammed* [2005] EWCA Crim 1880.

- (2) 50 % could not see the advantages of introducing a separate offence of diminished responsibility killing.
- (3) 50% could see the disadvantages of introducing a separate offence of diminished responsibility killing.
- (4) 50% could not see the disadvantages of introducing a separate offence of diminished responsibility killing.

B.55 Clearly, the prosecutors were evenly split over the question of whether a separate offence of diminished responsibility killing should be introduced. However, it is difficult to draw any strong conclusions from these figures, particularly in light of the impact of *Holley* on the responses and on the law itself.

B.56 The responses that provided further comments identified the following advantages:

- (1) Charging defendants with two separate offences may help the jury to separate and understand the issues better, and so lead to more appropriate verdicts.
- (2) The likelihood of an acquittal may be reduced if the defendant is charged with two separate offences. It may also eliminate acquittals arising from confusion on the part of the jury.
- (3) A clear verdict would result because the jury would identify whether it was diminished responsibility killing, murder or provocation.
- (4) A separate offence would establish “as early as possible if “mental health” is a live issue.”
- (5) The separate offence would help focus the court on the relevant issues and make judicial directions more straightforward.

B.57 The responses that provided further comments identified the following disadvantages:

- (1) The new offence would not remove the problem of juries that cannot decide between provocation and diminished responsibility. This will lead to acquittals as it does now.
- (2) If provocation and diminished responsibility are retained, there will still be a problem of separating them. The issues raised by provocation and diminished responsibility “are often inextricably linked and sometimes opposites sides of the same coin.”
- (3) It was likely that both issues would still be heard together (this would depend on the judge’s direction).
- (4) Provocation and diminished responsibility are often pleaded in tandem on the basis of the same psychiatric evidence. This gives the jury the opportunity for a compassionate verdict.

- (5) The new offence would only complicate matters further and confuse juries. A clearer definition of each defence is preferable to address the overlap.
 - (6) The new offence would have little impact. Most defendants would be charged with murder as well, unless they offered an acceptable plea.
 - (7) It is likely that the new offence would be perceived as downgrading a deliberate killing (albeit by a person not in full command of their faculties at the time).
 - (8) Given that the new offence may be perceived as a lesser offence, it would fall into disrepute if the CPS decision making process about what to charge were not regarded as robust. Therefore the decision should be restricted to a limited number of authorised prosecutors.
 - (9) The old law of joint defences did not result in unwarranted acquittals. Changing the name will not address any perceived problem.
 - (10) Provocation should not be an offence to murder.
- B.58 The advantages and disadvantages identified by prosecutors arguably do not point in a particular direction. However, as noted above, this issue is less pressing since the decision in *Holley*.

Question 3

- B.59 Question 3 was prefaced by the following statement:

The Commission has concerns about the adequacy of the procedure for assessing whether D's responsibility is diminished. Under French criminal procedure, if there are questions about D's mental state at the usual preliminary examination of the issues by the judge, the latter can commission an examination of D by court appointed experts whose written reports are disclosed to both sides well before the trial. Both sides are free to ask for a further report on D's mental state, and all the experts give evidence at trial.

- B.60 The questionnaire participants were asked two questions. The first question asked:

Are the procedures for assessing D's mental state prior to and/or at trial adequate?

- B.61 The majority of responses thought that the current procedures were not adequate (57%). However, a large minority thought the current procedures were adequate (30%). A minority gave a mixed response (13%).
- B.62 Most responses to the first question only gave a yes or no answer without further comment. However, of those who gave no further comment on the first question, many gave further comments on the second question which are also applicable to the first question. Consequently, the comments on the first question are considered in our analysis of the second question.

B.63 The second question asked:

In what way, through the adoption/variation of the French system, could the procedures be improved?

B.64 The questionnaire participants were not asked to say yes or no to the French system. However, many responses indicated their approval or disapproval of the French system or of a system like the French system. Of those who directly commented on the French system or on a system like it, a large majority (73%) indicated approval for the French system or a system like it. A small minority (7%) indicated disapproval. The remainder (20%) gave a mixed response.

B.65 A key concern of those who did not think the current procedures were adequate was that conflicting expert reports on complex issues placed the jury in a difficult position. Further, it was thought that the adversarial process of using separate defence and prosecution expert witnesses was more likely to lead to conflict. Withdrawing the issue from the prosecution and defence was thought by those in favour of change to be more likely to result in consensus.

B.66 Another key concern among those who thought that current procedures were not adequate was the fact that the defence was entitled to pick and choose which reports to disclose, thereby avoiding disclosure of reports that were unfavourable to the defence.

B.67 A number of responses noted that problems arise when a mental health issue is only drawn to the prosecution's attention "at some remove from the arrest and occasionally just before trial." This puts the prosecution at a disadvantage and can result in delays. It was thought that if a court requested a report at an early stage of a homicide case, "it is possible that any mental health issues would be crystallised and even resolved at an earlier stage in the proceedings." Therefore any process which ensured that reports were obtained and disclosed well before the trial would be welcomed.

B.68 Many responses suggested possible solutions to the problems associated with the current procedure, including the following:

- (1) The judge could make a preliminary ruling on the defendant's mental state, thus withdrawing the issue from the jury.
- (2) The defence and prosecution's expert witnesses could meet before trial to discuss their findings.
- (3) Defence and prosecution experts should be compelled to disclose their reports.
- (4) Experts should be given more time to adequately assess defendants than they are given under the current system. ("A system could perhaps be adopted whereby the court-appointed expert has far more time to continually observe and assess the defendant, better still in a hospital environment rather than prison.")

- (5) Existing provisions concerning disclosure should be brought into force, specifically sections 6C (notice of intention to call witnesses) and 6D (notification of names of experts instructed by the accused) of the Criminal Procedure and Investigation Act 1996.

A number of responses thought that a more transparent system, such as reports requested the court, would inspire greater public confidence in the system and would appear fairer to victims' families.

- B.69 A number of responses explicitly supported the French approach. One response stated:

I would suggest adapting something approaching the French system – which is essentially an “objective” enquiry to establish the “truth” of the situation – this would avoid the “hired gun” approach which is an inevitable consequence of the “adversarial” approach – court approved expert with full medical disclosure may also reduce costs!

Another stated:

The French idea appears excellent. Too many trials currently revolve around trying to find an expert who will support one side or the other, rather than reaching a just conclusion as to D's mental state.

One response suggested that the use of expert reports commissioned by the court could extend beyond reports on mental health, to other areas where expert reports are used.

- B.70 In contrast, a small minority thought the current system was adequate. One response stated:

Whether medical experts are instructed by the Crown, the defence or the court matters not. They all appear as expert witnesses independent of the party that pays their fees, to give impartial evidence to assist the court.

This directly contradicts the criticisms noted above about perceived bias and non-disclosure of reports in practice.

- B.71 A number of responses were mixed. One noted that the current system works well in cases where a mental health issue is identified early on. At this point reports can be commissioned by the prosecution and defence to clarify the issues and assist in making an informed case disposal. However, the system fell down when the mental health issue emerged at a late stage in proceedings.

- B.72 Finally, one response noted that in the English system, courts used to request a report on the defendant. However, “[t]he problem with this approach arose when defendants were advised *not* to see the psychiatrist.” Further, according to a number of responses, reports are sought in any event when the defendant is in custody. Therefore the main problems arise when the defendant is on bail.

- B.73 Overall, a large majority of prosecutors did not think that the current procedures for assessing a defendant's mental state were adequate. The key problems arose in relation to conflicting reports, perceived bias, non-disclosure and late notice by the defence raising a mental health issue. The majority favoured a system similar to the French system.

Charging Decisions

- B.74 The final part of the questionnaire focused on what impact proposed changes may have on charging decisions. The section was prefaced with the following statement:

Since the mid-1960s, whilst the rate of recorded homicides has roughly doubled (c.400-800), receptions into prison for murder have increased four-fold (58-208). Receptions doubled between 1965-1975 (58-103), and doubled again between 1975 and 1991 (103-208). Juries have clearly been convicting of murder in an ever larger proportion of homicide cases. This may suggest that pleas of provocation or diminished responsibility are increasingly less successful before the jury. It may suggest pleas of guilty to manslaughter are accepted less readily in serious cases by the prosecution.

- B.75 The questionnaire asked two questions on charging decisions. The questions were expressed in an open-ended way, rather than as a yes or no answer. Consequently, the percentages referred to in the quantitative analysis section are the percentage of respondents who raised a particular matter in response to the question.

Question 1

- B.76 The first question asked:

In what circumstances is it right to accept a plea of guilty to manslaughter?

- B.77 A small majority of respondents (56%) said that it may be appropriate to accept a plea of guilty to manslaughter in cases of diminished responsibility. However, almost all stated that they would only accept this plea in limited circumstances. For example, this plea would only be accepted in the "clearest cases", when there was "unanimous agreement" between the experts, "where there was no realistic prospect of conviction" or when there was a psychiatric report supported by independent evidence indicating diminished responsibility.
- B.78 A large minority of respondents (41%) said that it may be appropriate to accept a plea of guilty to manslaughter in cases of provocation. Again, this was only in limited cases. Respondents prefaced their comments with "rarely", "hardly ever", "where there was no realistic prospect of conviction", "where there was insufficient evidence" to prosecute for murder or in "clear cases" that cannot be rebutted.

B.79 A minority of respondents (15%) said that it may be appropriate to accept a plea of guilty to manslaughter in cases of involuntary manslaughter, but only “occasionally”, “where there was no intent” or where there was “no intent on clear evidence”.

B.80 Finally, a small minority (7%) said that it may be appropriate to accept a plea of guilty to manslaughter in cases of excessive self-defence. Once again, this acceptance was prefaced with the words “rarely” or “where there is no realistic prospect” of conviction for murder.

B.81 Regarding prosecution practice, one prosecutor stated:

Most pleas to manslaughter (in my experience) [are] accepted on “bird in the hand” basis when it was known that witnesses [were] unreliable and offer and acceptance of plea was made on basis of risk assessment by both sides – whether this is proper or not is perhaps immaterial – it is realistic.

B.82 There was a general reluctance among prosecutors to drop murder to manslaughter on a plea. One response suggested the introduction of an intermediate grade of homicide for diminished responsibility and provocation.

B.83 A number of responses commented on the preface to the question regarding the increase in the rate of homicide and receptions into prison. One response thought the question was ill-founded, stating:

This question ignores the issue that violent crime has changed in the course of the last 40 years and it is naïve to suggest that the changes are because fewer pleas to manslaughter are accepted. It is equally likely that in a more violent society the proportion only of genuine diminished cases has fallen not the actual numbers.

Another response suggested other possible reasons for the increases, stating:

It may be right that the prosecution is accepting pleas to manslaughter less readily in the light of past judicial criticism of the Crown for being too ready to do so. There may well be other reasons – better detection, better forensic evidence, more murders being committed.

B.84 One response noted that there are guidelines in the CPS Manual regarding when to accept a plea of manslaughter.

B.85 Another response noted that since the introduction of sentencing guidelines for the murder tariff, there had been a significant increase in the number of guilty pleas to murder. The respondent couldn't remember any guilty pleas to murder before the change.

B.86 Finally, one prosecutor noted that difficulties could arise in explaining the grounds for a manslaughter plea to a victim's family. This factor may deter prosecutors from accepting a plea of manslaughter. The prosecutor stated:

It has always been my view that diminished responsibility and provocation are jury issues but it is difficult for juries to understand the issues around mental state, and diminished [victims'?] families also find it difficult to understand how their murdered relative was the victim of manslaughter, but I have accepted it when 3 consultants all agreed diminished, when the judge said if it was accepted, life would be the sentence and would mean life and when [name deleted] has spent 2 hours explaining to the victims family the whys and wherefores – however two weeks later the family were on a television programme saying that they didn't understand why he wasn't convicted of murder and why they felt let down by the system. I have never since had such a clear cut case and have not been in the position again – but the victim's families put me in such a position that I would have difficulty accepting such a plea again. ... But there must be a clear indicator for change.

- B.87 Overall, prosecutors were willing to accept pleas to manslaughter, but only in very limited cases where the prospect of conviction for murder was low. Even in such cases, a number of prosecutors believed that it may still be appropriate to charge murder in order to test the evidence at trial. There seemed to be a greater willingness among prosecutors to accept pleas of diminished responsibility compared to provocation. However, prosecutors' strong preference was to charge defendants with murder.

Question 2

- B.88 The second question asked:

How would it affect charging decisions if there was an intermediate grade of homicide – say, 2nd degree murder – between murder and manslaughter, with a discretionary life maximum sentence, that encompassed killings where the defendant's intent was to do only serious harm?

- B.89 Of the questionnaire participants that directly commented on the effect such a change would have on charging and plea decisions, a minority (17%) thought that the proposal would be an improvement at the charge stage. One respondent stated: "It would be a major improvement and far fairer." 28% thought that it would make the situation worse at the charge stage. 56% thought that this proposal would have little impact at the charge stage. The remainder of respondents did not comment directly on whether they thought the proposal would be an improvement at the point of charge or not.
- B.90 Generally, the responses indicated that the introduction of an intermediate grade of homicide would not have a great impact at the point of charge. Charging occurs very early on in a matter, before the prosecution has necessarily accumulated sufficient evidence to determine whether the defendant intended to kill or cause serious harm. As a result, defendants are generally charged with the higher level offence on the basis that it can be downgraded later (either prior to trial or on the basis of a plea). Consequently introducing a lesser offence would make little difference at the point of charging a defendant as it is likely that the prosecution would continue to charge with murder regardless.

