



Law Commission

**Partial Defences to
Murder**

**Provisional Conclusions
on
Consultation Paper No 173**

**Law Commission
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PARTIAL DEFENCES TO MURDER

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PARTIAL DEFENCES TO MURDER

The Law Commission's Provisional Conclusions

1. Two strong messages have emerged from the responses of consultees. One is that the law of homicide needs reviewing. We agree, and intend to say so in our report. The other is that the law of provocation is unsatisfactory, but it is very difficult to produce a satisfactory solution to its problems within the present framework of the law. We agree with this too, but we think that improvements within the present structure are possible.

Provocation: whether it should be abolished

2. The responses from consultees have confirmed us in the view that the present law of provocation is most unsatisfactory and requires statutory reform.
3. In some respects it is too broad. It is morally offensive to regard as 'provocation' conduct by a victim which in truth calls for society's protection – e.g. the crying baby, the court official seeking to enforce a court order, or a person in an unhappy relationship who is seeking to leave.
4. In other respects it is too narrow. It affords (at least if strictly enforced) no defence to a person in an abusive relationship who acts in genuine fear of serious violence, unless the danger is imminent or they are acting under sudden and immediate loss of self-control.
5. A possible approach would be to abolish the defence of provocation, as has been done elsewhere (Tasmania) and has been recommended by other law reform bodies (e.g. the New Zealand Law Commission), but that has only happened or been recommended in jurisdictions which do not have a mandatory sentence for murder. Consultees were overwhelmingly of the view that it would be wrong to abolish the defence of provocation while the mandatory sentence remains, and we share that view.
6. The government has indicated that there is no present prospect of its considering abolition of the mandatory sentence. However, a wider review of the law of murder would be about much more than the mandatory sentence.
7. Consultees have been divided on the question whether, even if the mandatory sentence were to be abolished, there should continue to be a partial defence of provocation.
8. Powerful arguments can be advanced either way. Abolitionists argue that a person who is sane and who kills another person unlawfully (i.e. not in self-defence), with the intent required for murder, ought to be guilty of murder however great the provocation may have been. Provocation may be a mitigating circumstance which should be taken into account in passing sentence, but not in defining the offence. Assessing sentence requires a balanced appraisal of all the circumstances of the

case (aggravating as well as mitigating), and this is a judicial rather than a jury function. Not only is it inappropriate that provocation should be singled out among other possible mitigating circumstances as providing a special partial defence, but there are great difficulties in trying to define what may amount to provocation and how serious it has to be in order to amount to a partial defence.

9. Those who argue for the retention of some form of provocation defence, whether or not the mandatory sentence is retained, say that there are moral and practical reasons for doing so. Where the defendant's conduct was precipitated by really serious provocation, it is morally right that this should be reflected in the way that society deals with the defendant; and it is desirable that the factual and evaluative question whether the defendant was provoked in that sense should be taken by the jury. A short sentence (or even in some circumstances a non-custodial sentence) for a provoked killing will be more understandable by, and acceptable to, the public if it results from a conviction by a jury of an offence not carrying the title of murder, than a decision by a judge after a conviction for murder. The existence of such a partial defence is justifiable in the law of murder, although there is no similar partial defence to non-fatal offences of violence, not only because the sentence for murder is fixed by law but also because of the unique gravity and stigma attached to murder. The real problem with provocation is not the underlying concept, but the way it has developed. It needs to be reshaped.
10. Some have said that it is unfortunate that one is forced to refer to provocation as a 'defence', when the critical question is whether a killing under provocation should be categorised as a less grave offence than murder. There is general agreement that provocation (subject to what is meant by that word) should be capable of making a significant difference in the sentence passed on the defendant. That result could be achieved by a variety of routes; by labelling a killing under provocation as a separate offence; by labelling it as the same offence, but with different statutory sentencing provisions in a case of killing under provocation; or by labelling it as the same offence with the same sentencing structure, but leaving it to the judge to set the appropriate sentence having regard to the provocation. As some consultees have pointed out, the problems about what should or should not be regarded as provocation would not disappear by abolishing the defence of provocation, but would be faced at a separate stage of the proceedings.
11. The debate has generated interesting discussion about the moral qualities of the emotions of anger and fear. One school of thought holds that anger cannot ethically afford any ground for mitigating the gravity of deliberately violent action, or at any rate violent action which threatens life. The counter argument is that anger can be an ethically appropriate emotion and that in some circumstances it may be a sign of moral weakness or human coldness not to feel strong anger. That does not legitimise a violent response; one of the functions of the legal system is to channel legitimate anger at wrongdoing in ways that are considered just and proportionate. Nevertheless, a killing in anger produced by serious wrongdoing is ethically less wicked, and therefore deserving of a lesser punishment, than, say, a killing out of greed, lust, jealousy or for political reasons. If it be right that such a

killing merits a lesser sentence because it is less wicked, then the question whether a distinction should be drawn in the classification of the offence or at the sentencing stage is not a matter of simple ethics.

