

Summary: Intervention & Options

Ministry of Justice

Coroners and Justice Bill: homicide clauses

Stage: Legislation

Version: 2

Date: 14 January 2009

Related Publications: <http://www.justice.gsi.gov.uk/publications/cp1908>

- “Murder, Manslaughter and Infanticide: Proposals for Reform of the Law”, Summary of responses and Government position, Ministry of Justice, 14 January 2009
- “Murder, Manslaughter and Infanticide: Proposals for Reform of the Law”, Consultation Paper, Ministry of Justice, July 2008
- “Murder, Manslaughter and Infanticide”, Law Commission Report No 304, November 2006 - <http://www.lawcom.gov.uk/docs/lc304.pdf>

This Impact Assessment is available to view or download at:

<http://www.justice.gov.uk/publications/coroners-justice-bill.htm>

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What is the problem under consideration? Why is Government intervention necessary?

In 2003 the Government announced a review of the law of homicide in response to concerns about the law, in particular in the context of domestic killings. Since then, the Law Commission and Government have taken forward the review with extensive consultation. The conclusion of the review is that reform is necessary to ensure fairness and justice. Government intervention is necessary because primary legislation is needed to give effect to the recommendations.

What are the policy objectives and the intended effects?

The policy objective is to ensure the law is fairer, clearer and up to date in the following areas:

- partial defences of provocation and diminished responsibility; and
- infanticide.

Full details are set out in the consultation paper on proposals for reform of the law and the summary of responses to consultation and Government response (referenced above).

What policy options have been considered? Please justify any preferred option.

During the review process many options have been considered by the Law Commission and Government, from wide ranging reform to many aspects of the law of murder to doing nothing. Following consultation, the Government has concluded that reform is necessary but should at this stage be limited to reform of the partial defences, where the main concerns with the law arose, and infanticide, where the reforms are minor, have no cost and remedy a potential loophole in this sensitive area.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

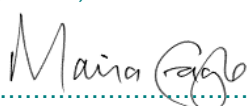
The costs will be reviewed by monitoring the changes in numbers of people convicted of murder and manslaughter each year. These figures are published annually by the Ministry of Justice.

The benefits of improved justice and increased public confidence will not be measured directly, but will be apparent in the degree to which relevant cases are raised by practitioners and interested groups.

Ministerial Sign-off For consultation stage impact assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options

Signed by Maria Eagle MP, Parliamentary Under Secretary of State at the Ministry of Justice



..... Date: 14 January 2009

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' The key costs are expected to arise as a result of increased demand for prison places. We estimate that this will build up to an additional 100 - 200 places at a cost of £4-8 million per year. There may be a small impact on courts, with perhaps one additional trial per year at negligible additional cost.				
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">One-off (Transition)</td> <td style="width: 30%; text-align: center;">Yrs</td> </tr> <tr> <td>£</td> <td></td> </tr> </table>		One-off (Transition)	Yrs	£	
	One-off (Transition)		Yrs			
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	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">Average Annual Cost (excluding one-off)</td> <td></td> </tr> <tr> <td>£ 4-8 million</td> <td></td> </tr> </table>		Average Annual Cost (excluding one-off)		£ 4-8 million	
Average Annual Cost (excluding one-off)						
£ 4-8 million						
Total Cost (PV)		£20.9 million				
Other key non-monetised costs by 'main affected groups'						

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' These changes are aimed at bringing clarity to the law, improving justice and enhancing public confidence.				
	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">One-off</td> <td style="width: 30%; text-align: center;">Yrs</td> </tr> <tr> <td>£</td> <td></td> </tr> </table>		One-off	Yrs	£	
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Average Annual Benefit (excluding one-off)						
£						
Total Benefit (PV)		£				
Other key non-monetised benefits by 'main affected groups'						

Key Assumptions/Sensitivities/Risks An additional 10-20 murder convictions a year in place of manslaughter Average time served for manslaughter: 5.5 yrs; average time served for murder: 14 yrs

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?	England and Wales			
On what date will the policy be implemented?	To be decided			
Which organisation(s) will enforce the policy?	CJ agencies			
What is the total annual cost of enforcement for these organisations?	£ 4-8 million			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	N/A			
What is the value of the proposed offsetting measure per year?	N/A			
What is the value of changes in greenhouse gas emissions?	N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			No impact
Increase of £	Decrease of £	Net Impact	£

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

Murder Review Costs Analysis

Introduction

This impact assessment examines the costs and benefits of the proposed reforms to the law of murder contained in the homicide clauses 39-44 in the Coroners and Justice Bill, which cover reform of the partial defences to murder of provocation and diminished responsibility and of the law of infanticide.