- B.91 Of those who did consider the potential change at the charge stage, one indicated that the decision-making process needed to be robust, and so the decision to charge with a lesser offence should be limited to a number of authorised prosecutors. This was likely to cause delays in gathering sufficient evidence and it would be unlikely that it would be available at the point the charging decision needed to be made. Another prosecutor thought that the new offence would make the charging process more difficult by creating a new “borderline” between “first degree murder” and “second degree murder” which would be difficult to negotiate. This would be complicated by the wishes of the victim’s family. Similarly, another prosecutor stated that the proposal would be unlikely to have an impact on charging, “[g]iven the expectation of relatives of victims for a trial, Prosecutors and police offices would be under pressure to charge murder.”
- B.92 A number of prosecutors noted that the introduction of an intermediate grade of murder may make a difference to pleas. If the defendant had the option of pleading guilty to “second degree murder”, this might encourage pleas given that the mandatory life sentence would not apply. Further, the prosecution might be more willing to accept such a plea if the alternative was having to prove intent to kill. One response stated: “This would result in nearly all cases being resolved as 2nd degree.”
- B.93 Some prosecutors approved of such a change to the operation of pleas. However, others disapproved of the prospect of more defendants being found guilty of a lesser offence carrying a lesser sentence than they would under the current system. Some thought there was potential that such a change would bring the system into disrepute by introducing a ‘soft option’. A number of prosecutors were concerned that victims’ families would perceive it in this light. Further, another respondent was concerned that defence lawyers would tell clients to say they only intended to cause serious harm, not to kill.
- B.94 Other prosecutors raised concerns over labelling. One thought that “second degree murder” sounded too American, but conceded that this may make it more easily understandable for the public who are already familiar with the term from television. Another prosecutor thought that if intent to cause serious harm was withdrawn from murder, it was really downgrading it to manslaughter, “calling it second degree murder is a fig leaf to prevent the outcry when what the public would see as a murder is charged as manslaughter.” Another asked: “Are we not going through hoops to deal with the problem of mandatory life sentence for murder?”
- B.95 Similarly, another prosecutor noted that this was a back door way around the mandatory life sentence. However, this prosecutor thought that the proposal did not address cases where the defendant intended to kill out of compassion, not malice.
- B.96 One response was suspicious of the motives behind this proposal. The prosecutor stated:

This proposal is presumably to allow judges greater flexibility in sentencing. It cannot be to increase the conviction rate if the statistics in this section are correct. Why do we not trust the judgment of juries which convict of murder? If flexibility in sentencing is the motive behind the proposed change how is that consistent with the increased use of indeterminate sentences introduced by the CJA in 2003?

- B.97 Finally, other responses questioned whether it was fair to reduce intent to cause serious harm to a lesser offence. One argued that introducing a lesser offence was not appropriate.
- B.98 Overall, most prosecutors did not think the introduction of “second degree murder” for cases of intent to cause serious harm would have a great impact upon the charging process and decisions. However, some suggested that it may affect the offer and acceptance of pleas to the lesser offence. Some prosecutors thought this was a good thing. However, others were critical of this outcome as defendants would arguably get away with a lesser offence and sentence than they deserved.

QUESTIONNAIRE SENT TO PROSECUTORS

MURDER PROJECT: PROSECUTION DECISIONS IN HOMICIDE CASES

The Law Commission is currently embarking on a review of the law of murder. We would very much like to have your observations on some possibilities for change.

(A) THE DEFINITION OF MURDER

CURRENT LAW: Murder may be committed when a killing stemmed from either an intention to kill or from an intention to inflict grievous harm. The latter can be called the 'GBH rule'.

The Law Commission would find it invaluable to have the views of prosecutors on whether a fairer outcome, but one that does not make the process of prosecution unduly complex, would be more likely if there were a change to the GBH rule along one or other of the lines suggested below.

The first alternative below is meant to be much more restrictive than the GBH rule.

The second alternative is meant to be slightly more restrictive than the GBH rule.

The third alternative reflects the law in many other common law jurisdictions.

The first and third alternatives are wholly subjective in nature, whereas the second alternative has an element of objective judgement to be passed by the jury on whether the harm was life-threatening.

Unlike the first and second alternatives, the third alternative does not employ the term 'intention'.

FIRST ALTERNATIVE: *D is guilty of murder if he intended to kill, or if he intended to cause what he realised at the time might be a life-threatening injury.*

Comments:

SECOND ALTERNATIVE: *D is guilty of murder if he intended to kill, or if he intended to cause a harm the jury regards as inherently life-threatening at the time it was done.*

Comments:

THIRD ALTERNATIVE: *D is guilty of murder if he intends to kill, or is recklessly indifferent at the time to the causing of death.*

Comments:

It may help to focus on a scenario:

A 25-year-old man (D) of average build, strength and intelligence admits killing the victim (V) whilst sober, but denies that he had the mental element required for murder. D will not plead provocation.

D had an argument with his wife V who he thought he heard confessing to adultery. He lost his temper, picked up a small kitchen knife lying nearby on the table, and stabbed V once in the stomach, the blade penetrating about three inches. Regaining his temper, D immediately called an ambulance.

Through no one's fault, complications arose with regard to V's treatment and she died. D's claim is that, at the time, he did not think about the possible consequences of stabbing V.

Which of the legal definitions above is most/more/less/least likely to focus on what are, in your view, the significant issues (answer: 'most likely'/'less likely'/'least likely'/'equally likely'):

Current law:

First Alternative:

Second Alternative:

Third Alternative:

(B) DIMINISHED RESPONSIBILITY

1. The Commission will be considering this partial defence in some detail. Suppose that the defence is preserved in its current form (as a partial defence that can be raised when murder is charged). It is likely that the Commission will be recommending that a successful plea of diminished responsibility or provocation reduces the crime to "**second-degree murder**", and not to so-called voluntary manslaughter, as now. The term 'manslaughter' would be reserved for 'involuntary' manslaughter.

Do you support this proposal, if no other changes are made?:

2. The Commission is concerned that the ability of persons accused of murder to run provocation and diminished responsibility together may lead to unwarranted acquittals, because it is no longer possible adequately to separate the issues relevant to each defence at trial (*R v Smith* [2001] 1 AC 146). The Commission has already recommended that provocation be reformed to make such separation easier (Law Com 290, *Partial Defences to Murder*). Another approach would be to create a **separate offence of 'diminished responsibility killing'**, leaving provocation alone as a partial defence to murder.

Can you see advantages to this approach?:

Can you see disadvantages to this approach?:

Comments:

3. The Commission has concerns about the adequacy of the procedure for assessing whether D's responsibility is diminished. Under French criminal procedure, if there are questions about D's mental state at the usual preliminary examination of the issues by a judge, the latter can commission an examination of D by court-appointed medical experts whose written reports are disclosed to both sides well before trial. Both sides are free to ask for a further report on D's mental state, and all the experts give evidence at trial.

Are the procedures for assessing D's mental state prior to and/or at the trial adequate?:

In what way, as through adoption/variation of the French system, could the procedures be improved?:

(C) CHARGING DECISIONS

Since the mid-1960s, whilst the rate of recorded homicides has roughly doubled (c.400-800), receptions into prison for murder have increased four-fold (58-208). Receptions doubled between 1965 -1975 (58-103), and doubled again between 1975 and 1991 (103-208). Juries have clearly been convicting of murder in an ever larger proportion of homicide cases. This may suggest that pleas of provocation or diminished responsibility are increasingly less successful before the jury. It may suggest pleas of guilty to manslaughter are accepted less readily in serious cases by the prosecution.

1. In what circumstances is it right to accept a plea of guilty to manslaughter?
2. How would it affect charging decisions if there was an intermediate grade of homicide – say, '2nd degree murder' – between murder and manslaughter, with a discretionary life maximum sentence, that encompassed killings where the defendant's intent was to do only serious harm?

FEEL FREE TO ADD FURTHER COMMENTS ON ANY OF THE ABOVE QUESTIONS ON THE BACK OF THIS SHEET

APPENDIX C

SUBMISSIONS FROM JUDGES ON THE FAULT ELEMENT IN MURDER

C.1 The Law Commission sent a question paper to a random sample of judges who have experience of murder trials to ask their opinions on whether reform of the fault element of murder was desirable and, if desirable, what changes needed to be made. We asked the judges to express their views on the following options for reform of the fault element of murder:

- (1) D can be guilty of murder only where D had an intention to kill or cause serious harm (the current law);
- (2) D can be guilty of murder only where D had an intention to kill and nothing else;
- (3) D can be guilty of murder only where D had an intention to kill or cause risk to life;
- (4) D can be guilty of murder only where D had an intention to kill or cause harm that the jury regards as being inherently life-threatening; or
- (5) D can be guilty of murder only where D had an intention to kill or he indifferently ran a foreseen risk of causing death.

We also provided a space for any other comments that the judges may have had.

C.2 The question paper did not expressly offer the option of having degrees of murder. In other words it did not make clear whether “murder” meant the single highest level homicide offence, as it currently does, or whether it might include several offences, for example both “first degree murder” and “second degree murder”. This means that some judges may have proceeded on the basis of the first interpretation of “murder” and some the latter.

C.3 Thirteen judges responded to our question paper. The majority, nine, believed the current law was inadequate and favoured change. Only four judges believed that the current law was superior to all the offered alternatives.

C.4 Of the nine judges favouring reform six, or two-thirds, favoured limiting murder solely to those killings that were committed with an intention to kill. Two judges would include intention to cause risk to life. Finally, one judge favoured a definition of murder that consisted of an intention to kill or cause harm that the jury regarded as inherently life-threatening.

C.5 The additional comments made by the judges favouring reform were also interesting. Three of the nine, or a third, suggested that an intention to kill ought to lead to a conviction for “first degree murder” and an intention to cause serious harm a conviction for “second degree murder”. Another judge noted that it was inappropriate to convict D of murder where he never intended harm that is life-threatening.

- C.6 Those judges who preferred limiting murder to intentional killings tended to believe that the other options, such as “intending to cause a risk to life” or “intending to cause harm that the jury regard as inherently life-threatening”, would be too complicated for juries to apply easily in practice.
- C.7 Interestingly, half of the four judges who preferred the current definition of murder over any of our proposed reforms expressed some preference for changes to the law in their additional comments. One said that he preferred the current definition because it worked in practice but said he would like to see the mandatory life sentence abolished. Another said that a further jury decision on “degrees of murder” may have merits.
- C.8 The judges’ answers are presented in tabular form below:

Option for the fault element of murder to include	Judges in support
1) Intent to kill or do serious harm (current law)	4
2) Intent to kill	6
3) Intent to kill or to cause risk to life	2
4) Intent to kill or to cause harm the jury regard as inherently life threatening	1
5) Intent to kill or indifferently run a foreseen risk of death	0
TOTAL	13

APPENDIX D

THE LAW OF HOMICIDE IN OTHER JURISDICTIONS

SCOTLAND

- D.1 There are two offences of homicide in Scotland: murder and culpable homicide, which is equivalent to manslaughter. In appropriate cases a judge may withdraw culpable homicide from the jury and direct that they can either convict of murder or acquit.¹ Culpable homicide may be charged when death results from an unlawful act, from recklessness, or found following the successful raising of either provocation or diminished responsibility. Provocation and diminished responsibility are no longer partial defences but denials of mens rea, which prevent the prosecution proving murder.² There is no offence or defence of infanticide. Murder carries a mandatory life sentence whilst judges have complete discretion in sentencing following a conviction of culpable homicide.
- D.2 The definition of murder can be stated as:
- ...any wilful act causing the destruction of life, whether [wickedly] intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.³
- D.3 “Destruction of life” includes any shortening of life. As for the mens rea requirements, the courts are yet to fully develop the terms “wicked intention” and “displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences”.
- D.4 “Intention” is particularly under developed, partly because of the availability of the alternative mens rea “wicked recklessness”. Hence, it is unclear whether intention is limited to direct intention or includes oblique intention. Moreover, the redefining of murder’s mens rea to require “wicked intention” means that those who were previously entitled to a defence now fall outside the scope of the offence instead. However, it is unclear whether this is all the redefinition does, or whether some defendants who previously lacked a defence may now also fall outside the definition of murder. Indeed, nothing suggests that the broader interpretation is not the correct one. This has implications for the partial defences (discussed below).
- D.5 “Displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences” also remains unclear. It is said that “wicked recklessness” is interpreted objectively.⁴ However, in this context the word “objective” does not bear its normal meaning, as an accidental stabbing

¹ See inter alia *Broadly v HMA* 1991 SCCR 416.

² *Drury v HMA* 2001 SCCR 583, 591 per Lord Rodger.

³ MacDonald’s *Criminal Law* (5th ed) 89 and subject to judicial approval on countless occasions. The word “wickedly” in square brackets was, however, inserted by *Drury v HMA* 2001 SCCR 583.

⁴ *Cawthorne v HMA* 1968 JC 32.

certainly is not murder. Moreover, the acts from which “wicked recklessness” can be inferred must be done intentionally.⁵ Therefore, the term is not so much “objective” as, to some extent, “constructive”. However, the extent to which this is the case is also unclear: previously judges have directed some juries that intention to seriously assault is a third type of mens rea for murder.⁶ Now, however, it appears that, if this suffices at all, it will only suffice in cases of armed robbery. The better view, however, is that intention to seriously assault is merely one means of establishing wicked recklessness,⁷ not an alternative form of mens rea.