12. In our Consultation Paper we were guilty of an over-simplistic approach to the 'justificatory' and 'excusatory' bases of provocation, as has been pointed out to us by a number of academic critics. The paradigm case of provocation involves a relationship between two people, the provoker and the provoked. The emotion aroused in the provoked contains a cognitive component, viz. the belief that the provoked has been wronged by the provoker. Somebody who is gravely provoked has more reason to become upset and hostile towards the provoker than somebody who has not been ill used; and over reaction to a grave wrong is morally more excusable in the scale of wickedness, and so deserving of less punishment, than over reaction to something which was not a wrong.
13. A just system of law should reflect this, and we have come to the present view that the arguments for seeking to do so in the categorisation of offences of homicide, rather than merely in the sentencing process, outweigh the arguments to the contrary. Most civilised systems of law have gradations of homicide which allow for the existence of extenuating circumstances, and although the wider structure of the law of homicide is outside our terms of reference, we see a case for retaining grave provocation within it as a form of extenuating circumstances.
14. The situation is different where there has not been grave provocation. One highly experienced judge expressed the views of many respondents when she wrote:

The scope of provocation has been so enlarged that a judge is obliged to leave it when ... the conduct and/or the words in question are trivial. The issue should only arise where circumstances are sufficiently grave to justify it. Such tightening up would not remove the last straw in the slow burn of domestic violence, although provocation must always be distinguished from revenge.
15. The proposition that the issue should only arise where circumstances are sufficiently grave to justify it leaves the question how the law might be reshaped. Before considering that in further detail, we make two preliminary observations.
16. First, there may be cases where there has been no grave provocation on an objective view, but the defendant has acted in a sudden moment of high emotional stress and in a way which is truly out of character. We do not think that provocation should be stretched to cover such cases. We consider later whether diminished responsibility should be expanded to cover cases of extreme emotional distress.
17. Secondly, a number of approaches could be taken in seeking to define what may found a defence of provocation. It could be limited to, or exclude, defined categories of conduct or a broader principle or principles could be adopted.

Provocation: how to reshape it

18. In principle, we consider that the first pre-requisite of a defence of provocation should be **that the defendant acted in response to (1) gross provocation or (2) fear of serious violence towards himself or herself or another, or (3) a combination of (1) and (2)** (the trigger).
19. The second should be **that a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way** (the objective test).

The trigger: gross provocation

20. We consider that **the essence of gross provocation is that it is words and/or conduct which caused the defendant to have a justifiable sense of being seriously wronged**. The moral basis for recognising a partial defence of provocation is that the defendant had legitimate ground to feel strongly aggrieved at the conduct of the person at whom his/her response was aimed, to the extent that it would be harsh to regard their moral culpability for reacting as they did in the same way as if it had been an unprovoked killing.
21. We have considered whether provocation should be confined to cases of serious and unlawful actual or threatened violence to the person; or criminal conduct; or provocation by conduct, as distinct from words. However, we see real problems with inflexible provisions of that kind.
22. Our terms of reference ask us to have particular regard to the impact of the partial defences in the context of domestic violence, and we have done so. The responses which we have received have for the most part not been polarised on male – female lines. There is not, for example, a single ‘feminist’ position. We have had very helpful responses from a number of women’s groups, and these expressed a range of views. One theme which emerged strongly is that a person may feel imprisoned in an abusive and humiliating relationship without being the victim necessarily of serious physical violence. One group proposed abolishing the defence of provocation and replacing it by a partial defence of self-preservation on the grounds of domestic violence, but they recommended the definition of domestic violence used in the New Zealand Domestic Violence Act 1995, which defines it as physical, sexual or psychological abuse, including but not limited to intimidation and harassment. This group was not alone in recommending that any reforms should include a comprehensive legal definition of domestic violence based on the definition in the New Zealand Act.
23. Another group argued for an approach to domestic violence which may include ‘physical, sexual, emotional or financial abuse’. They stressed that concentration on the purely physical can lead to a failure to understand the position in which vulnerable people may find themselves. They suggested:

We believe that the proper way to proceed is to consider reforming the law of provocation so that the requirement of 'suddenness' is removed altogether and the notion of the 'reasonable man' is replaced by the less legally technical 'ordinary person'. Juries could be directed simply to put themselves in the shoes of the defendant in order to decide whether an ordinary person in the same circumstances and sharing many of the same characteristics as the defendant would do as the defendant did. We believe that jealousy, infidelity on its own, preserving family honour, self induced provocation or an excitable temperament should never be sufficient to constitute provocation. Any concession to human frailty should always depend upon the context of the abuse and upon the effect that that behaviour has on a defendant.

The main priority is to ensure that the entire context of abuse in which the fatal act takes place is put before a jury and to ensure that there is room in the law to understand the entirety of the context in which the act occurs.

24. Turning to non-domestic cases, we would not want to narrow the law of provocation as it currently affects householders. There is undoubtedly a very strongly held view among many members of the public that the law is wrongly balanced as between householders and burglars. In the recent Today Programme's Listeners' Law poll, the proposal which received the greatest number of votes was to legitimise any use of force by householders towards burglars. We think that much of the public anxiety is possibly based on a misunderstanding of the present law and of the highly unusual facts of the Tony Martin case. However, we do accept that many members of the public are genuinely worried about what may happen to them if they use force to defend their property against intruders and are subsequently judged to have gone too far. A proposal to narrow the law of provocation so that it would only apply in relation to violence or threats of violence to the person would be likely to arouse strong and understandable opposition. Sometimes burglaries involve the most vile acts of desecration of a person's home and of belongings which may be cherished for highly personal reasons. If, for example, a householder confronted a burglar responsible for such behaviour and immediately attacked him, intending to cause really serious harm (but not to kill), and the burglar died, we think that it would be a harsh law which precluded the jury from considering provocation, and we doubt whether such a law would command public support or respect.
25. In paragraph 12.25(3) of our consultation paper we gave other examples of cases in which the defendant would not have been at risk of serious physical violence, but where the deceased's conduct was nevertheless such that we can see a moral case for allowing a partial defence of provocation. Some respondents suggested other examples. One consultee said:

We do not agree that words alone should never constitute provocation since there may be some circumstances where a person is subjected to a campaign of abuse which when combined with a complete lack of options of escape can amount to provocation. A good example of this is someone subject to racism in

the workplace.... The racist conduct may fall short of violent conduct, threats of violence or threats to kill, but may nevertheless count as seriously inhumane and degrading treatment and amount to provocation.

26. In deciding whether there was gross provocation, the court should be entitled to take into account all the characteristics of the defendant. Whether there was gross provocation can only be properly judged by considering the situation in which the defendant found himself or herself. In any particular case it will be necessary to look at the relationship between the provoker and the provoked, and the defendant's social and cultural environment. The question is not whether the conduct would have been grossly provocative to the person 'on the Clapham omnibus', but whether it was grossly provocative to a person in the defendant's situation. However, that does not mean that if the defendant considered it to be gross provocation, the jury must therefore accept that it was gross provocation. The jury may conclude that the defendant had no sufficient reason to regard it as gross provocation, or indeed that the defendant's attitude in regarding the conduct as provocation demonstrated an outlook (e.g. religious or racial bigotry) offensive to the standards of a civilised society. (We discuss below the roles of the judge and jury.)

The trigger: response to fear

27. In paragraph 18 above, we referred to a defendant who acts in response to fear of serious violence to himself or herself or another. Lord Hoffmann in *Smith (Morgan)*¹ suggested that provocation under the present law is not confined to anger, but may include fear; and in many cases there will be an overlap between conduct which is gross provocation and conduct which causes the defendant to fear serious violence. However, the proposed partial defence would go beyond the traditional limits of provocation.
28. Before the defence arises, the jury will first have had to exclude self-defence (where that has been raised). The proposed defence could cover the following types of case:
- (1) D, the abused partner in an abusive relationship, reacts to "mild" violence with lethal violence. D's response is disproportionate to the immediate risk and therefore D does not have a defence of self-defence. However, D's conduct is in response to V's accumulated conduct and D's fear for her future safety.
 - (2) D, the abused partner in an abusive relationship, suffers regular violent assaults by V. She eventually reacts by killing V in his sleep, believing this is the only way that she will be able to live her life free from fear.
 - (3) D, a householder, overreacts to an intruder, V. V has not acted in a personally threatening way, but D acts out of a combination of outrage and fear for his safety.