The clauses are the result of extensive consultation on reform of the law of murder which started in 2003 with a review conducted by the Law Commission at the instigation of the then Home Secretary. The Law Commission produced two documents¹, detailing proposal for reform of several aspects of the law of homicide, including proposals for a new structure for the offences of homicide. Having carefully considered the Law Commission's reports, the Government decided to take a staged approach to reform and commence with reform in the areas in most need of it. In July 2008, we published "Murder, manslaughter and infanticide: proposals for reform of the law" ("the Consultation Paper") with proposals for reform to provocation, diminished responsibility, complicity to murder and infanticide. In the impact assessment that accompanied that document we said:

"The purpose of this stage of the murder review is to reform aspects of the law of murder which have become outdated or unclear over time, because of changing attitudes in society or developments in the common law. The focus is on areas where there are identifiable problems and the changes are more about fine-tuning than wholesale reform. The review has focused on the law as it relates to provocation, diminished responsibility, infanticide and complicity to murder.

In none of areas that the review has looked at would the changes result in more cases entering the criminal justice system or in any more criminal convictions. The changes would affect the boundaries between offences, in some cases altering the offences of which defendants are convicted and, thus, the sentences imposed.

To inform our consideration of the impact of the proposed changes, we have analysed the sentencing remarks of murder and manslaughter cases in 2005. We looked at approximately 90% of murder and 80% of manslaughter, cases and assessed how they might be affected by our proposals, in terms of the trial procedure, the verdicts and the sentences imposed.

This paper sets out our conclusions. We think only the criminal justice system will be affected: we do not anticipate costs will be incurred outside the criminal justice system. Costs are considered separately for each of the major policy issues: provocation, diminished responsibility, infanticide and complicity to murder."

Much of the analysis that follows replicates the analysis conducted before consultation, as the changes that have been made to the proposals on provocation and diminished responsibility following consultation have been aimed at ensuring the policy is more precisely achieved in the clauses rather than changing the policy.

¹ *Partial Defences to Murder*, (2004), Law Com No290 and *Murder, Manslaughter and Infanticide* (2006) Law Com No.304.

However, following consultation the Government has decided against reform of complicity to murder at this stage. This was because of widespread concern about reforming this area separately from reform of secondary liability in the criminal law in general.

Full details of the responses to consultation are set out in the paper “Murder, manslaughter and infanticide: summary of consultation and Government response” (“the Government Response”

This impact assessment therefore looks at the impact of the proposed changes to the law of provocation, diminished responsibility and infanticide, as set out in the Coroners and Justice Bill.

Provocation

Provocation is a partial defence to murder which, if pleaded successfully, reduces a conviction for murder to manslaughter. The law on provocation is set out in the Homicide Act 1957 but it has also developed through case law. There is a concern that the current partial defence is too easy to access by those who kill after losing their tempers but that it does not provide a sufficiently tailored response to those who kill out of fear of serious violence.

The Government therefore proposes to abolish the existing law on provocation and to replace it with new partial defences tailored to those who kill as a response to:

- a fear of serious violence; and/or
- circumstances of an extremely grave character, giving rise to a justifiable sense of being seriously wronged.

“Fear of serious violence”

As we explained in more detail in the Consultation Paper, we do not see this new partial defence as extending the application of the existing partial defence but as providing a more logical means of reaching outcomes which we think are broadly being reached now. For this reason, we do not think that the introduction of this partial defence would impact on the nature of court cases or on sentencing.

We do not believe that the changes we have made in respect of the “fear of serious violence” defence, as set out in the Government Response to consultation, alter the analysis above.

“A justifiable sense of being seriously wronged”

This partial defence would apply only in circumstances of an extremely grave character. In the initial impact assessment we based our analysis on a slightly different wording of this limb of the defence, referring to “exceptional circumstances”. The change in wording has been made because of concerns that “exceptional” gave an impression of frequency rather than seriousness of the circumstances. We believe that the emphasis should be on gravity and the new wording reflects that. However, we think that in terms of numbers the effect will be the same, that because of the high bar set for the defence only a very few cases will succeed on this basis and so the proposed new defence will have a narrower application than the current partial defence of provocation. This is likely, therefore, to impact on both trials and outcomes.

From our sample of 2005 cases, we identified 20 where provocation appeared to be the basis of the manslaughter conviction, and 15 (including 17 defendants) where pleas of provocation appeared to have failed and resulted in a murder conviction.

We think trials would be likely to be affected in two ways by the new, narrower partial defence. On the one hand, the CPS would accept fewer pleas to manslaughter, thus **increasing** the number of trials. On the other hand, some defendants who currently plea manslaughter unsuccessfully would plead guilty to murder in future (because their chances of succeeding with

a manslaughter plea would be so reduced), thus **reducing** the number of trials. We think that these effects would broadly cancel one another out: our analysis of the 2005 cases suggested perhaps one additional trial overall. While this would lead to a small increase in cost, this needs to be seen in the context of the cost of a cases involving sentencing alone. Such cases vary in length depending on the issues in the case which will involve pre-sentencing representation and can involve Newton hearings to establish certain facts. The costs in terms of legal representation and court time are likely to be shorter in sentencing only cases, but we believe that the *additional* costs of one case are likely to be relatively low.