D.6 In any event, the central issue is the accused’s disposition. The prosecution need to prove “...wicked recklessness *as to imply* a disposition depraved enough to be regardless of the consequences”. Therefore, it seems that intentional use of life-threatening violence *alone* is insufficient to fulfil the mens rea requirement of murder *if* the defendant had some regard for the consequences. Imagine that A and B carryout identical violent assaults which include kicking their victim whilst on the ground but do not include any blows to the head. A avoids blows to the head because he wants to reduce the chance of death. B gives the issue no thought and avoids blows to the head purely by chance. From B’s attack the jury may be able to “imply a disposition depraved enough to be regardless of the consequences” and convict of murder. However, the same jury may not be able to imply the same from A’s attack, and instead may only convict of culpable homicide. This is further proof, if needed, that wicked recklessness is not “objective” in the conventional sense of the word.⁸

D.7 In Scottish law, like English law, murder can be committed in the second degree, that is by being the perpetrator’s accomplice. Murder “art and part” is the equivalent to aiding and abetting in English law. Under this doctrine, the defendant will be guilty of murder if the perpetrator kills and the defendant actively associated himself with the perpetrator in a common criminal purpose which was, or included, the taking of human life or carried an obvious risk of this happening.⁹ Accordingly, the defendant can be guilty of murder art and part without having any foresight of injury, never mind death. Moreover, if the defendant associates himself with some lesser common criminal purpose and the perpetrator kills, the defendant will still be guilty of culpable homicide. However, this only applies to antecedent concert, not to spontaneous concert, where, for murder and culpable homicide, the defendant himself must be found to have the necessary mens rea for the offence.¹⁰ However, there appears to be no principled reason why antecedent and spontaneous concert should be treated differently.

⁵ *Ibid*, 38 per Lord Cameron.

⁶ *Ibid*, where no criticism was made on appeal.

⁷ *Arthur v HMA* 2002 SCCR 796.

⁸ See *Halliday v HMA* 1998 SCCR 509, where D’s decision to wash his clothes rather than call an ambulance after a vicious attack was found to be evidence of indifference. Arguably, if evidence of indifference is relevant then, by logic, the lack of such evidence must be too.

⁹ *McKinnon v HMA* 2003 SCCR 224.

¹⁰ *Brown v HMA* 1993 SCCR 382.

- D.8 Scottish law has two partial defences to murder, namely, provocation and diminished responsibility. Provocation may take the form of violence or the discovery of infidelity by one from whom the defendant could reasonably expect fidelity. In both cases the response must be immediate and, in the case of the former, proportionate too.¹¹ Of course, under the broader interpretation of wicked intent, cases falling outside these restrictions may still succeed on a basis of denying the required mens rea.
- D.9 Diminished Responsibility has recently been broadened.¹² It now appears that any psychological or psychiatric disorder will suffice, and may even be triggered by sunstroke, alcoholism, thyroid problems, prescribed drugs or abuse and still be the basis of a diminished responsibility plea. However, voluntary intoxication and personality disorders cannot form the foundation of the plea.¹³ In order for the plea to succeed, the mental disorder must cause a substantial impairment of the defendant's ability to control his actions. Previously, judges have been able to withdraw the issue from the jury. However, this will only remain possible if the effect of the redefinition of the mens rea of murder to require wicked intent is limited only to excluding those who previously had a defence from the definition of the offence.

FRANCE

- D.10 Despite its similar name, *meurte* is narrower than murder in English law: it requires an intentional killing. Where death is caused but the defendant only intended to inflict grievous bodily harm the death is regarded as an aggravating factor relevant only to sentencing following conviction for one of the lesser offences against the person.
- D.11 Intention is not defined in the *Code Penal* or accompanying case law. However, French legal writing reveals that intention can be divided into direct intention, where the intended result must be desired, and indirect intention, where the defendant knows his act will have the "intended" result. Accordingly, intention in French law is similar to intention in English law.
- D.12 Turning to sentencing, custodial sentences in France can be either *réclusion criminelle* (criminal detention) or "mere" *emprisonnement*. In practice there is little difference between the two and *réclusion criminelle* was almost abolished in 1994 when the new Code Penal was passed.
- D.13 In French law there is no mandatory life sentence. The old Code Penal stipulated both a maximum and a minimum sentence for each offence. The new Code abandoned this practice and only stipulates maximum sentences. However, for the most serious offences, those potentially punishable by *réclusion criminelle* for life, the custodial term passed must be at least two years, and where the crime is potentially punishable by a determinate period of *réclusion criminelle* the custodial term passed must be at least one year.¹⁴ However, wherever the term

¹¹ *Drury v HMA* 2001 SCCR 583.

¹² *HMA v Galbraith* 2001 SCCR 551.

¹³ *Brennan v HMA* 1977 JC 38. It appears that this is for policy reasons.

¹⁴ Code Penal, art 132-18.

passed is less than five years a court is free to suspend it.¹⁵ Finally, there is also the issue of the *périod de sûreté* or safety period, during which D is ineligible for early release on parole. This has become the centrepiece on the crime debate in French politics, especially since the abolition of the death penalty in 1981.

- D.14 *Meurte* carries a maximum sentence of 30 years *réclusion criminelle* without a safety period.¹⁶ However, there are also “aggravated murders”, including murders committed in connection with another crime or where the victim falls within a range of stipulated categories, such as children under 15 years old, state officials, or minorities victimised by virtue of their membership of a minority group. For these murders the maximum sentence available is increased to life and a safety period of half the determinate term, or in the case of life sentences, 18 years, applies.¹⁷
- D.15 Where the killing is not only intended but also premeditated the crime ceases to be *meurte* and becomes *assassination*, which carries a maximum sentence of *réclusion criminelle* for life with a safety period.¹⁸
- D.16 So far as defences are concerned, provocation, self-defence, “mercy” killing and insanity raise issues worthy of brief mention.
- D.17 The New Code penal, which was passed in 1994, abolished minimum penalties, and the partial defence of provocation was, therefore, deemed unnecessary and abolished.
- D.18 The defence of self-defence will be available to the defendant where the action taken was an immediate response to an unjustified attack, including an attack of another, and the force used was not disproportionate.¹⁹ Moreover, the defendant will be judged according to the situation as it was reasonably believed to be. It will also be presumed that the defendant acted in self-defence where he or she acted: to repulse an entry to a inhabited place made by breaking in using violence or deception at night; or to prevent themselves becoming the victim of theft or pillage carried out by violence. However, this presumption has now ceased to be irrebuttable.²⁰
- D.19 There is no defence of “mercy” killing in French law.
- D.20 France has provisions that broadly equate to the English defences of insanity and diminished responsibility. Defendants will not be criminally liable where they offended whilst suffering from a psychological or neuropsychological disorder which destroyed their discernment or their ability to control their actions. Under this provision, unlike under English law, those suffering from irresistible impulses and those who are, at least involuntarily, intoxicated will not be criminally liable.

¹⁵ *Ibid*, 132-29. However, CP art 132-30 stipulates that this option is not available if the defendant has been given a custodial sentence in the last 5 years.

¹⁶ *Ibid*, art 221-1.

¹⁷ *Ibid*, arts 221-2 and 221-4.

¹⁸ *Ibid*, art 221-3.

¹⁹ *Ibid*, art 122-5.

²⁰ *Ibid*, art 122-6.

Furthermore, while those suffering from a psychological or neuropsychological disorder that merely reduces their discernment or impedes their ability to control their actions, remain punishable, the sentencing judge is expressly told to consider the disorder when sentencing²¹.

GERMANY

- D.21 The basic homicide offence in German law is *Totschlag*. *Totschlag* is defined as any killing of a human being carried out with an intention to kill that is not murder.²² It is broadly equivalent to voluntary manslaughter in English law. Because *Totschlag* requires an intention to kill, cases where death is caused with an intention only to do serious bodily harm will be charged as inflicting bodily injury resulting in death,²³ an offence against the person not a homicide offence.
- D.22 Meanwhile, murder is very narrowly defined in German law. *Totschlag* becomes murder when the killing is committed:
- ...out of a lust for killing, [or] in order to satisfy his sexual desires, [or] motivated by 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.²⁴
- D.23 A killing is committed deviously where the defendant relies on the trusting nature and consequent helplessness of the victim to commit the crime. This range of situations is designed to catch those who commit murder in a way that evidences a higher anti-social personal disposition. Simply put, in these situations the defendant and his actions are more evil.
- D.24 In German criminal trials nothing separates conviction and the passing of sentence. There is no plea in mitigation, instead the trial judge sentences the defendant on the basis of the information placed before the jury. Therefore, all defences and mitigating factors that the defendant wishes to rely upon must go before the jury. Accordingly, those mitigating factors that can only be placed before the court by the defendant himself will be left unconsidered if the defendant denies the offence completely.
- D.25 Murder carries a mandatory life sentence.²⁵ Unless the general provisions on diminished responsibility apply (see paragraphs D.29-D.31) the court has no discretion to pass a lesser sentence. This has caused problems where an upgrading element, which makes the offence murder coincides with mitigating elements that would downgrade the sentence if the crime had not become one to which a mandatory sentence applies. A paradigm example is where a battered woman suffering from provocation (but not diminished responsibility) “deviously” kills, that is murders, her abusive partner. The judicially engineered solution to this problem has been to hold that the courts are constitutionally authorised to

²¹ *Ibid*, art 122-1.

²² German Penal Code, s.212.

²³ *Ibid*, s 227.

²⁴ *Ibid*, s 211(2).

²⁵ *Ibid*, s 211(1).

disregard the mandatory life sentence in those cases where to impose it would be disproportionate.

D.26 *Totschlag* carries a sentence of not less than five years and, in the worse cases, life.²⁶

D.27 Meanwhile, where the crime displays the stipulated characteristics or circumstances to bring it within the provision governing less serious cases of manslaughter, the sentence will be between one and ten years. This provision primarily caters for killings that would come under the partial defence of provocation in English law. For the defendant to utilise this provision the victim must have directed physical or verbal abuse at the defendant or one of the defendant's close relatives and consequently the defendant must have suffered a loss of temper and thereby have been carried away to commit the offence. There must be no grounds for blaming the defendant for the loss of temper, for example the defendant must not have acted in a way to give the victim a reason for acting provocatively.²⁷ Essentially, the provision requires an evaluation of the role of the defendant and the victim in the killing. Only where the defendant was the wronged party will this provision be available. However, this provision can also be relied on in "an otherwise less serious case". This need not be synonymous with provocation, the provision being a catch-all catering for cases where the defendant's ability to control his or her actions was reduced by factors like fear, duress, or compassion.

D.28 Killing on request is a special form of lesser manslaughter. Where the killing is performed at the victim's express and earnest request the defendant will receive a sentence of between six months and five years.²⁸

D.29 The Defendant's sentence will be mitigated where the offence is committed as a result of a:

...pathological emotional disorder,...severe mental disturbance,
severe mental retardation or other severe mental abnormality...²⁹

which substantially reduced D's ability to appreciate the wrongfulness of his or her conduct or his or her ability to act according to their appreciation of the conduct's wrongfulness.³⁰ This covers the mental states covered in English law, as well as states not so covered, such as transitory states and self-induced states, even if culpably self-induced. Therefore, severe intoxication may lead to an abnormal mental state that can found a claim of diminished responsibility.

²⁶ *Ibid*, s 212.

²⁷ *Ibid*, s 213.

²⁸ *Ibid*, s 216.

²⁹ *Ibid*, s 20.

³⁰ *Ibid*, s 21.

- D.30 Where the diminished responsibility provision applies the sentence will be reduced, unless mitigation is refused because other aggravating factors outweigh the diminished responsibility based mitigation. Therefore, assuming that the mitigation is granted, a life sentence is reduced to a sentence not shorter than three years, whilst any determinate term will be reduced by one quarter.³¹
- D.31 Where double mitigation applies, for example where the defendant suffers from both provocation and diminished responsibility, the sentence will be between three months and seven and a half years. However, if the double mitigation arises from a killing on request committing under diminished responsibility the sentence will be at least one month and up to three years and nine months.
- D.32 Turning to defences, German law provides two excusatory yet complete defences: excessive self-defence³² and exculpatory necessity.³³ The former requires that the force used in response to an attack be excessive due to confusion, fear or panic. Meanwhile, the latter applies where the defendant commits an unlawful act in order to protect himself or herself, or a close relative from an imminent danger to life, limb or freedom that could not otherwise be averted.
- D.33 The prosecution must disprove these defences, as no burden, evidential or legal, rests upon the defence.

CANADA

- D.34 Sections 222-240 of the Canadian Criminal Code³⁴ address homicide. These must, however, be read alongside the jurisprudence of the Canadian Supreme Court, as the Code has not been amended since numerous successful Charter³⁵ challenges.
- D.35 Culpable homicide is Canadian law's starting point. This is a genus of two species, manslaughter or murder, the two being separated by murder's additional mens rea requirement.
- D.36 Culpable homicide is committed where death is caused by an unlawful act, criminal negligence, the victim's own actions (if triggered by violence or deception) or, in the case of a child or sick person, wilful frightening.³⁶ However, the defendant will be found guilty of murder rather than manslaughter when they mean to cause death or bodily harm that is known to be likely to cause death (even if someone other than the intended victim dies), or they do anything that is known to be likely to cause death during the pursuit of an unlawful object, even if death is not desired.³⁷ Importantly, subjective foresight of the risk of death is a

³¹ *Ibid*, s 49.

³² *Ibid*, s 33.

³³ *Ibid*, s 35.

³⁴ Hereafter "the Code".

³⁵ The "Charter" being the Canadian Charter of Rights and Freedoms.

³⁶ Code, s 222(5).

³⁷ Code, s 229.

constitutional pre-requisite for a murder conviction.³⁸ These differing states of mind are briefly examined in turn below.