¹ [2001] 1 AC 146, 168.

(4) D, a soldier or policeman, panics in face of a hostile crowd and over reacts, killing V.

29. In informal discussions our proposal has been subject to criticism from two sources: academics and the senior judiciary. At the heart of each there is a common concern: whether conduct in response to provocation and conduct in response to fear should be joined in a single defence, or whether there should be a separate partial defence for those who kill in fear, but who do not attract the full defence that they acted in lawful self-defence.
30. A number of academics favour separate defences, because they say that the situations are morally different. Their concern is that we are inappropriately linking two conceptually different partial defences: provocation and excessive force in self-defence.
31. The former requires an act which, it is said, the actor acknowledges is unlawful in its genesis but for which there is a sufficient excuse or justification from an external source so as to permit a different label to be attached to the defendant's conduct.
32. By contrast, the second defence applies to a person who thinks that he is acting lawfully but who has miscalculated the extent of the action open to him and so has fallen into unlawfulness. This is sufficient to prevent the label of murder to be attached to his conduct.
33. It is therefore said to be conceptually confused to join them together as we suggest.
34. While we respect this view, we question how far it corresponds with the likely thought processes of a defendant. It will be seldom that a defendant does other than merely react to the external stimulus. We also think that there is medical, practical and moral justification for the proposed combination.
35. The Royal College of Psychiatrists said in their response to our consultation paper:

... we would point out that the approach adopted within the document to the relationship between provocation and self-defence, with the suggestion of a new partial defence of 'excessive self-defence', is based, at least partly, upon a legal misrepresentation of psychology and physiology. Hence, one way of reading the proposal to abolish the provocation defence 'in favour' of the new partial defence of self-defence is that it rests upon the assumption that 'anger' cannot be a justification for 'responsive violence', but 'fear' can be. However, this assumes that the two emotions of anger and fear are distinct. In medical reality they are not. Physiologically anger and fear are virtually identical, whilst many mental states that accompany killing also incorporate psychologically both anger and fear. Hence, the abused woman who kills in response even to an immediate severe threat will also be driven at least partly by anger at the years of abuse meted out to her, and perhaps her children. Again, the woman who waits until the man is 'helpless' to kill him, is likely not merely to be angry

but also fearful that eventually he will kill her, and/or her children, and that there is no way of preventing it other than by the death of the man (partly because her cognitions have been so distorted by the years of abuse that she does not perceive the options for escape, for example legal options, at all in the same way as an ordinary person would do). Any legal solution to the current perceived problems with partial defences to murder which rested upon the assumption that fear and anger can (even usually) be reliably distinguished must, from a medical perspective, therefore fail.

36. Practically, it is desirable to try to keep jury directions as broad and simple as possible.
37. Morally, the common element is that of response to unjust conduct (whether in anger, fear or a combined emotional state).

Accident or mistake

38. The defence is primarily intended to cover cases where the provocation was given by the person killed. However, at common law the defence was also capable of applying where, under provocation, the defendant killed someone other than the provoker by mistake or accident. The cases on this subject are rare, and we would not intend to change the law in that area.

Duress

39. We do not intend that this partial defence should apply to a person who acts under duress of threats – e.g. a person who, under fear for his life, obeys the order of a terrorist to drive him where he is directed. That situation does not fall within our terms of reference. The Law Commission has considered duress as a defence to murder in the past, and any further consideration of that subject would fall within a wider review of murder.

The objective test

40. Even if there was gross provocation, it by no means follows that an ordinary person would have reacted in the way that the defendant did. Most people from time to time suffer gross provocation without resorting to lethal violence. **The defence should only be available if a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.**
41. In deciding whether a person of ordinary temperament in the circumstances of the defendant might have reacted in the same or similar way, the court should take into account all the characteristics of the defendant other than “matters that bear simply on the [his or her] general capacity for self-control” (to adopt a succinct expression used by Professor Glanville Williams² in his analysis of the decision in *Camplin*³). The only qualification which we would make is that the court should

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

³ [1978] AC 705.

have regard to the defendant's age, because capacity for self-control is a factor of maturity, and it would be unjust to expect the same level of a twelve-year-old and an adult (as was recognised in *Camplin*). In other words, we prefer the minority position in *Smith (Morgan)*, which also accords broadly with the law in Australia, Canada and New Zealand, and with the recent provisional recommendations of the Irish Law Reform Commission.