As far as outcomes are concerned, the narrower partial defence would lead to some defendants who are currently convicted of manslaughter being convicted of murder instead. We estimate that there might be an additional 10 – 20 murder convictions a year. As the average time served in custody for murder is 14 years, compared to 5½ years in custody for manslaughter, this would increase demand for prison places. We estimate that this would build up over 8 years to between 100 and 200 prison places, with the effect starting to be felt around 5 years after implementation, i.e. at the point when the offenders concerned would have been released had they been serving a determinate sentence for manslaughter. The full effect would not be felt for around 15 years. This would represent an additional pressure on the prison population, not factored into current projections, and could therefore require additional capacity. The total resource cost of these extra places would build up to £4-8m per year (at £40,000 per place) with £20-40m capital cost.

During consultation, one respondent suggested that the estimate of 100 – 200 places is conservative because the average of 14 years for time served in murder cases is based on data which precedes the effect of the Criminal Justice Act 2003. The 2003 Act introduced a statutory framework for sentencing in murder cases, under which the starting point for determining the term for murders is 15 years, where the defendant is an adult and there are no especially serious factors.

We have looked again at the data available and believe that an estimate of 14 years is probably about right. This is because in the cases which resulted in murder in 2005, where provocation appeared to have been pleaded unsuccessfully, many of the minimum tariffs were below 15 years (with discounts of 1 to 4 years), in just one case the offender received a higher tariff, with an additional 3 years on the 15 year starting point.

Given the margin of error in the estimates, we believe that an average of 14 years represents as accurate a starting point as possible.

Impact of changing provocation

In summary, we expect that the additional costs resulting from the changes to provocation would be in the region of £4-8 million annually. The “do-nothing” option would have no direct financial costs associated with it.

However the benefits of the change would be greater clarity in the law, improved justice and increased public confidence.

Diminished responsibility

Diminished responsibility is also a partial defence to murder which, if successfully pleaded, reduces a conviction for murder to manslaughter. The Law Commission recommended that the law be clarified and updated to reflect developments in medical knowledge. The Government’s proposals aim to do this.

Given the nature of the changes proposed, we do not expect any significant shifts in the numbers or types of cases which benefit from the partial defence of diminished responsibility, and our analysis of the 2005 cases supports this conclusion. We do not therefore think that there will be an impact on the courts or prison population as a result of the changes.

Infanticide

The law of infanticide allows mothers who kill their babies (while they are under a year old) while suffering the after-effects of birth, to be convicted of infanticide instead of murder or manslaughter. Convictions for infanticide currently occur less than once a year².

The current law appears to be working satisfactorily. The Government proposes a minor change to make clear, in the light of a recent Court of Appeal judgment, that infanticide cannot be charged in circumstances which would not otherwise be homicide. We do not think that this is happening in practice – the loophole being plugged is a theoretical one – so we do not expect the change to have any impact on courts or sentencing.

Cost benefit analysis summary

The costs arise from the proposals in relation to provocation. The Government believes that there are homicide cases at present where offenders are able to reduce their convictions to manslaughter on the basis of provocation in circumstances where a more just outcome would be murder. This is unfair on the victims' families in such cases and wrong in principle. The Government believes that the need for justice in homicide cases is sufficiently great as to outweigh the particular costs involved.

² Coleman, K. (2008) Homicide. In D. Povey (Ed.) Homicides, Firearm Offences and Intimate Violence 2006/07. Home Office Statistical Bulletin 03/08.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	Yes	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	No

HUMAN RIGHTS IMPACT ASSESSMENT

Human Rights considerations are set out fully in the Explanatory Notes which accompany the Coroners and Justice Bill.

EQUALITY IMPACT ASSESSMENT

Introduction

Concern about the differential impact on men and women of the law on homicide has been a key driver for the review of the law of murder. In June 2003 the then Home Secretary asked the Law Commission to consider the partial defences to murder of diminished responsibility and provocation and to have particular regard to their impact in the context of domestic violence. The Law Commission published their report, 'Partial Defences to Murder', in 2004 ("the Partial Defences Report")³. The Government then asked them to review the law of homicide more generally, and their further report, 'Murder, Manslaughter and Infanticide' ("the Murder Report")⁴ was published in November 2006.

In this second report the Law Commission expressed concern at the piecemeal way in which the law on homicide has evolved and the fact that some aspects are now out of date and others uncertain. This affects the operation of the law in practice and public confidence in it. The Law Commission made wide-ranging recommendations for reforms, including a new structure for homicide, reform of the partial defences to murder of provocation and diminished responsibility (which, where successful, can reduce a charge of murder to manslaughter), reforms to the law on duress and complicity in relation to homicide and improved procedures for dealing with infanticide.

The Government initially decided, because of the scale of the reforms proposed and the importance of this area of law, that a step-by-step approach would be appropriate, with the review being conducted in two phases. The step-by-step approach would enable some evaluation of the impact of the first set of changes before implementing any further one. The first phase, announced in December 2007⁵, focused on:

- the partial defence of provocation;
- the partial defence of diminished responsibility;
- complicity; and
- infanticide.