- D.37 Motive is irrelevant when deciding whether the defendant meant to cause death: mercy killers are murderers.³⁹ Oblique intent cases are invariably brought under the “unlawful object” limb but orthodox opinion suggests that the intention limb is also applicable. Therefore, this limb probably covers the oft-cited plane bomber seeking to claim under their cargo insurance.
- D.38 The “likely” in “means to cause bodily harm that is known to be likely to cause death” is a simple word requiring no elaboration.⁴⁰ Moreover, where a series of acts leads to the victim’s death the requisite knowledge need only be present momentarily during the series of acts.
- D.39 Finally, what might be called the “unlawful object” mental state covers cases where the defendant engages in a scheme that, if completed, would amount to a serious crime, and during this scheme does something which is known to be likely to cause death. This will catch the terrorist who plants a bomb giving a barely sufficient warning, who may not fall within the “means to kill” limb.
- D.40 The sentence for murder depends on the type of murder: first degree or second degree. First degree murderers are ineligible for parole for 25 years. Second degree murderers have a minimum tariff set between 10 and 25 years by the trial judge, who may receive a recommendation from the jury.⁴¹
- D.41 All murders are second degree murders, except planned and deliberate murders (where a period of planning separates the intention’s formation and the act’s commission), contract killings, murders of stipulated officials (for example police officers) where the defendant knew the victim was a member of the said category, or murders committed during the commission of certain stipulated offences.⁴²
- D.42 In Canadian law, as in English law, it is possible to commit murder as an accomplice. Sections 21-23 of the Code address aiding, abetting and counselling.
- D.43 Aiding and abetting can take many forms. For example, aiding includes supplying an instrument or acting as look out, while abetting, which is separate to aiding but similar to counselling, consists of encouraging or supporting the principal. The secondary party must also share the principal’s level of mens rea: they must intend to aid the killing of the victim or intend to abet the causing of bodily harm known to be likely to cause death. Vitally, the secondary party must act with the intention to assist the principal commit murder.

³⁸ *Martineau* [1990] 2 SCR 633.

³⁹ *Latimer* [2001] 1 SCR 3.

⁴⁰ *Dove* (2004) 187 CCC (3d) 506 (BCCA).

⁴¹ Code, s 745.

⁴² Code, s 231.

- D.44 The secondary party can be convicted of manslaughter and the principal of murder, or vice versa. Moreover, if A assists B to murder C but B kills D by mistake, A is probably liable for the death via extended transferred malice. Finally, parties to a joint unlawful enterprise are liable for all crimes committed during that enterprise if foreseen as the enterprise's likely consequence.
- D.45 Meanwhile, counselling is treated identically to aiding and abetting, except that for counselling the Code states that the counsellor remains liable where the principal adopts a different means of committing the offence. This would probably be applied by implication to aiders and abettors too; however, the point is academic, as counsellors are normally abettors too.
- D.46 Under Canadian law, the defendant can rely on a range of defences, including provocation, mental disorder, automatism, duress, necessity, intoxication, self-defence, and what is called "the rolled up plea".
- D.47 Provocation is the only partial defence to murder. The killing must occur during a sudden loss of self-control following a wrongful act or insult sufficient to make the ordinary person lose self-control.⁴³ It is unnecessary to show that the ordinary person would have done as D did, only that he would have lost self-control. There is a liberal approach to "sudden" and the "ordinary person" will share the defendant's age, sex and any other factors that would give the provocation special significance.⁴⁴
- D.48 If D is rendered incapable of appreciating the nature or quality of his or her act or that it was wrong by a mental disorder he will be found "not criminally responsible on account of mental disorder".⁴⁵ This is broader than the M'Naughten rules: "mental disorder" includes any illness or abnormality that impairs the mind's functioning, except self-induced or transitory states.⁴⁶ Meanwhile, "appreciate the nature and quality of the act" includes estimating the act's consequences.⁴⁷ Whilst "wrong" means morally wrong according to society's standards.⁴⁸ A finding of mental disorder entitles D to the least restrictive disposal possible: an absolute discharge if D is not a danger to the public.⁴⁹
- D.49 To avail themselves of the defence of automatism the defendant must establish the act's involuntariness on the balance of probabilities.⁵⁰ Then the judge will decide whether the plea is one of automatism or mental disorder. In deciding this, the judge will examine whether the act's cause was internal and assess any danger of repetition.

⁴³ Code, s 232.

⁴⁴ *Thibert* [1996] 1 SCR 37.

⁴⁵ Code, s 16.

⁴⁶ *Cooper* [1980] 1 SCR 1149.

⁴⁷ *Ibid.*

⁴⁸ *Chaulk* [1990] 3 SCR 1303.

⁴⁹ Code, s 672.54.

⁵⁰ *Stone* [1999] 2 SCR 290.

- D.50 Two duress defences existed: one at common law, one in the Code.⁵¹ It now appears that the statutory provision is redundant, bar its list of excluded offences.⁵² The common law defence is available where the defendant faces threats of death or serious harm, has no safe avenue of escape, has not exposed himself to the threats, and (it seems) acts proportionately. A Charter challenge to the statutory list of excluded offences, which applies to the common-law defence, is awaited.⁵³
- D.51 The defence of necessity permits prima facie unlawful action where a peril or danger is imminent and the defendant has no reasonable legal alternative course of action, so long as any harm caused is proportionate to that avoided.
- D.52 Murder is a crime of specific intent so intoxication that prevents mens rea being formed reduces murder to manslaughter. The Legislature abolished a judicially created general defence of extreme intoxication.⁵⁴ A Charter challenge to this enactment is awaited.
- D.53 The Code's complicated and much maligned⁵⁵ provisions do not contain a defence of excessive self-defence. However, the liberal approach to pre-emptive self-defence benefits battered women who kill.⁵⁶
- D.54 Finally, whilst Supreme Court authorities conflict,⁵⁷ it appears that the cumulative effect of failed defences can negate mens rea: the so called "rolled up plea".

UNITED STATES OF AMERICA

- D.55 The states in America divide into two: those with murder statutes based on the English Common Law, of which California is typical; and those with murder statutes based on the American Law Institute's Model Penal Code, of which New York is typical.
- D.56 The California Penal Code largely retains the old common law definition of murder:
- The unlawful killing of a human being, or a foetus, with malice aforethought.⁵⁸
- D.57 There is also a rebuttable presumption that the killing was lawful if death occurs more than three years and a day after the defendant's act.⁵⁹

⁵¹ Section 17.

⁵² *Paquette* [1977] 2 SCR 189.

⁵³ This process has begun, *Fraser* [2002] NSJ No 400 (Prov Ct) being a lower court authority striking down the part of the list of excluded offences containing robbery.

⁵⁴ The Code s 33 reverses the decision in *Daviault* [1994] 3 SCR 63.

⁵⁵ See *Pintar* (1996) 110 CCC (3d) 402 (Ont CA).

⁵⁶ *Lavallee* [1990] 1 SCR 852.

⁵⁷ Contrast *Perrault v R* [1971] SCR 196 and *Robinson* [1996] SCR 683.

⁵⁸ Canadian Penal Code ("CPC"), s 187.

⁵⁹ *Ibid*, s 194.

D.58 In contrast, New York's crimes of homicide have a very different structure. Homicide is defined as:

Conduct which causes the death of a person ...under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, [or] criminally negligent homicide....⁶⁰

D.59 Notably, "causing death" rather than "killing" is required under the New York Penal Code. This better covers cases of complicity. Subsequent provisions then add the mental elements that dictate which crime of homicide is committed.

D.60 Turning to issues of mens rea, under the California Penal Code malice can be express or implied. Express malice equates to an intention to kill.⁶¹ However, this excludes cases of knowledge rather than intent and cases where grievous bodily harm rather than death is intended. Despite the California Penal Code's narrow definition of implied malice, which states that implied malice exists where "no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart",⁶² such cases do in fact fall within implied malice by virtue of the California Jury Instructions, which state that implied malice exists where:

- (1) the killing resulted from an intentional act;
- (2) the natural consequences of the act were dangerous to human life; and
- (3) the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.⁶³

D.61 Accordingly, both the person who blows up a plane to claim under their cargo insurance policy and the person who intends to inflict grievous bodily harm but not death will have malice implied.

D.62 Implied malice is also the statutory source for the judicially developed doctrine of felony murder. This states that any killing in the course of an inherently dangerous felony will be murder, unless the felony is so close in nature to homicide as to merge with it, in which case it ceases to be able to be an independent basis for a finding of murder.

D.63 Additionally, second degree murder will be elevated to first degree murder where certain circumstances exist, including premeditation, the use of "weapons of mass destruction", or where the killing occurs during the commission of certain offences.⁶⁴ The victim's status does not elevate the murder to first degree murder but does increase the judge's sentencing powers.⁶⁵

⁶⁰ New York Penal Law ("NYPL"), s 125.00.

⁶¹ CPC, s 188.

⁶² *Ibid*, s 188.

⁶³ Californian Jury Instructions, s 8.11.

⁶⁴ CPC, s 189.

⁶⁵ *Ibid*, s 190.

D.64 Turning to mens rea under New York's Penal Law, unlike in California, there is not a single mens rea for murder. Instead the Penal Law says homicide will be second degree murder where:

- (1) with intent to cause the death of a person the defendant causes the death of that person or another person;
- (2) under circumstances evincing a depraved indifference to human life, the defendant recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person;
- (3) the defendant, during the commission of a stipulated crime, or flight from the scene of a stipulated crime, causes the death of another not involved in the crime; or
- (4) under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person.⁶⁶

D.65 Furthermore a person acts:

- (1) intentionally, where it is their conscious objective to cause a result or to engage in such conduct;
- (2) knowingly, where he is aware that his or her conduct is of such a nature or a circumstance exists; and
- (3) recklessly, where he is aware of, and consciously disregards, a substantial and unjustifiable risk that such a result will occur or such a circumstance exists.⁶⁷

D.66 The failure to mention "knowingly" in D.64(1) appears to be an oversight, especially since it is included in the Model Penal Code, but one of limited importance since such cases will normally fall within D.64(2). Unlike in California, felony murder has a statutory basis and the courts have held that the list of offences in the Penal Law are exhaustive, thus supposedly preventing the issue of merger arising.⁶⁸ The felony murder provision also departs from the Model Penal Code, which creates a rebuttable presumption that felony murders are committed with the extreme indifference required by D.64(2), rather than establishing them as a distinct means of committing second degree murder as in D.64(3).

⁶⁶ NYPL, s 125.

⁶⁷ *Ibid*, 15.05.

⁶⁸ Although it is arguable that burglary with intent to kill ought not form the basis of felony murder due to the doctrine of merger.

- D.67 Meanwhile, second degree murder will be elevated to first degree murder where the killing displays certain characteristics, including the victim being of a certain status (for example a law enforcement officer or a witnesses), and the killing occurring during the commission of certain stipulated offences.⁶⁹
- D.68 Finally, California and New York have different approaches to defences. Under the Californian Penal Code, once murder is prima facie proved by the prosecution, the burden to establish any defence moves to the defendant.⁷⁰ The following defences are specific to homicide:
- (1) Excusable Homicide,⁷¹ which requires the homicide to be committed: by accident during a lawful act performed without any unlawful intent; or by accident and misfortune, in the heat of passion,⁷² upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.
 - (2) Justified Homicide,⁷³ which includes killings in the course of the defence of oneself or another from a reasonably anticipated felony, or in defence of property or habitation. Therefore, the thief who intends to forcibly steal a wallet risks a lethal response in self-defence.
- D.69 Meanwhile under New York Penal Law, first degree murder is reduced to second degree manslaughter by the defence of acting under extreme emotional disturbance. This appears to be a combination of provocation and diminished responsibility, which focuses on the defendant's state of mind. Meanwhile, second degree murder can also be reduced to second degree manslaughter if the killing occurs in the course of aiding a suicide.⁷⁴

AUSTRALIA

- D.70 The law of homicide is a matter for State jurisdiction. The laws adopted by the States on murder do vary to some degree. However, in most significant respects there is a large degree of convergence. This is in part because the High Court of Australia is the final court of appeal for questions on murder regardless of which State's law the question arises under. Currently Victoria and South Australia retain the Australian common law, New South Wales and the Australian Capital Territory have statutory enactments, and Queensland, the Northern Territory, Western Australia, Tasmania, and the Commonwealth have a completely codified criminal law (although they still rely in part on the common law when interpreting their code).

⁶⁹ NYPL, s 125.27.

⁷⁰ CPC, s 189.5.

⁷¹ *Ibid*, s 196.

⁷² This will only reduce the charge to voluntary manslaughter, *ibid*, s192.

⁷³ *Ibid*, s 197.

⁷⁴ NYPL, s 125.25.

- D.71 Typically, murder is defined as a killing committed with an intention to kill or to inflict grievous bodily harm, or being “reckless” as to killing (but not as to inflicting grievous bodily harm). These mental elements shall be considered in turn.
- D.72 Intention has repeatedly been held to be a simple word that forms part of everyday English. As such the appellate courts have frowned upon any attempt to explain or define the word, preferring juries to be left to apply it as their common sense dictates. The Australian courts have successfully avoided the difficulties experienced by the English courts when dealing with “intent” largely because there has been virtually no need to consider the concept of indirect intention in Australia.
- D.73 A major reason for this has been that the Australian States have some concept of “reckless” murder. However, “reckless” in this concept does not have the same meaning as in English law or indeed the Australian law on non-fatal offences against the person. To avoid confusion the High Court of Australia did not use the word in its seminal statement of the mental element for murder and has made clear that the word “reckless” ought not to be used when directing the jury in murder cases.⁷⁵ It seems that what Australian lawyers mean when they refer, for want of a better universally recognised phrase, as “recklessness” in the context of murder means something vaguely akin to indirect intention in English law. In *Crabbe* it was held:

If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting death or grievous bodily harm will be the likely result, for the word “probable” means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm... a person who, without lawful justification or excuse, does an act knowing that it is probable that death or grievous bodily harm will result, is guilty of murder if death in fact results.