42. This is not to deny a defence to an abused person whose temperament may have been changed as a result of the provocation, for that would be a matter which bore not simply on her general temperament independent of the provocation but on the effect of the provocation itself. As Lord Millett said in *Smith (Morgan)*⁴, about such a case:

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

43. We think that the objective test should apply in the case of a person responding to fear of serious violence as in the case of a person responding to provocation. It might be argued that self-restraint is a relevant factor when considering provocation but not when considering the position of a person acting in fear, but we would disagree. Ordinarily it would not be even partially excusable for a person in fear, but not in imminent danger, to take the law into his or her own hands. We would not, for example, want a partial defence to be available to criminal gangs who choose to deal with threats of violence from rival gangs by striking first.

Exclusion of premeditated revenge

- 44. The defence should not be available if the defendant acted in premeditated desire for revenge.**

45. We prefer this to the present requirement that the defendant should have acted in sudden and temporary loss of self-control (*Duffy*).⁵ The *Duffy* test has been troublesome, especially in the case of abused women. From its earliest years premeditated revenge was excluded from provocation, but we think that Devlin J's test in *Duffy* was with hindsight an unsatisfactory way of doing so.

- 46. A person should not be treated as having acted in premeditated desire for revenge if he or she acted in fear of serious violence, merely because he or**

⁴ [2001] 1 AC 146, 213.

⁵ [1949] 1 All ER 932.

she was also angry towards the deceased for the conduct which engendered that fear.

47. Without such a principle the extension of the defence to those who kill in fear could be nugatory, because (as the Royal College of Psychiatrists have pointed out) those who kill in fear often also have an element of anger, in which case the killing may have an element of retaliation. In practice, we think that a jury would be able to differentiate between a defendant who killed out of fear, although angry at the same time, and a defendant who was not truly killing out of fear for their future safety (or that of the children) but for other reasons.

Exclusion of self-induced provocation

48. **The defence should not be available if the gross provocation relied upon was incited by the defendant for the purpose of providing an excuse to use violence.**

Role of judge and jury

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

50. If provocation is to be defined by general principles rather than specific categories, this is important. The restoration of this power to the trial judge (which was removed by section 3 of the Homicide Act 1957), coupled with the supervision of the appellate courts, will enable the law to set boundaries in a reasoned, sensitive and nuanced way, whereas an inflexible statutory formula would have no room for development.

51. Consider, for example, the decision of the High Court of Australia in the leading case of *Stingel*.⁶ The defendant stalked a former girlfriend. She obtained a court order preventing him from approaching her, but he ignored it. After a party he found her (according to his account) in a car with another man having sex. He was sworn at and told where to go. He fetched a knife from his car and killed the man. The judge withdrew the defence of provocation from the jury and the High Court upheld his decision. In *Smith (Morgan)*⁷ Lord Hoffmann, agreeing with the decision, said:

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

⁶ (1990) 171 CLR 312.

⁷ [2001] 1 AC 146, 169.

52. Unfortunately our empirical evidence about the success rate of provocation defences before juries is not as good as we would have liked (and less good than our empirical evidence about the success rate of diminished responsibility). The evidence which we have had tends to suggest that juries are less prone than is sometimes thought to return verdicts of manslaughter on grounds of provocation where the provocation alleged is simple separation or infidelity, but in our view such cases ought not to be left to the jury. In *Holmes*⁸ Lord Simon said that Othello would be guilty of murder, even if Iago's insinuations had been true, and we think that this should be so.
53. There are also cases in which a defendant relies on additional taunts or insults. Any study of the history of the defence of provocation shows that it has changed as public values have changed, and that the change of social attitudes is a gradual process. Public opinion should not necessarily be decisive about what the law should be, for public opinion may not be carefully thought out and the law may itself help to shape public opinion, but it should properly be taken into account. As part of our research we commissioned Professor Mitchell (professor of criminal law and criminal justice at Coventry University) to interview a small group of individuals drawn from various parts of the country, who reflected a wide cross-section of backgrounds and personal circumstances, and a subgroup of next-of-kin of victims of unlawful homicide (contacted through the organisation Support After Murder and Manslaughter (SAMM)). Interviews were conducted with 62 respondents (including 15 SAMM respondents) and the interviews lasted on average for 1 hour 15 minutes. The sample was small but nevertheless provided an interesting pointer towards public attitudes. The interviews were recorded and contemporaneous notes made. Interviewees were given scenarios of various homicides and questioned about their assessment of the seriousness of each scenario. One scenario involved a husband who killed his wife because she had been having an affair. A variant involved the husband being taunted by the deceased about his sexual inadequacy when he confronted her about the affair. Just over half the respondents thought that this lessened the gravity of the crime, giving as their reason that the husband reacted spontaneously to the taunt. Interestingly, there was no significant difference between the replies of male and female respondents.
54. It is a sad commonplace that when relationships break up there are often arguments and mutual recriminations. We think that it would be seldom that words spoken in such a situation could legitimately make the other party feel severely wronged, to the extent that a person of ordinary tolerance and self-restraint in such a situation might have used lethal violence; but there may be cases where one party torments another with remarks of an exceptionally abusive kind or where one party's behaviour puts quite exceptional emotional pressure on the other. Unless the law is reduced to a formula which removes any evaluative function from the judge and jury (which we would not favour) there are bound to be borderline cases.