Detailed legal and policy considerations were set out in the Consultation Paper 'Murder, Manslaughter and Infanticide: Proposal for Reform of the Law' ("the Consultation Paper")⁶. At the same time, the Government published an Equality Impact Assessment which invited comments on the equality issues raised.

The Government received over 70 responses to the consultation paper and also held workshops to discuss the proposals with stakeholders. Amongst the responses there were some comments on the equality impact of the proposals. The Government's response to consultation has also been published⁷.

³ *Partial Defences to Murder*, (2004), Law Com No290.

⁴ *Murder, Manslaughter and Infanticide* (2006) Law Com No.304.

⁵ Written Ministerial Statement, *Homicide*, 12 December 2007, Hansard: Column 43WS.

⁶ *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (28 July 2008) Ministry of Justice Consultation Paper CP 19/08.

⁷ *Murder, Manslaughter and Infanticide: summary of responses and Government position*

This Equality Impact Assessment updates the one published at consultation stage, it repeats the analysis of that paper on the extent to which the current law of murder, in the areas for reform, has a differential impact on any particular groups of people. Then, as in the previous assessment, considers the likely impact of the Government's proposals to be introduced in the Coroners and Justice Bill and highlights the areas commented on during consultation, taking into account comments received during consultation.

Methodology

In order to make an assessment of the way that the law is currently working and the possible impact of the reforms, a number of sources of information were used: the Law Commission's two reports⁸, the homicide statistics collected by the Home Office⁹ and the sentencing remarks in murder and manslaughter cases in 2005.

The homicide statistics collected by the Home Office provide information on homicide victims, defendants brought to trial and the offence they are convicted of. The data also provide diversity information about the victims and defendants, including gender, ethnicity, and age.

However, the regular data collections do not provide all the detail needed about the specific issues that the review is looking at; for example, the basis of a manslaughter conviction will not always be clear. We have therefore analysed sentencing remarks made by judges in murder and manslaughter cases to provide more qualitative detailed information about homicide trials and how the law is operating at present. The sentencing remarks have been used to make an assessment of the types of defences raised, the outcome in the trial and how any proposals for reform might affect outcomes in future.

The sentencing remarks considered were those made in murder and manslaughter trials completed in 2005, the latest year for which we had the necessary data to identify the cases. Sentencing remarks do not, of course, provide a full picture of any particular case and some provide more detail than others, but taken together, they do provide a good overall summary. It was not possible to locate all the remarks from that year, but we did locate approximately 90% of the remarks in murder cases and 80% of those in manslaughter cases which we think is a robust and representative sample.

Consultation and Involvement:

Both of the Law Commission's reports followed extensive consultation (for a full list of consultees see Appendix H of the Partial Defences Report and Appendix G of the Murder Report). We began the second stage of the review by contacting a wide range of individuals and organisations from the criminal justice system, academia, the medical professions and non-governmental organisations.

Following that stage and taking into account the views of stakeholders, we published the Consultation Paper with draft clauses. Along side it we published an Equality Impact Assessment inviting views on the equality issues raised. We sent the Consultation Paper to a wide range of stakeholders, including a number of groups with interests in diversity.

⁸ The Partial Defences Report and the Murder Report.

⁹ Coleman, K (2008) Homicide. In D Povey (Ed.) *Homicides, Firearm Offences and Intimate Violence 2006/07*. Home Office Statistical Bulletin 03/08.

We also held a further three workshops to discuss the proposals in the Consultation Paper on provocation, diminished responsibility and complicity to murder and infanticide.

After the formal period of consultation, the Government published a summary of the responses to the consultation, setting out its intention to continue along the lines proposed in the Consultation Paper in terms of reforms to provocation, diminished responsibility and infanticide. In terms of complicity to murder, in response to consultation the Government has decided not to proceed with reform at this stage (further details are available in the Government's response).

A full list of those who attended the workshops and those who responded to the Consultation Paper is available in the annexes of the Government response.

Provocation

Equality concerns

Gender

There are long-standing concerns about whether the current partial defence of provocation impacts differently on men and women and it was partly these concerns which triggered the current review. When in June 2003 the then Home Secretary requested the Law Commission to consider the partial defences to murder, he specified that the Commission should have particular regard to the impact of the partial defences in the context of domestic violence.

The concerns, which were also voiced by some of the stakeholders whom we consulted, can be broadly summarised as follows:

- that it is too easy for the partial defence to be made out by men who kill their female partners and claim that they were provoked by their victim's infidelity or ending of the relationship; and
- that it is too hard for it to be made out by women who kill abusive partners, partly because this is not provocation in the sense that the statute originally intended and partly because the requirement for a loss of self-control (it is claimed) privileges men's typical reaction to provocation over women's.

How provocation is currently used

Unlike diminished responsibility, convictions for manslaughter on the grounds of provocation are not recorded separately from manslaughter in general, and the sentencing remarks which we examined do not always make clear the exact basis of the verdict. However, we have identified 20 cases where provocation appears to have been the basis of the conviction.