- D.74 The Australian High Court has since confirmed that “probable” or “likely” does not mean more probable or likely than not: a substantial or real chance, even if less than 50%, suffices.⁷⁶ This is, of course, a far lower threshold than English law’s “foresight of a virtual certainty”.
- D.75 The statement of principle in *Crabbe* has been left largely unchallenged since. Indeed, the practices of the sentencing courts seem to affirm the idea that “reckless” killers are “comparable” to intentional killers. Whilst reckless killings are more likely to be seen as less bad, the courts have shown themselves willing to treat the worst cases of “reckless” killings as harshly as intentional killings. It appears that reckless killings are most likely to be viewed as being of the worst type where the recklessness displays indifference to life, that is, suggests that the defendant would have acted as he did even if he had known that death was a certainty.

⁷⁵ *Crabbe* (1985) 156 CLR 464.

⁷⁶ *Boughey* (1986) 161 CLR 10.

- D.76 Whilst the courts have differentiated between what may be called “types” or “degrees” of recklessness at the sentencing stage, attempts to place a gloss on the word reckless in the definition of the substantive offence of murder have failed. In the past those who have argued that the law should focus on the defendant’s attitude to the risk, rather than his mere awareness of it, have seized upon the use of the word “expecting” in “expecting death or grievous bodily harm will be the likely result”. They have argued that “recklessness” should require an “expectation” of death rather than a mere “appreciation”. However, it has become clear that the use of the word “expecting” was of limited significance and the correct approach is to simply consider the defendant’s awareness of the degree of risk being run.
- D.77 Similarly, the repeated assertion that it is the degree of risk foreseen that is relevant, combined with the fact that the definition of the mental element deliberately declines to use the word “recklessness”, has doomed any attempt to make the fault element of murder include the running of a risk *which is unjustified*. Questions of justification or excuse in cases of reckless killings, like intentional ones, arise solely at the defence stage.
- D.78 However, whilst the above may be clearly established, the major difficulty with the definition of the mental element of murder is that fact that the line between murder and manslaughter is hazy. It is unclear precisely where “recklessness” sufficient for a murder conviction becomes simple everyday recklessness (that is, the unjustified running of a foreseen risk of any degree) rendering the killing only manslaughter. Meanwhile, manslaughter can be committed by gross negligence or by foreseeing a risk that is insufficient to come within “reckless” murder.
- D.79 So far as sentencing is concerned in murder cases some but not all States retain the mandatory life sentence. All States empower their judges to set non-parole periods, although some have taken legislative action to curtail the judicial discretion when doing so. In manslaughter cases those States that do not have a discretionary life sentence have a maximum sentence of at least 20 years.
- D.80 Turning to defences, self-defence is a complete defence to murder and the States each provide for a varying range of partial defences, such as provocation, duress and diminished responsibility. Interestingly, *Crabbe* suggested that the Australian common law will allow necessity as a defence to “reckless” murder and murder committed with an intention to inflict grievous bodily harm but not to murder committed with an intention to kill.⁷⁷ However, case law since *Crabbe* has offered no further guidance on the issue.
- D.81 Finally, a brief word about complicity. A defendant will be guilty for a murder committed by his accomplice wherever the offence came within the scope of their criminal plan, no matter how unlikely the commission of the crime seemed when the plan was formulated. Moreover, the defendant will be guilty of a murder committed by his accomplice outside the scope of their plan if the defendant foresaw the commission of the offence as possible. The harsh width of this doctrine has been justified by analogy with the doctrine of unlawful act manslaughter, found in one form or another in all the States.

⁷⁷ The separating of conjoined twins seemingly being a narrow exception to this rule: *State of Queensland v Nolan* [2001] QSC 174.

APPENDIX E

ANALYSIS OF “LIFER” CASES

INTRODUCTION

- E.1 Whilst all murders are by definition serious, some murders can be seen as being “more” serious. This is reflected in the tariff that is set for each murderer. The tariff is the period of the mandatory life sentence that the convicted murderer must serve before release. It is designed to reflect the period of time that must be spent in custody for the purposes of retribution and deterrence. Once this period has been served, the murderer *may* be released on licence. Such licences are by definition conditional and revocable. The murderer will only be released on licence if the parole board is satisfied that the murderer does not pose an unacceptable risk to the public. It is important to appreciate that the tariff’s expiry is a necessary, but not sufficient, condition of a murderer’s release on licence.
- E.2 The Law Commission has conducted research into murderers whose tariff was, comparatively speaking, “short”, with a view to investigating what common factors recurred in these cases. We decided to examine the cases of all murderers who were convicted between 1994 and 1996, whose tariff was set at 10 years or less, and who had been released by 1 August 2005. Having reviewed the files held by the National Offender Management Lifer Review and Recall Team¹ 53 such cases came to our attention.

SUMMARY OF OUR FINDINGS

- E.3 All the cases in the sample had some feature that reduced the defendant’s culpability for the killing. This tended to be because the defendant was easy to sympathise with; or, alternatively, because the victim was more difficult to sympathise with, normally because they were, to some extent, the author of their own misfortune.
- E.4 The most common mitigating factor was some form of provocation. On occasions this verged on being sufficient to provide a partial defence that would reduce the crime from murder to manslaughter. However, even where this was not the case, the provocation was invariably sufficient to constitute a genuine mitigating circumstance.
- E.5 After provocation the most common mitigating factors were diminished responsibility and self-defence. Those cases involving a claim of diminished responsibility that appear to have verged on providing the defendant with a partial defence almost invariably involved a conflict between experts, one of whom testified that the defendant came within the partial defence and ought, therefore, be found guilty only of manslaughter. Those cases where the defendant’s mental disorder was not sufficient to form a potentially viable partial defence almost invariably involved a low scale mental disorder, often some form of reactive depression.

¹ Attention should be drawn to the fact that these files did not contain the sentencing judge’s comments and contained some information that came to light post-sentencing. Therefore, studying these files was not necessarily guaranteed to present the same image of the case that the sentencing judge had.

- E.6 Meanwhile, whilst excessive force used in self-defence may not have been the largest category it did contain some of the most striking cases. One particularly striking case illustrated that the gap between complete acquittal and a murder conviction can be as little as a *second* “unnecessary” stab at the aggressor.
- E.7 There was also a noticeable subset of cases which, whilst involving no suggestion of a partial defence whatsoever, were brought within the sample by virtue of the fact that they were committed by young defendants who were frequently not just young but also immature for their age.
- E.8 It appeared that the most common relationship between defendant and victim was that of man and wife, cohabiting couple, or parting couple. Meanwhile, a knife was the most common weapon used. Frequently this would be picked up by the defendant in the heat of the moment.

DETAILED BREAKDOWN OF OUR FINDINGS

- E.9 So far as potential defences are concerned, of the 53 cases in the sample:
- (1) 8 showed a degree of provocation that appeared to verge on providing a partial defence; and
 - (2) 12 showed a degree of provocation that whilst being insufficient to provide a partial defence offered some degree of mitigation.
 - (3) 5 showed a degree of diminished responsibility that appeared to verge on providing a partial defence; and
 - (4) 3 showed a degree of diminished responsibility that whilst being insufficient to provide a partial defence offered some degree of mitigation.
 - (5) 4 showed what appeared to be barely excessive degrees of force used in self-defence; and
 - (6) 9 showed the use of a degree of force that whilst being clearly excessive nonetheless would have provided some degree of mitigation.
 - (7) 10 involved young and immature defendants.
 - (8) 2 involved defendants who were extremely intoxicated.
- E.10 So far as the relationship between victim and defendant is concerned:
- (1) 11 cases involved couples, whether married or cohabiting;
 - (2) 4 involved ex-partners;
 - (3) 3 involved other family relationships such as parent-child;
 - (4) 7 involved friends;
 - (5) 17 involved acquaintances not falling into preceding categories, such as employer-employee or fellow employees; and

(6) 11 involved complete strangers.

E.11 Finally, so far as the weapon used is concerned:

- (1) 31 cases involved the use of a knife;
- (2) 7 involved the use of punching or kicking or both;
- (3) 4 involved blunt, non-penetrating trauma;
- (4) 7 involved strangulation; and
- (5) 4 involved the use of a gun.

E.12 This information is summarised in tabular form below.

		Couple	Family	Friends	Acquaintance	Stranger
Provocation	Major	A1 B1 C2 D0 E0	A0 B0 C0 D0 E0	A1 B1 C0 D0 E0	A0 B0 C1 D0 E1	A0 B0 C0 D0 E0
	Minor	A2 B0 C0 D4 E0	A0 B0 C0 D0 E0	A1 B0 C0 D0 E0	A3 B0 C0 D0 E0	A1 B0 C0 D0 E1
Diminished	Major	A0 B0 C1 D3 E0	A0 B0 C0 D0 E0	A1 B0 C0 D0 E0	A0 B0 C0 D0 E0	A0 B0 C0 D0 E0
	Minor	A1 B0 C0 D0 E0	A0 B0 C0 D0 E0	A2 B0 C0 D0 E0	A0 B0 C0 D0 E0	A0 B0 C0 D0 E0
Self-Defence	Major	A0 B0 C0 D0 E0	A1 B0 C0 D0 E0	A0 B0 C0 D0 E0	A2 B0 C0 D0 E0	A1 B0 C0 D0 E0
	Minor	A0 B0 C0 D0 E0	A1 B0 C0 D0 E1	A0 B0 C0 D0 E0	A3(1) B1 C0 D0 E0	A2 B1 C0 D0 E0
Youth		A0 B0 C0 D0 E0	A0 B0 C0 D0 E0	A0 B0 C0 D0 E0	A3(2) B2(1) C0 D0 E0	A3(1) B1 C0 D0 E1(1)
Intoxication		A0 B0 C0 D0 E0	A0 B0 C0 D0 E0	A1 B0 C0 D0 E0	A1 B0 C0 D0 E0	A0 B0 C0 D0 E0

KEY

- A: Knife
- B: Fist/Boot
- C: Blunt Object
- D: Strangulation
- E: Gun
- (x): Of whom are secondary parties.

APPENDIX F

A CASE STUDY

INTRODUCTION

- F.1 This section looks at the recent case of *S*.¹ The facts do not conform to the archetypal killing by a woman who is the victim of domestic violence.² However it was argued that the appellant in *S* was suffering from a personality disorder that had arisen in part from a history of physical and sexual abuse. The case was affected by the procedural and substantive difficulties common to cases in which such disorders are at issue.

THE FACTS OF THE CASE

Facts

- F.2 D, in her thirties, killed V, a diabetic in his sixties, by administering several syringes of insulin. The two were described as having a complex relationship. V had been a lodger in D's house during her childhood. Since she was a child, D had stayed at V's flat from time to time when she was without accommodation. D was addicted to alcohol since her early teenage years, and later became addicted to other drugs. When D was desperate for money or drugs, V would pay D to perform sexual acts upon him. Their relationship was amicable at the relevant time. D assisted V with managing his diabetes. D was heavily intoxicated by alcohol and other drugs at the time of the offence.

At trial

- F.3 D's son gave evidence that D prepared and administered the insulin to V saying that she was going to kill him. V was found dead the following morning.
- F.4 D denied having administered the insulin at all. Shortly after V's death, while suffering the effects of withdrawing from drugs, D said that her son had administered the insulin. At trial, she said she had no recollection of attacking V, or of wanting to harm him. She may have injected V under the impression that it was medically necessary, but she was of the opinion that she would have remembered doing so. The second limb of her defence was that causation had not been made out – insulin was not in itself toxic and, owing to V's weak heart, death could have occurred at any time.
- F.5 No diminished responsibility argument was advanced. This was, firstly, because the available medical assessments disclosed only minimal evidence of a relevant mental disorder. Secondly, diminished responsibility was not compatible with the other defences advanced: diminished responsibility is predicated on acceptance

¹ We are grateful to Harriet Wistrich of Birnberg Peirce Solicitors for access to the case papers when preparing the study.

² For which see the well known facts of *Ahluwalia* [1992] 4 All ER 889, in which the defendant was severely abused by her husband over a period of several years. She killed him by setting fire to his bedclothes while he was asleep.

of responsibility for death coupled with the requisite intent,³ whereas D's other arguments variously sought to negate the actus reus, causation and intent.

On appeal

- F.6 The Court examined two new psychiatric reports indicating that the appellant had a viable defence of diminished responsibility, as well as a report prepared at the request of the Crown which suggested the contrary.
- F.7 The first new psychiatric report was prepared in 2004 by Dr B, who had previously prepared a report for the purposes of a bail application in 1996. Dr B found that the appellant was suffering from a long-standing personality disorder. The disorder caused her to maintain that she was not responsible for the death at all. Thus the very condition from which the appellant was suffering had effectively removed the possibility of putting the issue of diminished responsibility before the Court. Dr B had not addressed diminished responsibility in her 1996 report because she had only been instructed in respect of a bail application. In 1996 she had no access to the relevant medical history; it would therefore have been impossible to comment on diminished responsibility.
- F.8 The second new psychiatric report was prepared in 2003 by Dr M. He was also of the opinion that the appellant was suffering from a personality disorder at the time of the offence. The disorder was substantially responsible for her lack of memory, albeit in conjunction with her intoxication. Her personality disorder had caused her to pursue an implausible defence.
- F.9 The third report, obtained by the Crown, was prepared by Dr J in 2004. It was his opinion that, if the appellant's amnesia was genuine, it resulted from intoxication. She did not have a personality disorder. In any case, denial and memory loss were not particular features of the alleged disorder. Furthermore, a genuine disorder would have manifested itself in similar behaviour in prison. This had not happened. Her alcohol and drug use was solely responsible for her "chaotic lifestyle". There was simply no explanation for the killing.
- F.10 The Court declined to admit the new psychiatric evidence, on the grounds that:
- (1) the appellant's lack of recollection was not consistent;
 - (2) denial was not a documented feature of borderline personality disorder;
 - (3) there were more persuasive explanations for her denial/lack of recollection, namely that she was not telling the truth or that intoxication had caused her lack of recollection.
 - (4) critically, it had not been established on appeal that the reason the appellant had not run diminished responsibility at trial was integral to her abnormality of mind. There was no reasonable explanation for failing to provide the relevant evidence at trial.

The appeal was therefore dismissed.

³ A "confession and avoidance" plea.

COMMENTARY

Introduction

F.11 Personality disorders, post traumatic stress disorder (PTSD) and depression all commonly ground a plea or appeal by women who kill. In theory, such conditions may ground a successful partial defence to murder.⁴ However, there are particular limitations in the substantive law and in the criminal justice system where such conditions are concerned. They arise from a number of features peculiar to the way in which these conditions may manifest themselves. In practice it is particularly difficult to run successfully a partial defence based on such disorders. Some of these difficulties are highlighted by the trial and appeal in S.

At trial

F.12 On appeal, two experts gave a psychiatric explanation for S's claim at trial that she could not remember the killing and that she was not responsible for it.⁵ When put forward at trial, however, a jury of ordinary experience would have understandably looked upon her version of events with scepticism. S's genuine belief in the truth of her own account clearly belies an assumption at the heart of the adversarial trial system, namely that defendants who are fit to plead are also always capable of putting forward a defence which is in their own best interests.

F.13 The problem is complicated by the fact that an underlying personality disorder is highly likely to go unnoticed in the period leading up to the trial. This is so for two main reasons. Firstly, individuals tend to be reluctant to co-operate with efforts to assess their mental state. Dr F, a prison psychotherapist, commented in a report compiled while S was awaiting trial that:

[S] is keen to have some help. She is starting to look at her problems but she is apprehensive in disclosing things about herself for fear that they might be used against her ... in court.

F.14 Secondly, personality disorders are latent to an extent that other "abnormalities of mind" are not. This further adds to the likelihood that they will go unnoticed. Only in-depth studies are likely to be able to establish whether or not they are likely to have had any bearing on the defendant's conduct. For this reason Dr B gave evidence to the Court of Appeal that defence counsel were unwise to have relied on the report she prepared with reference to a bail application to discount a defence of diminished responsibility.⁶ The preliminary reports were particularly inadequate to assess whether a defence of diminished responsibility was available because the defendant was denying any memory of, or responsibility for, the offence in question. Dr B, who examined S two days after her conviction, said that he could not offer a psychological or psychiatric explanation for the offence because she was denying that she was guilty.

⁴ Indeed, the Court of Appeal overturned the murder conviction of the defendant in *Devaney* [2005] EWCA Crim 944 and substituted one of manslaughter by reason of diminished responsibility, which derived from a personality disorder. It is notable that, in that case, the psychiatric evidence presented in favour of the appellant was uncontested by the Crown.

⁵ See paras F.7-F.8 above.

⁶ See para F.7 above.

F.15 Even after some time has passed, the exercise remained difficult. Seven years after the offence, when S had come to accept her responsibility for the killing, Dr M stated that:

[i]t must also be emphasized that in this assessment it was especially apparent that her characteristic coping strategy...is essentially one of denial! This made it all the more difficult...to explore her emotional state and thinking around the time of the index offence.

F.16 Thus a doctor unable to probe for a personality disorder in the limited examination time available prior to trial is likely to report, explicitly or by implication, that there is no relevant condition for the purposes of a diminished responsibility plea. Defence lawyers, in reliance on such preliminary reports, are less likely to pursue this avenue in the limited time available to prepare for trial. This is especially true when the alternative pleas being considered are incompatible with a diminished responsibility based argument.⁷

F.17 The consequences of not having adequate notice taken of a personality disorder at trial were also reflected in S's sentence. In Dr B's opinion in her second report in 2004:

As part of her disorder she cannot accept responsibility for her behaviour and her projection of blame onto others acquires an almost delusional intensity. Such persons are said to be 'in denial' and psychologically unable to admit to wrongdoing or show appropriate remorse.... [Emphasis added.]

F.18 However, on recommending a tariff of 12 years to the Home Secretary, the trial judge had written:

I would have been minded to recommend less, had she been able to face up to what she had done, and in particular had she not been willing to allege in open court that her son could have committed murder.

On appeal

F.19 Admissibility at the appeal stage is not governed solely by whether or not the evidence would have been admissible (or indeed persuasive) at trial. Rather it is directed by the test set out in section 23 of the Criminal Appeal Act 1968 (the 1968 Act), of which the admissibility of the evidence at trial and its persuasiveness form only a part. Section 23 provides that:

(1) For the purposes of an appeal under this Part of this Act the Court of Appeal may, if they think it *necessary or expedient in the interests of justice*—

(a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them to be necessary for the determination of the case;

⁷ See para F.5 above.

- (b) order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Court, whether or not he was called in those proceedings; and
 - (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
- (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—
- (a) whether the evidence appears to the Court to be *capable of belief*;
 - (b) whether it appears to the Court that the evidence may afford *any ground for allowing the appeal*;
 - (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
 - (d) whether there is a *reasonable explanation for the failure to adduce the evidence in those proceedings*. [Emphasis added]

F.20 In S's case, when deciding whether it was "necessary or expedient in the interests of justice" to receive the new evidence, the Court had regard to the presumption that a defendant is only entitled to one trial. They noted the words of Lord Bingham CJ in *Campbell*, who said:

This Court has repeatedly underlined the necessity for defendants in criminal trials to advance their full defence before the jury and call any necessary evidence at that stage. It is not permissible to advance one defence before a jury and when that has failed, to devise a new defence, perhaps many years later, and then seek to raise the defence on appeal.⁸

F.21 To do so would be to "subvert the trial process".⁹ There is therefore a presumption, even where evidence would have been admissible (and indeed persuasive) at trial, that it would not be "in the interests of justice" to admit new evidence. However the Court recognised that, in exceptional circumstances, evidence should nevertheless be admitted. In S's case, the Court considered sections 23(2)(b) and 23(2)(d) to be at issue: whether the new evidence afforded a ground for allowing the appeal and whether there was a reasonable explanation for the failure to adduce the evidence at trial respectively.

⁸ [1997] 1 Cr App R 199, 204.

⁹ *Steven Jones* [1997] 1 Cr App R 86, 93, per Lord Bingham CJ.

F.22 In a technical sense, evidence of diminished responsibility was readily available to S's defence team. She had displayed symptoms of a personality disorder at the preliminary psychiatric examinations which took place before trial. However, her defence lawyers considered but actively rejected diminished responsibility as a "weak" line of argument. In such a situation, the words of Schiemann LJ in *Weekes* appear to apply:

[T]he defendant must put forward his whole case at trial and...it is not in the interests of justice to permit him to put forward his case with different evidence before different tribunals....¹⁰

In sum, the defendant fell foul of the "two trials" principle described above.

F.23 Yet in practical terms there were several significant obstacles to adducing medical evidence to the degree of relevance and persuasiveness necessary to ground a partial defence of diminished responsibility at trial.¹¹ It is possible to adopt a purposive approach to section 23(2)(d) and consider that these difficulties constituted a "reasonable explanation for the failure to adduce the evidence". However, the Court of Appeal believed that, in determining whether the test had been met, it was crucial to decide whether the S's amnesia about the circumstances of the killing were in truth a manifestation of her abnormality of mind. The answer to this would be indicative of whether there was a reasonable explanation for the defence not having been run at trial. The Court later noted that the critical feature about the case was that it had not been established that this was the case.

F.24 Consider the implications of the exercise the Court set for itself. Under section 23(2)(a), the Court of Appeal need only satisfy itself that the evidence is "*capable* of belief". The Court said that this criterion was plainly met. Yet the Court was now saying that, in order to determine whether there was a reasonable explanation for the failure to adduce the new psychiatric evidence at trial under section 23(2)(d), the Court had to decide whether it was *persuaded* by the thesis of Dr M and Dr B. In other words, because the persuasiveness of the appellant's fresh evidence was a prerequisite for its admissibility under section 23(2)(d), the Court felt compelled to go beyond deciding whether the evidence was *capable* of belief, and decide which set of evidence it actually *preferred*. The latter is an exercise ordinarily at the core of the role of the jury. Indeed, in giving its reasoning for preferring the evidence of Dr J on the one hand over that of Dr M and Dr B on the other, the Court could do little more than restate the opinions of Dr J.¹²

F.25 Two principal problems emerge from this process. Both problems are peculiar to the situation where, because of an allegedly denial-inducing personality disorder, the persuasiveness of the new evidence itself determines whether there is a reasonable explanation for the failure to adduce evidence at trial. The first problem is that, as described above, the Court effectively takes on the role of the

¹⁰ [1999] Cr App R 520, 522.

¹¹ Described at para F.12-F.15 above.

¹² Compare paras F.9 and F.10 above.

jury. As such the evidence is put to a higher standard of proof than that required of it under section 23(2)(a).

- F.26 The second problem is that, when deciding on which set of evidence to prefer, the odds are stacked against acceptance of the evidence favourable to the appellant. As described in paragraphs F.13-F.16 above, there are likely to be earlier accounts of the appellant's mental state, suggesting that she has no relevant disorder, even if a later reports suggest the contrary. The very existence of competing reports disinclines the Court to accept the new evidence,¹³ not least because "[e]xpert witnesses, although inevitably varying in standing and experience are inter-changeable in a way in which factual witnesses are not."¹⁴ Further, when comparing the new psychiatric evidence to the other psychiatric evidence available, the Court considered it relevant that S was raising the defence of diminished responsibility for the first time years after the trial, and that the evidence sought to be admitted was both challenged and controversial.¹⁵
- F.27 The general evidential assumption (that evidence obtained long after the time of the offence is unpersuasive) belies the thesis that personality disorders and PTSD are only *ever* likely to emerge after a significant period. As a result, contemporaneous reports are in fact *less* likely to be representative of the defendant's mental state at the time of the offence. Nevertheless, the general principle might explain why the Court in S preferred the evidence of the single psychiatrist, Dr J, over that of the two psychiatrists whose mutually corroborating reports supported the case of the appellant.

THE EFFECT OF OUR PROPOSALS

Abolition of all partial defences¹⁶

- F.28 Although we are not making a provisional proposal to this effect, abolishing all partial defences (with mitigating factors going to sentence) would avoid some of the problems described above insofar as they stem from the adversarial nature of the current proceedings. In particular, defence teams would no longer have to choose between incompatible defences and so diminished responsibility would still be available for consideration after conviction. Indeed, because the extent of a personality disorder or PTSD is only likely to emerge once there has been time for reflection and further psychiatric examination, it is at this point that certain offenders would derive most benefit from consideration of the psychiatric evidence. Although such a system would ostensibly lead to a lengthier and costlier sentencing process, it would in turn reduce the need for appeals against conviction to the Court of Appeal such as that in the case discussed above.

¹³ Cf *Devaney* [2005] EWCA Crim 944 in which the uncontested new evidence grounded a substituted verdict of manslaughter on the grounds of diminished responsibility.

¹⁴ *Steven Jones* [1997] 1 Cr App R 86, 93, per Lord Bingham CJ.

¹⁵ The Court's thinking echoed the words of Lord Taylor CJ in *Ahluwalia* [1993] Cr App R 133, 142: "...if there is no evidence to support diminished responsibility at the time of trial, this court would view any wholly retrospective medical evidence obtained long after the trial with considerable scepticism."

¹⁶ See Part 6.

- F.29 There is, of course, a significant disadvantage to this approach: a killer whose mental responsibility was substantially impaired would nonetheless be labelled a “first degree murderer”. However, as has been demonstrated above, certain offenders face formidable obstacles to obtaining an appropriate, lesser conviction under the present system. From a pragmatic perspective, it would be a significant improvement if such offenders were at least to receive the benefit of an appropriate tariff.

Provocation

- F.30 In the above case, Dr M was of the opinion that S perceived the victim’s objectively innocuous behaviour in the period immediately leading up to the attack as provocative because of her intoxication with a combination of drugs. He commented that:

[B]y the time he had shown what she perceived as deliberate defiance and aggravating insults she had lost her temper. She remembered thinking, “I can’t stand it any more: he’s doing this on purpose – he’s gone too far!”

- F.31 Thus there was evidence of a loss of self-control. On the law of provocation at the time of trial, S would have further had to demonstrate, in essence, that her response was partially “excusable”. (Although there were competing lines of authority as to the content of the provocation test at this time, the test was later to be formulated as one of ‘excusability’ by Lord Hoffmann in *Smith (Morgan)*.¹⁷) Following *Holley*¹⁸ she would have faced an additional hurdle in the form of the ‘tightened’ objective limb of the provocation test.

- F.32 Our proposed reformulation of provocation¹⁹ is designed to address the paradigm case of domestic violence. It is notable that in S’s case there was no evidence of a fear of serious violence or of gross provocation. Arguably the unavailability of the provocation defence is appropriate, because the victim’s behaviour towards the defendant, although far from blameless over the longer term, was not *in fact* a major motivating factor in the offence.²⁰

Diminished responsibility²¹

- F.33 In S’s case, Dr M noted that her “severe personality disorder” was due to “inherent causes as well as contributions from adverse aspects of her development...” He noted that:

¹⁷ [2001] 1 AC 146.

¹⁸ [2005] UKPC 23; [2005] 3 WLR 29.

¹⁹ Set out in Part 6.

²⁰ Note that a plea of provocation, however formulated, would still be predicated on acceptance of responsibility for death coupled with the requisite intent.