19 of the 20 defendants in these cases were men, but none involved men killing female defendants. The victim in the case involving a female defendant was also female, and this killing occurred in the context of a dispute between two families. The predominance of male defendants using provocation successfully appears to offer some support to the concern that the defence is oriented to men, although this has to be seen in the context of the higher number of men convicted of manslaughter than women.

The nature of the defendant/victim relationships is summarised in the table below:

Nature of relationship	Total no
Feuds (between families, neighbours etc)	7
Relative (son/father/stepfather/brother etc)	5
Other	8
	20

On the other hand, our sample of murder convictions includes 15 cases (where defendants were men and victims of the offence were women) in which pleas of provocation based around infidelity and sexual jealousy appear to have been rejected.

Males who kill females

Out of our sample of cases overall, we have identified 147 cases involving male defendants killing female victims (this includes female children). 60 seem to have involved men killing their female partners. Of all the cases involving men killing females, 117 (80%) resulted in murder convictions.

30 cases, involving 31 defendants, resulted in manslaughter convictions, of which 15 were on the grounds of diminished responsibility, 14 were unlawful acts and 2 gross negligence. 10 seem to have involved men killing their female partners.

Females who kill males

Out of our sample of homicide cases in 2005, we have identified 34 cases (35 defendants) involving women killing 34 male victims (including male children). Of these cases, 19 defendants were convicted of murder, and 16 of manslaughter. As far as we can tell from the available information, 5 of the murder cases involved women killing their male partners, but not in the context of physical abuse by the victim. In the manslaughter cases, by contrast, 12 cases involved women killing their male partners, in about a third of which the woman had previously suffered physical violence at the hands of the victim.

What do we conclude from this?

This evidence supports the view put forward by the Law Commission in their report, "Partial Defences to Murder", that "juries are less prone than is sometimes thought to return verdicts of manslaughter on grounds of provocation where the provocation alleged is simple separation or infidelity"¹⁰. It also suggests that courts are less prone than is sometimes thought to convict of murder women who kill abusive partners.

However, problems remain. If the courts are producing broadly the right outcomes, they have to do so at times by pushing the current law to its limits. First, there is a tension between a continuing requirement for "a sudden loss of self-control" and an accommodation of the "slow-burn" responses associated with domestic abuse cases. Second, and linked to this, there is the difficulty of applying an emotional response founded primarily on anger to situations where the predominant emotion is fear. This risks creating practical problems when defendants are deciding how to run their defences since it is hard to run the two in parallel. The Law

¹⁰ The Partial Defences Report, para 3.145.

Commission believe that defendants sometimes plead guilty to manslaughter for fear that a plea of self-defence might fail and leave them with a murder conviction¹¹.

It was also clear from our discussions with stakeholders that concerns remain about the operation of this partial defence in practice and its appropriateness for cases involving domestic violence. In particular, during the formal consultation period there was a view from some stakeholders that because the evidence on which we based our conclusion dated to 2005 it would not reflect some of the impacts of more recent case law.

How are we responding to this?

We are responding to this by proposing the abolition of the existing provocation partial defence and its replacement with two new partial defences specifically tailored to the situations we want them to cover:

- The new “fear of serious violence” partial defence would mean that those (men and women) who kill out of fear of violence would no longer have to shoehorn their defence into a partial defence designed for a different (and, arguably, more male-oriented) set of circumstances.
- The new “words and conduct” partial defence would apply only in circumstances of an extremely grave nature, so eliminating its possible application to routine relationship and domestic conflicts – for use by either men or women; this would be reinforced by an explicit statement on the face of the statute that sexual infidelity on its own could not constitute grounds for the defendant to have a justifiable sense of being seriously wronged to an extent which would warrant reducing murder to manslaughter.

We are also proposing to amend the current case law requirement for a loss of self-control to be sudden, a requirement which sits uncomfortably with the “slow-burn” responses found in some domestic violence cases. During consultation, some respondents remained concerned that “suddenness” could be read back into the legislation, and were concerned that this would perpetuate a gender bias. We have responded to this concern, by putting the matter beyond doubt in the proposed legislation.

The analysis of provocation focuses mainly on gender as this is the area which gives rise to the greatest concern. However, during the research we undertook and consultation other issues also arose: sexual orientation and sexuality and honour killings.

Sexual orientation and sexuality

In the first impact assessment, we said:

“As far as sexual orientation is concerned, two of the successful provocation cases relate to killings involving a homosexual element. It is not possible to draw any conclusions from such a small number of cases, particularly when we have only limited information about them, so we cannot say whether the current law impacts any differently on such cases. However, we think that the steps outlined above will impact positively on cases involving homosexual relationships in the same way that they will on heterosexual ones by providing more tailored responses to the particular situations which may arise.”

¹¹ The Partial Defences Report, para 4.22.

One respondent thought that further research should be undertaken to examine the extent to which sexual orientation and sexuality may have an impact in homicide cases. We do not think that this is necessary for the reforms proposed by the Government, because the new defences are designed to apply equally in all circumstances.