²¹ Our proposed revision of the partial defence of diminished responsibility is also set out in Part 6.

Since adolescence she was virtually constantly intoxicated with a variety of substances.... She did not allow herself the opportunity of any periods of sustained sobriety and thus she failed to mature and develop through normal experience...there is much to indicate that with enforced abstinence [in prison] there has been a most impressive maturation of her personality.

- F.34 Furthermore, Dr M drew attention to the psychiatric effects of the combination of years of sexual abuse suffered at the hands of the deceased and other men on the one hand, with a recent violent rape experienced by the defendant on the other hand. He was of the opinion that:

Undoubtedly, there must have been some generalising effects: thus she had become all the more sensitised over the inevitably abusive relationships she suffered from men...

- F.35 The reformulated defence would require the jury to take into account all mental disorders, regardless of their origins. Here, the psychiatrist was of the opinion that environmental factors caused S to develop an abnormality of mental functioning in the months prior to the commission of the offence. On our reformulated defence, the resulting abnormality could be taken into account.

CONCLUSION

- F.36 Under our proposals, S would have no defence of provocation available to her. We believe this is the right result, because her reduced culpability (if any) is best explained by reference to the abnormality of her mental functioning. To this end, our reformulated diminished responsibility defence would allow a wider range of contributory factors to be considered. It recognises that a killer's motivation is inevitably multifactorial, and allows for a more coherent, and therefore more believable, account of the contributing mental factors.²²
- F.37 That said, however, the effectiveness of the defence remains dependent on the defendant's ability to admit to having perpetrated the killing with the requisite intent, which may well be absent at trial. We are of the opinion that reform of the substantive law can only go part way to ameliorating the particular difficulties faced by defendants in diminished responsibility cases such as S, because any reformulated defence would continue to have to operate in an adversarial context. However we believe there remains scope for improved collection, presentation and use of psychiatric evidence in the courts within the adversarial system.²³ **We welcome suggestions as to how this may be achieved.**

²² Note the comment of Dr Madelyn Hicks, quoted at para 6.40 of this paper.

²³ See the discussion at paras 6.99-6.116 of Part 6.

APPENDIX G

BACKGROUND INFORMATION ABOUT MURDER AND HOMICIDE

INTRODUCTION

- G.1 There is no doubt that homicide, and murder in particular, looms large in public and media debates about crime. For example, on 9th November 2005, in its search facility www.bbc.co.uk listed 11,292 entries for news items under 'murder' and 943 under 'manslaughter'. That easily exceeds the combined total for the number of news items on robbery (2,237), rape (2,588) and burglary (1,084).
- G.2 The devastating impact that murder, and manslaughter, can have on victims' families has led to the establishment of flourishing support groups for these 'secondary' victims. Important examples are Support after Murder and Manslaughter (SAMM), and the Victims of Crime Trust. Rape aside, no other crime has warranted quite this level of sustained, specialised attention amongst voluntary groups.
- G.3 The importance of murder is also reflected in the way it is investigated, prosecuted and tried.
- G.4 Within its Specialist Crime Directorate, the Metropolitan Police has, for example, a Homicide Command dedicated to the investigation of homicides. It is divided into three units (West; South; East), each unit being led by a Detective Chief Inspector, with 33 dedicated staff. The units are supported by, for example, a Murder Review Group, Coroner's officers, and pathologists.
- G.5 Turning to prosecution, murder cases are usually handled by the Crown Prosecution Service in the area in which the case arises. The Chief Prosecutor in the area must be notified of the case, so that he or she can either deal with it personally, or ensure that someone else with sufficient experience and seniority deals with it. However, cases involving special difficulty or controversy, such as terrorist cases, suspicious deaths in custody, or possible euthanasia cases will be referred to CPS Headquarters Casework Directorate.
- G.6 On request, the CPS will meet the family of someone killed through criminal activity, to explain the decisions taken about prosecution. Any decision to drop or to substantially alter a charge is communicated to the victim's family, alongwith reasons for the decision.
- G.7 Murder cases may only be tried by specially chosen and trained judges. They are 'ticketed' to try murder cases, following the recommendation of the presiding judge on the relevant circuit. In England and Wales, there are 86 circuit judges, out of 628 in total, who are ticketed to try murder cases.
- G.8 Murder is a rare crime in England and Wales. In 2003-2004, there were 1,109,017 violent crimes recorded by the police, but only 0.1% of these involved homicide (853 deaths). Further, only about a third of these homicides result in convictions for murder (277 such convictions in 2003). The rest range from causing death by dangerous driving to manslaughter.

IS SOCIETY NOW SOFTER, OR TOUGHER ON MURDERERS?

- G.9 Homicide has, in common with some other forms of violent crime, been on the increase over the last forty years. In 1965, the year that the death penalty for murder was finally abolished, 58 people went to prison under a mandatory life sentence. By 2003, this figure had risen to 277. The numbers of those going to prison for murder roughly doubled between the late 1960s and the late 1970s, and doubled again between the late 1970s and the mid 1990s, since when the rate of increase has slowed. It should not be forgotten that there are also in the region of 80-90 convictions for attempted murder in any given year. Many of these may have been cases in which the victim only survived by luck or the skill of the surgeon.
- G.10 In recent times, governments have become ever tougher on convicted murderers, in terms of the time that they spend in custody. When most people conjure an image of an England and Wales with the death penalty for murder, they probably think back to notorious mid-twentieth century cases, such as those that ended in the executions of Ruth Ellis, Derek Bentley, and others. They thus come to imagine a society that kept the number of murders lower by punishing that crime with the ultimate penalty. In fact, the death penalty was at that time as often as not turned into one of life imprisonment through the exercise of the prerogative of mercy (this was done in 90% of cases involving women offenders).
- G.11 Furthermore, less well known is the fact that, at that time, once the penalty of death had been turned into one of life imprisonment, offenders were treated with surprising leniency.
- G.12 As pointed out above, in 1965, the year of the abolition of the death penalty, 58 murderers were given the mandatory life penalty. 25 of these offenders - nearly half - had been released from prison on licence *within a ten-year period* from the date of conviction. 22 more had been released on licence 10-15 years after conviction. Only seven served more than fifteen years behind bars.
- G.13 Contrast that statistic with the figures twenty years later. In 1985, of the 173 murderers who received the mandatory penalty, only 6 served less than 10 years behind bars. By way of contrast, 56 served more than 10 years before release, and the rest had not been released by 2002 (when these figures were compiled).
- G.14 Moreover, that period (the late 1960s to the late 1980s), saw a steady fall in the number of cases in which the Parole Board was prepared to recommend release. Parole was recommended in 50% of all lifer cases in 1968, but was only recommended in roughly 20% of mandatory lifer cases in 2003/4.
- G.15 By the year 2003, there were nearly 2,700 prisoners, in all, serving mandatory life sentences for murder in England and Wales, whereas there had been only 133 lifers in 1957. The increase is mainly due to an increasingly less indulgent answer given by all branches of government - Parliament, the executive, and the judiciary - to the question of how long the custodial element of a life sentence should be.

- G.16 There are still a small number of murderers who are released early (at or about the 10 year mark). We conducted a small study of a tranche of those convicted between 1994 and 1996, whose tariffs were set at ten years or fewer, to see what the circumstances may have been that led to their early release (see Appendix E).
- G.17 Predominantly, cases in which early release occurred involved some element of provocation from the victim, albeit provocation of a gravity insufficient to persuade the jury to acquit of murder and convict of manslaughter instead. After provocation, the most common mitigating factors were evidence of mental disorder, and evidence that the offender was in some way seeking to defend him or herself from attack but went too far in killing the victim. A significant number of such cases involved a defendant who was immature for their age at the time of the offence, even if they had no specific defence to murder.
- G.18 The abolition of the death penalty means that the length of time in custody under a life sentence has, for many people, effectively become the only benchmark for judging how seriously the crime is being taken. In that regard, as indicated above, there can be no denying that all branches of government have become progressively more punitive in their treatment of murderers.
- G.19 Previously, the mere fact that the death penalty had to be passed in almost all cases came to symbolise how seriously the crime was taken. The actual length of time spent in custody, when the death penalty was commuted, seems to have taken second place. The abandonment of that older standpoint must be a welcome development, whatever one's view on the mandatory penalty, or on the length of time that should be served in prison for murder.

WHO TYPICALLY COMMITS, AND IS A VICTIM OF, MURDER?

- G.20 The typical perpetrator of homicide is white (78% of cases), male (90% of cases), and between 21 and 40 years of age (63% of cases). He will have killed a spouse, lover, relative, offspring or acquaintance (70% of cases), using either a sharp or blunt instrument (50% of cases).
- G.21 Whilst these percentages are almost all very similar to those, for example, in the USA, there is one notable exception. In the USA, 67% of all murders (in 2003) involved the use of firearms, compared with a figure of between roughly 5% and 10% in recent years in England and Wales.
- G.22 The killing will typically have been of a single victim (98% of cases), and will probably have taken place while the offender was in a violent rage, or during a quarrel (54% of cases). In 72% of cases, the offender will have a criminal record, probably with a violent or sexual element to the crime(s) (50% of cases).
- G.23 The typical victim of homicide is also white (78% of cases), and male (68% of cases), although the proportion of female victims (32% of cases) is much higher than the proportion of female perpetrators (10% of cases). The victim may well be a little older, on average, than the perpetrator of homicide. The victim is over 30 years of age in 62% of cases. Only 2% of perpetrators are over 60 years of age, whereas 12% of victims are over that age.

- G.24 It would not be wrong, then, to think of homicide as an event typically arising out of quarrels or feuds between adult men in the prime of life, that have led to a loss of temper, probably on both sides, and hence to the use of violence.
- G.25 We must be careful in drawing conclusions, however, because these figures relate to 'homicide', meaning principally murder and manslaughter, and are not confined to murder cases.
- G.26 There are also further nuances in the statistics. One is the much higher proportion of women charged with murder where the victim was their partner (35% of women defendants), as compared with the proportion of men in that situation (19% of male defendants).

**WHEN PEOPLE ARE CHARGED WITH MURDER, WHAT DO THEY
TYPICALLY PLEAD?**

- G.27 At least half of all murder trials are taken up with claims that the police have got the wrong person. In another 10-15% of cases, there is a guilty plea, or no apparent defence.
- G.28 When it comes to defences currently related to the substantive law, our earlier research divided the figures between men and women defendants (the figures below are first those for men, followed by those for women).
- G.29 The most popular specific defence is lack of intent (25%; 29% of cases). It will be important to bear this in mind, if the mental element in murder is changed. After 'lack of intent', the most popular plea is provocation (18% in both cases), followed by self-defence (14%; 10% of cases) and diminished responsibility (8%; 14% of cases).

APPENDIX H

ALTERNATIVE VERDICTS IN HOMICIDE CASES

- H.1 What is the position where a jury is divided on its verdict in a homicide trial? This may occur either because some wish to convict of murder and some of a lesser form of homicide, or because they all opt for a lesser form of homicide, but for different reasons. It is an issue on which the law must speak with clarity if, following reform of the law of murder and homicide, more verdicts to choose between become available to the jury.
- H.2 At present, the issue may arise when some members of the jury wish to convict of murder and some of manslaughter, or because they all opt for manslaughter but for different reasons. This is, then, the context in which our discussion is placed.

DIFFERENT FORMS OF MANSLAUGHTER

- H.3 This topic is discussed extensively by Professor Richard Taylor,¹ who analyses three Court of Appeal cases.²
- H.4 The general principle appears to be that it does not matter that the jury disagrees on some of the facts, provided that the facts on which they do agree are sufficient to justify a verdict of guilty. These facts can include a set of alternatives as long as it would be possible for a person to believe that the alternatives are exhaustive and that the members of the jury are unanimous (or believe by the required majority) that this is so.
- H.5 Suppose that the jury members agree that the defendant deliberately stabbed the victim, and that the victim died as a result.³ Half of them believe that the defendant never intended to inflict a serious injury, but that there was no provocation for the attack. The other half believes that the defendant did intend serious injury, but was provoked. Thus, the first half would convict of involuntary manslaughter of the “unlawful act” variety. The second half would convict of voluntary manslaughter on the ground of provocation.
- H.6 In such a case they can arrive at a unanimous verdict of manslaughter, because the facts on which they agree (deliberate stabbing and consequent death) are in themselves sufficient for that verdict, without going into the questions of intent to inflict serious harm and of provocation. They would not differ over a finding of involuntary manslaughter. They would only differ on their reasons for not finding murder.
- H.7 Suppose, now, that the victim had marks of two different types of injury, and the circumstances are such that the defendant must have inflicted both of them, but it is uncertain which was the cause of death. Again the jury may be evenly divided between the two explanations, but can return a unanimous verdict of

¹ “Jury Unanimity in Homicide”, [2001] Crim L R 283.

² *Jones*, *The Times* 17 February 1999; *Carr* [2000] 2 Cr App R 149; *Boreham* [2000] 1 All ER 307.

³ *Jones*, above.

manslaughter, because they are unanimously of the opinion that the defendant must have caused the death by an unlawful act one way or the other.