The cases we identified in the research analysis could indicate a possible bias that provocation may succeed more easily in cases where issues about sexual orientation are raised. A couple of respondents to consultation explicitly made this point and were keen to ensure that “homosexual advances” could not be used as the basis of a plea of manslaughter, a situation which they felt could arise under the current law. We believe that restricting the new partial defence to “circumstances of an extremely grave character” would prevent such unmeritorious cases succeeding for those reasons.

One respondent expressed concern that the “reasonable person” test would disadvantage gay, lesbian, bisexual and transgender people:

“We feel that the gender-specific “sex” part of this proposal discriminates unfairly against [lesbian, gay, bi-sexual and transgender] LGBT defendants, as any jury is likely to be largely heterosexual and will therefore have difficulty imagining themselves in the position of an LGBT defendant. The jury will also have little understanding of the particular ways that abuse can be manifested within an LGBT relationship. This includes threatening to ‘out’ a victim to work, family or friends, preventing them access to the ‘scene’ and control over a person’s gender presentation to the outside world.”

The Government has looked at this point very carefully and we do not consider the clause would have this effect. Retaining the reasonableness test in this form is in accordance with the current common law approach. The reasonableness test in subsection 41 (3) of the Coroners and Justice Bill allows for all defendant’s characteristics to be taken into account, insofar as they do not bear on the defendant’s general capacity for self control. Therefore, where a defendant being gay, lesbian, bisexual or transgender is relevant to the partial defence, this will be raised and considered by the jury. Where it is not relevant, it should not be raised at all.

The reference to gender therefore, is not going to be of significance to the outcome of the defence for a defendant who is gay, lesbian, bisexual or transgender. The issue here seems to be an underlying one about what can be done in the wider context of the Criminal Justice System, to address ignorance and prejudice that might result in discrimination towards gay, lesbian, bisexual and transgender people. We think this is a point that would be better addressed through activities to raise awareness of the general public.

Honour killings

A general concern has also been raised about so-called “honour” killings which are particularly relevant to issues of ethnicity and religion. We are not aware of provocation having been used successfully in “honour” killings. This is as it should be and we do not want either of the two new partial defences to increase the likelihood of such cases resulting in manslaughter in future. This view was strongly supported by stakeholders. In the Murder Report¹², the Law

¹² The Murder Report, para 5.25.

Commission proposed abolishing altogether the requirement for a loss of self-control in provocation cases and considered the impact that this might have on “honour” killings. They concluded that the bar on revenge killings which they also proposed would provide an adequate safeguard. We are less confident and that is one reason why we are proposing retaining a requirement for a loss of self-control, but amended to make it more gender-neutral. The requirement for the “words and conduct” partial defence to apply only in circumstances of an extremely grave character, and the exclusion of sexual infidelity should all also assist here.

However, following consultation we are also amending the defence to ensure that it excludes killings carried out in a considered desire for revenge, which is likely to be relevant to “honour” killings.

Diminished Responsibility

Equality Concerns

Disability

Convictions for manslaughter on the grounds of diminished responsibility (section 2 manslaughter) are recorded separately from manslaughter in general. Home Office statistics show 19 convictions in 2005/06.¹³ This may be an under-recording as our analysis of sentencing remarks for the calendar year 2005 included 39 cases (involving 39 defendants and 43 victims) where diminished responsibility appeared to be the basis of the manslaughter conviction.

The basis of the diminished responsibility was not always clear but is summarised in the table below:

Diagnosis	Total no of defendants
Paranoid schizophrenia	11
Unspecified mental health problems	10
Personality disorder	4
Depression	4
PTSD and stress	2
Other	8
Total	39

The current partial defence of diminished responsibility enables the law to make special provision for those who commit murder if, at the time of the killing, they were suffering from an abnormality of mind which substantially impaired their mental responsibility for the killing. The partial defence therefore impacts differently on different groups in that it allows for defendants with such a mental disorder to be treated differently from those without, despite the fact that both have committed the same crime (i.e. killing with intent to kill or do serious harm).

This partial defence enables those convicted of manslaughter on these grounds to be sentenced not only on the basis of their culpability but also on the basis of their medical needs. This does not necessarily mean shorter or more lenient sentences. Our analysis confirms the

¹³ Coleman, K (2008) Homicide. In D Povey (Ed.) *Homicides, Firearm Offences and Intimate Violence 2006/07*. London: Home Office. Home Office Statistical Bulletin 03/08.

Law Commission's conclusion that: "In a majority of cases where diminished responsibility has been successfully pleaded, the result will be one or other of a hospital order without limit on time, or a sentence of life imprisonment... There will be some cases that will rightly be met with a determinate sentence of imprisonment. An example might be a case in which the effects of the abnormality of mind are much less severe, or non-existent, by the time the trial has been concluded"¹⁴. The sentencing remarks in our sample of cases make clear that some defendants convicted on the grounds of diminished responsibility are unlikely ever to be released.

We have considered whether such a partial defence should be retained. We agree with the Law Commission that it should be; this was also the view of most stakeholders. If a defendant's mental responsibility for a killing is impaired by an abnormality of mind, it is in the interests of justice and fairness that that "diminished responsibility" be taken into account by the law; a murder conviction and mandatory life sentence is not an appropriate response to such a situation. Research commissioned by the Law Commission suggests that public opinion also supports a different response to such offenders¹⁵.

This review has not considered the issue of "mercy" killings. The question whether there should be a partial defence of "mercy" killing raises many of the same issues raised by the debate as to whether assisted dying should be legalised. The Government has made clear that assisted dying is a matter of conscience and for Parliament to decide. Parliament has considered this on several recent occasions.

Gender

Of the 39 defendants, 32 were male and 7 female; of the 43 victims, 24 were male and 19 female.

Like provocation, diminished responsibility was considered in detail in the Partial Defences Report, with its impact on domestic violence being given particular attention. A key concern was around the availability of the partial defence to women who kill after suffering prolonged abuse at the hands of the victim and whether "battered woman syndrome" should constitute "abnormality of mind" for the purposes of the partial defence.

Our analysis suggests that diminished responsibility is pleaded successfully by both men and women who kill their partners. The precise medical diagnosis is not always clear from the sentencing remarks – as the table above indicates; in a quarter of cases it was not specified. In only one case is battered woman syndrome referred to explicitly but it is clear that, where there is evidence of the defendant having suffered domestic violence at the hands of the victim, the impact of this on her mental health is taken into account by both medical experts and the courts.

The Law Commission say the following on the subject of battered women syndrome:

It is recognised that abused women may suffer from mental health difficulties, such as depression, anxiety and post traumatic stress disorder. However from our research to date there appears to be no generally accepted medical position on "battered woman syndrome".

¹⁴ The Murder Report, p 96, footnote 67.

¹⁵ The Murder Report, *para* 5.84.

It is not a diagnosis but an explanation of how some women are affected by being in an abusive relationship. We do not see that it is a concept that would satisfactorily form the basis of a specific defence. Furthermore, defences to murder ought to be based on principles of general application.¹⁶

We propose to adopt the Law Commission's recommendation of basing the definition of diminished responsibility on the concept of a "recognised medical condition".

Retaining the reasonableness test in this form is in accordance with the current common law approach. This does not specify which conditions should and should not be included – this would be an impossible task and any such list would become quickly outdated. But it does encourage diagnoses to be more firmly rooted in the international classificatory systems and enables the partial defence to evolve with those over time. Where a woman has suffered mental health difficulties as a result of domestic abuse, this definition will enable them to be taken into account.

Age

In their 2006 report, the Law Commission recommend that the definition of diminished responsibility be extended to include developmental immaturity in the case of an offender aged under 18 at the time of the killing. Their concern centres on the difficulty of distinguishing between immaturity and mental abnormality in the case of offenders aged under 18.

As indicated in the main consultation paper, this provoked mixed reactions amongst stakeholders with whom we discussed this – more mixed, perhaps, than the level of support expressed to the Law Commission's consultation¹⁷.

In the workshops following publication of the consultation paper and in the formal responses some concerns were expressed that failure to implement the Law Commission's recommendation in this respect discriminated against children because, for example, an adult aged 40 with a mental age of 10 could benefit from the partial defence if they were diagnosed for this reason as suffering from a recognised medical condition, whereas a 'normal' child of 10 could not so benefit. The Government is not persuaded by this argument. The age of criminal responsibility is set at 10 years of age. A child who has reached this age is deemed to be criminally responsible for his actions.

The criminal justice system already makes special provision generally for defendants aged under 18 – in how they are tried, in the sentences for which they are liable and how and where those sentences are served. In this context, the challenge is to ensure that defendants aged under 18 are able to benefit from the same partial defences as adults, whilst also ensuring that the victims of offenders aged under 18 receive justice and that the public is appropriately protected.

We have the following concerns about the recommendation:

- We are not convinced that the absence of a provision along these lines is causing significant difficulties in practice. We did not receive any evidence to that effect in the consultation.
- We think there is a real risk of such a provision opening up the defence too widely and catching inappropriate cases. Even if it were to succeed only rarely, we think it likely

¹⁶ *The Partial Defences Report, A Consultation Paper* (2003) Law Com No173, para 10.94.

¹⁷ *The Murder Report*, para 5.127.

that far more defendants would at least try to run it in unmeritorious cases, so taking up time and resources unnecessarily in too many trials.

- We believe that it should remain the case that the partial defence is only available if a child is substantially less able to understand the nature of their conduct, form a rational judgment or exercise self-control as a result of suffering from a recognised medical condition.

The Government does not therefore propose to extend the definition of diminished responsibility in this way.

In discussions with stakeholders, it has emerged that a key concern is ensuring that the term “recognised medical condition” captures the conditions which, though not confined to under 18s, may be particularly prevalent among defendants in this age group; learning disability and autistic spectrum disorders have been cited as examples. We recognise that there is debate around the appropriate terminology for such conditions and that not everyone is comfortable with them being labelled as “medical conditions”. We understand this but they are included in the relevant classificatory systems¹⁸ and it is our view that, for these purposes, the term adequately covers them.