- H.8 Suppose, however, that the circumstances are such that the defendant must have inflicted one or other of the two injuries found on the victim, but not necessarily both. Suppose that half the jury believes that the defendant inflicted only the first injury, and that that was the cause of death. The other half believes that the defendant inflicted only the second injury and that *that* was the cause of death. In this case we have two completely inconsistent narratives, even though each, taken by itself, would result in a finding of guilty of manslaughter by unlawful act. They do not add up to an agreed certainty, as the questions of who inflicted the injury and of which injury caused the death are logically independent of each other. There is simply no evidential basis on which a person could conclude "It is possible that the defendant inflicted injury A and that the victim died of injury A, or that the defendant inflicted injury B and that the victim died of injury B, but not that the defendant inflicted injury A and that the victim died of injury B or vice versa".
- H.9 This means that it is usually improper to convict where half the jury believes that there is an unlawful act (or provocation) and the other half believes that there is gross negligence. Suppose that it is certain that the defendant died as the result of a negligently performed operation. Half the jury believes that the victim never consented to the operation but that the negligence was not gross. The other half believes that the victim consented but that the negligence was gross. Again these do not add up to a certainty of manslaughter, because the two issues are logically independent: there is no basis to conclude "I think the operation was done without consent, but *if* there was consent then it was grossly negligent".
- H.10 There could however be a case in which the defendant performed two acts, one unlawful and the other grossly negligent, and the jury only differs on which caused the death.⁴ Here the jury can convict of manslaughter, as both the unlawfulness and the gross negligence have been found unanimously, and one can logically conclude that one or other must have caused the death, so that one way or the other the defendant must have been to blame.
- H.11 In summary it is not sufficient that there is unanimity of outcome. The jury must agree (unanimously or by the required majority) on a set of propositions, which may include one or more sets of exhaustive alternatives. However, this set of propositions must be capable of being consistently held by a single individual, and must be sufficient to establish the offence.
- H.12 The above discussion concerns the sort of direction that ought to be given to the jury if they of their own motion explain their division of opinion and seek guidance about what verdicts are available to them. Further questions are:
- (1) how far the court should give directions in this sort of detail even if the jury does not request them;

⁴ Such as *A-G's Reference (No 4 of 1980)* (1981) 2 All E R 617.

- (2) whether a unanimous verdict of manslaughter can be impugned on the ground that the court did not ask the jury by which of the possible alternative routes they arrived at it.

In other words, must the court actively look for ambiguity, either in summing up or following the verdict?

H.13 In *Jones* it was held that, where a verdict of manslaughter is returned as an alternative to murder, and therefore the only issue can be provocation versus lack of intent to kill or do serious harm, the court is under no obligation to enquire about the basis of the verdict. It may do so if it wishes as an aid to sentencing, but only if the judge warned the jury in the course of summing up that he or she intended to do so.

H.14 It remains uncertain what the position would be in a case like that in paragraph H.8 or paragraph H.9 above, where the two alternative possible bases for a manslaughter verdict do not add up to a certainty. It seems to us that:

- (1) the judge in summing up should explain the two alternatives carefully, and direct that the jury should not convict unless it can agree unanimously (or by the required majority) on one of them; but
- (2) following such a verdict, there is no obligation on the judge to ask which of the two bases the jury convicted on; though once more, he or she may do so as an aid to sentencing provided that due warning has been given in the summing up.

H.15 As stated, problems are more likely to arise when the jury is divided between unlawful act (or provocation) manslaughter and gross negligence than when it is divided between two forms of unlawful act, or between unlawful act and provocation. This however is a matter of degree, and it is possible to devise exceptional cases on both sides of the line. The only reason is that instances of unlawful act or provocation manslaughter are likely to have more factual features in common with each other than with instances of negligent manslaughter: it is not because negligent manslaughter is in any way treated as a different offence.

H.16 For as long as manslaughter continues to be treated as a single offence which may take various factual forms, it seems unlikely that there is anything unsatisfactory in the law as explained above. Any complexities follow from the logic of the factual situation rather than from irrationalities in the law as such.

MURDER AND MANSLAUGHTER

H.17 A more difficult situation arises when the jury is divided between those who wish to convict of murder and those who wish to convict of manslaughter. Again the position may vary according to whether the manslaughter alternative takes the form of provocation or "unlawful act" on the one hand or gross negligence on the other.

Provocation/unlawful act

- H.18 Logic would indicate that, in this situation, the jury should be able to convict of manslaughter. All are agreed that there was an unlawful act causing death: the only issue is whether there is an element present that would make it murder. There are two possible counter-arguments to this, one of substance and one of procedure.

Does manslaughter exclude murder?

- H.19 The argument of substance is that there is no unanimous finding of manslaughter, because it is part of the definition of manslaughter that it does not amount to murder. It is quite true that textbooks often seem to talk in this way, but this is for the sake of brevity, to distinguish murder from *mere* manslaughter.
- H.20 If the issue of provocation arises, and provocation is not disproved beyond reasonable doubt, the jury can certainly return a verdict of manslaughter without actual proof of provocation. Similarly if the issue of intent to cause death or serious bodily harm, arises, and that intent is not proved beyond reasonable doubt, the jury can certainly return a verdict of manslaughter, without the need for intent to be disproved. Thus “not-murder” is descriptive of the kind of situation in which manslaughter verdicts are needed, but it is not a formal ingredient of the offence of manslaughter to be proved beyond reasonable doubt.
- H.21 In other words a verdict of manslaughter does not require certainty that the killing did not amount to murder. It would be absurd if the jury had to acquit a defendant entirely because it was not sure whether to convict of murder or manslaughter. Murder implies manslaughter, in the same way that causing grievous bodily harm with intent to do grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861, implies the malicious infliction of grievous bodily harm, contrary to section 20 of the Act.

Separate verdict on murder?

- H.22 The argument of procedure is that a jury divided between two opinions held with certainty is not the same as a jury in doubt. A unanimous verdict (or the required majority) is required for an acquittal as much as for a conviction. Thus to allow the jury to convict of manslaughter in this situation is wrong because it lets the defendant off the hook on the charge of murder. In fact the jury was divided on the question of murder, and the defendant ought to be re-tried.
- H.23 The difficulty with this proposition is that, if the defendant is re-tried and the second jury is also divided between murder and manslaughter, the defendant will then go free on all charges. Requiring a second trial instead of accepting a manslaughter verdict looks like a bet of “double or quits”.
- H.24 One possibility would be for the jury (at the first trial) to return a verdict of manslaughter and at the same time report that they were unable to agree on murder. It is true that there would then be a major problem about whether it would be proper to order a re-trial on the issue of murder alone, or whether, although murder and manslaughter are technically separate offences, this would in effect amount to trying the defendant twice for the same crime. As against this, there can be no doubt but that such a verdict would be available if the indictment

contained a count of manslaughter in addition to one of murder, though this would give rise to the identical problem about re-trials.

- H.25 Logically it should be possible for the jury to return such a verdict (guilty of manslaughter; disagreed on murder) even if the indictment is for murder alone, as every charge of murder necessarily contains a charge of manslaughter. This, however, is only as a matter of theoretical law. In practice the courts insist on unanimity of outcome.
- H.26 Judge Clarke⁵ points out that a similar problem arises in the converse situation, where the jury has unanimously rejected murder but is divided between manslaughter and acquittal. Here too, if the jury simply reported disagreement the defendant would be re-tried, and possibly convicted of murder by the second jury. This could be avoided if the indictment contained a manslaughter charge and the jury acquitted of murder and reported disagreement on manslaughter. He suggests that, in any case where on the facts this kind of disagreement seems likely, the indictment should be amended to add a manslaughter charge. Such a solution could be adapted to the present problem.
- H.27 Returning to the case where the jury is divided between murder and manslaughter, three situations are possible:
- (1) The members who wish to convict of murder are persuaded by the others to back down, on the reasoning that they will not get a verdict of murder anyway and that a verdict of manslaughter is better than a re-trial: the division of opinion then never comes to light.
 - (2) The jury reports that they are unable to agree on a verdict, and there is a re-trial on everything.
 - (3) Judge Clarke's suggestion (or rather its mirror image) is adopted, a count of manslaughter is added to the indictment, and the jury convicts on that and reports disagreement on murder.
- H.28 If this last suggestion is followed, the court will then have to decide whether it is proper to order a re-trial on the issue of murder. If there is a re-trial, presumably the first court will defer sentencing on the manslaughter count until the murder trial is over, to avoid double sentencing.

Recklessness/gross negligence

- H.29 In some cases there is a clear choice between murder and negligent manslaughter: for example, where the defendant left a well uncovered by night and the jury is divided on whether this was purely reckless or set as a deliberate trap. Here it would be possible for one person to conclude that this action is so unusual in itself that the defendant *must* either have intended harm or not have cared. The situation will then be the same as in the unlawful act cases. It ought theoretically to be possible to return a verdict of manslaughter while reporting disagreement on murder, but this may require the addition of a manslaughter count.

⁵ Clarke, "Jury Unanimity – A Practitioner's Problem", [2001] Crim LR 301.

H.30 In other cases, however, the grounds for finding murder and the grounds for finding gross negligence will be so different that it would be impossible for the same person to believe that, while neither is certain in itself, one or the other must have occurred. The situation is then analogous to that of the negligent operation (paragraph H.9 above), and the jury will have to report disagreement, necessitating a re-trial.

Conclusion

H.31 The problem is not serious enough to require a statutory solution, unless it turns out that the same thing often happens in cases other than homicide where the jury is divided between a serious offence and a lesser offence contained within it. In the case of wounding and grievous bodily harm, Judge Clarke reports that the usual practice is to charge both the section 18 and the section 20 offence. We are not aware of a practice where a jury convicts of the section 20 offence and reports disagreement on the section 18 offence: that is, whether the court and the prosecution must accept the situation or there can be a re-trial on the section 18 offence alone. There may be many other examples of lesser offences contained within more serious offences where the same difficulty could occur.

THE EFFECT OF CREATING MORE HOMICIDE OFFENCES

H.32 A key question is whether this problem would be aggravated if more homicide offences were created as a result of proposals such as those in the main body of this Consultation Paper. Depending on how the new offences are defined, the problem could occur in two different forms:

- (1) In some cases, two offences may “nest”. That is, the more serious offence is defined as the less serious offence plus some aggravating circumstance or state of mind, and every instance of the more serious offence is by definition also an instance of the less serious offence. In that case, the position where the jury is divided between the two offences will be the same as that for murder and manslaughter, as described above. The desired position is that, whether or not the lesser offence is specifically charged, the jury should be able to convict of the lesser offence and report disagreement on the more serious offence.
- (2) In other cases, two offences may exist side by side, in such a way that neither implies the other, even if there is some overlap. An example would be if unlawful act manslaughter and negligent manslaughter were made into separate offences. In such a case, even if it is logically possible on the facts to conclude that the defendant must have committed one or the other, it will be impossible to convict of either if the jury is split or undecided between the two.

H.33 The basic point is that it is not sufficient that the jury agrees on a single narrative, and that any alternatives within that narrative are logically exhaustive. The alternatives must also support the same nominal offence. That is, there must be unanimity of outcome as well as unanimity of narrative.

- H.34 For this reason, proliferation of offences should be avoided so far as possible, and where there are several related offences they should be designed to nest. For example if it is desired to separate out negligent manslaughter, it should be defined as any culpable killing where the mental element is *at least* negligence: it should therefore include all instances of unlawful act manslaughter, provoked manslaughter and murder.
- H.35 Another possibility would be to enact a general provision that, in defined cases where a court is uncertain whether a defendant has committed greater offence A or lesser offence B, but is certain that he or she must have committed one of them, it may convict the defendant of offence B. This would cover three categories of case:
- (1) Where offence A contains the same basic ingredients as offence B, but is differentiated from it by some aggravating circumstance;
 - (2) Where offence A contains the same factual ingredients as offence B, but is differentiated from it by some more culpable state of mind;
 - (3) Where offence A is a substantive offence and offence B is that of being an accessory or some other inchoate offence connected to A.
- H.36 This last suggestion involves a fiction that offence B has been committed when on the facts it might well not have been. It might also prove extremely difficult to draft. Some variant of it might well be needed for category (3), but that is a separate project. For categories (1) and (2), it would be better to seek this result by careful definition of the offences.

APPENDIX I

PERSONS AND ORGANISATIONS

I.1 We would like to record our gratitude to:

- (1) Professor Barry Mitchell, Coventry University, for making available his report on a public survey of murder and mandatory sentencing in homicides;
- (2) Professor Claire Finkelstein, University of Pennsylvania Law School; Professor Winifred H Holland, University of Western Ontario; Professor Ian Leader-Elliott, University of Adelaide; Ms Antje Pedain, Magdalene College, University of Cambridge; Professor John Spencer QC, Selwyn College, University of Cambridge; and Dr Victor Tadros of the University of Edinburgh, for providing us with studies of the law of other jurisdictions;
- (3) the High Court and Circuit judges who completed a question paper on options for reform of the fault element of murder;
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I.2 In addition, during the months leading up to the publication of the Consultation Paper, the Law Commission's Criminal Law Team prepared a considerable number of draft papers. These were circulated to a number of individuals and organisations for comment. Their responses have been invaluable in the preparation of this paper. We thank:

- (1) Age Concern;
- (2) His Honour Judge Broderick;
- (3) Dr Madelyn Hicks, Consultant Psychiatrist and Honorary Lecturer at King's College, University of London;
- (4) Justice for Women;
- (5) Kids Company;
- (6) Professor Ronnie Mackay, De Montfort University;

- (7) Dr B Mahendra, Barrister and Consultant Psychiatrist;
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- (17) Professor William Wilson, Queen Mary, University of London.

I.3 We thank the members of the Advisory Group to the Criminal Law Team for making themselves available for meetings and for commenting on the draft papers referred to in paragraph I.2 above:

- (1) Commander David Armand, Metropolitan Police;
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- (3) Lord Justice Auld;
- (4) Mr Alphege Bell, 2-4 Tudor Street Chambers;
- (5) Mr Colin Chapman, Crown Prosecution Service;
- (6) Professor Ian Dennis, University College London;
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- (9) Ms Deborah Grice, Home Office;
- (10) Mr Bruce Holder QC, 6 King's Bench Walk;
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