At the workshops and in further conversations with some key health professionals, there was a clear view that the diagnosis of recognised medical conditions would be possible in children with learning difficulties and autistic spectrum disorders and that the wording of the clauses was adequate.

Infanticide

Gender

The current law of infanticide provides an offence and defence to murder in situations where a birth mother kills her child under the age of 1 year if at the time she had not recovered from the effects of giving birth or lactation and as a result of this, the balance of her mind was disturbed.

The current offence/defence is thus accessible only to women, and a particular sub-section of women at a particular time in their lives. It is also an offence that can only ever be perpetrated on a small section of the general population: infants under 12 months of age. The tailored nature of the offence/defence – in and of itself - raises a number of equality issues that need to be considered.

It is clear from the Law Commission’s consultation¹⁹ that there are differing views about the justification for taking a different approach with women in these circumstances:

- Some people have argued that puerperal psychoses are no different from other psychoses, and that childbirth is merely a precipitating factor. They also argue that the stresses of caring for a child (which may extend to fathers, adoptive parents and other carers as well as birth mothers) are also precipitating factors and as such birth mothers should not have access to a particular offence/defence which no other group has access to.

¹⁸ *The World Health Organisation’s International Classification of Diseases (ICD-10); and the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-1V).*

¹⁹ *A New Homicide Act for England and Wales? A Consultation Paper (2005) Law Com No 177, Part 9.*

- On the other hand there is a strong body of evidence which indicates that mental illness is far more common in women after childbirth than at any other time in their lives and that the circumstances in which women kill their children are notably different to those in which men kill their children.

The Law Commission report indicated that the appetite for removing the offence/defence of infanticide altogether was limited, with most people favouring either the retention of infanticide or dealing with such cases through diminished responsibility. In other words there was a widely held view that these were cases where the defendant should be treated more leniently – whether that be through one vehicle or another.

Our own consultation essentially produced the same picture. Particular consideration was given to whether all cases currently being dealt with under infanticide could be absorbed under diminished responsibility. Most stakeholders thought that the burden of proof in diminished responsibility would prevent some of the current infanticide cases from being able to access the diminished responsibility partial defence to murder. This is because the burden of proof in diminished responsibility rests with the defendant whereas in infanticide it rests on the prosecution to disprove the case. In particular, concern was expressed that the different burden of proof would disadvantage some of the most vulnerable cases – such as the lone teenage mother who has concealed her pregnancy and gives birth at home alone. The lone birth – combined with the transient nature of some of the puerperal psychoses – would make it very difficult for such a defendant to access diminished responsibility.

Some respondents to consultation thought that men or other carers in the equivalent situation ought to have access to infanticide. The Government believes however that these other carers are not in an equivalent situation because infanticide takes into account the particular physiological effects of birth which do not apply to fathers or, indeed, women other than the birth mother. The retention of the offence/defence hinges on the combination of these physiological factors with exceptional circumstances such as a lone teenage mother who has concealed her pregnancy and gives birth at home alone.

On balance we believe that the practical and medical issues surrounding mothers who kill their children in the first 12 months of life justify the existence of the offence. In particular the offence/defence of infanticide addresses the fact that a woman in these circumstances would not necessarily have the same access to the partial defence of diminished responsibility as the rest of the population.

Where fathers who kill their children are suffering from a recognised medical condition which substantially impairs their ability to understand their own conduct, form a rational judgement or exercise self control then they would be able to raise a partial defence of diminished responsibility. This would apply equally to an adoptive or step parent and regardless of gender or sexuality of that parent.

Age

Some consultees have expressed concern that infanticide protects the rights of the mother at the expense of the rights of the child. Others have highlighted the fact that mothers convicted of infanticide are often children themselves.

Of the 49 cases convicted of infanticide between 1990 and 2003 there were 6 mothers aged 16 years or under and 10 mothers between 17 and 20 years of age. This illustrates that a significant proportion of infanticide cases involve mothers who are themselves children.²⁰

On balance we do not think the offence/defence devalues the rights of children – it simply recognises that there are specific and very narrow circumstances that warrant a different, more lenient treatment and that that can be beneficial to children and adults alike.

²⁰ The Murder Report, p 194, D8, Table 1a: Age range of accused.

Recommendations/ mitigating the impact

1. We believe that the proposed changes to the law of provocation will improve the equality of the law by tailoring its response more closely to the situations it needs to deal with and by addressing the long-standing concerns about the differential impact of the current law on men and women.
2. We do not believe that the current law of diminished responsibility has adverse effects on any particular groups in society. However, we do believe that it ensures that those with mental health issues are not punished unfairly as a result of their health, and in that respect it has a positive role to play in ensuring equal treatment. We therefore propose to retain it but in an updated form.
3. As far as infanticide is concerned, we agree with the Law Commission that the law is working satisfactorily in practice and requires no amendment. The very specific childbirth related circumstances which the offence covers justify the gender and age criteria on which the offence is based.