⁸ [1946] AC 588, 598.

Summary

55. There are three broad options in considering what should be done about the defence of provocation: abolish it, leave it as it is or reform it.
56. In our consultation exercise very few supported abolition of the defence without abolition of the mandatory sentence. Many supported its abolition, conditional on the abolition of the mandatory sentence, and advanced good arguments for that approach; but it would not be our favoured option, and in any case the government has indicated that it does not intend to abolish the mandatory sentence.
57. Some whose first option would be to abolish the defence (conditional on abolition of the mandatory sentence) would, as their second choice, prefer to leave the defence as it is than attempt statutory reform of it. The main arguments for this approach are that at a conceptual level the problems associated with the defence are very difficult, but at a practical level it works satisfactorily in the majority of cases; and that we should wait to see what difference *Smith (Morgan)* makes in practice before deciding whether and, if so, how the law in this area should be reformed. We are not persuaded by the “leave it alone” arguments. The great majority of consultees agreed with the views expressed in our consultation paper that the law of provocation is unsatisfactory and beyond cure by judicial reform. We also believe that it is capable of improvement by legislation.
58. We have set out in this paper the principles which we presently think should govern a reformed provocation defence. We summarise them as follows:

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

the defendant acted in response to

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

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

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

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

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

3) The partial defence should not apply where

the provocation was incited by the defendant for the purpose of providing an excuse to use violence, or

the defendant acted in pre-meditated desire for revenge.

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

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

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

Excessive force in self-defence

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

Merger of provocation and diminished responsibility into a single defence

61. The proposal by Professors Mitchell and Mackay for a merger of these defences (discussed in our Consultation Paper at paras 12.77 to 12.81) has stimulated a lively debate in recent issues of the Criminal Law Review. It attracted a small amount of support from consultees, but a far greater number were opposed to it. It would not be compatible with our present thinking about the way in which the defence of provocation should be reshaped.

Extreme emotional distress

62. Some consultees favoured replacing the defence of provocation by a defence along the lines of clause 210.3(1)(b) of the Model Penal Code, 1985 (MPC), which provides:

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

63. Other consultees suggested that diminished responsibility should be extended to include the case of a defendant who snaps under excessive stress.
64. The majority of consultees were opposed to a provocation defence (or substitution for a provocation defence) based on extreme emotional disturbance, primarily on the grounds that it would be vague and indiscriminate.
65. The MPC imports the qualification "for which there is reasonable explanation or excuse", but that raises further questions. The MPC in its full form goes on to provide that the reasonableness of the explanation or excuse is to be determined from the defendant's viewpoint, but Professor Sanford Kadish (Morrison Professor of Law Emeritus, University of California, who has provided us with a paper on the operation of the MPC) has pointed out that many 'reform states' (i.e. states which have adopted a defence based on this part of the Code) have either not adopted that provision or have adopted it in an amended form. Apart from the problem of the subjectivity or objectivity of the reasonableness requirement, it is also to be noted that the issue is not whether there is a reasonable explanation for the defendant's conduct, but rather whether there is a reasonable explanation for the defence's disturbance.
66. These factors in combination make the EMED defence potentially very broad, and also uncertain, in its application.⁹
67. In company with the majority of consultees, it is our present view that a distinction should be maintained between cases where the defendant's extreme disturbance is triggered by gravely provocative conduct on the part of the victim and cases where it is not, but is a reflection of some defect in his or her mental or emotional capacity to cope with life and its problems.
68. That leads to the question whether diminished responsibility should be extended to include cases of "stress".

Diminished responsibility

69. We have had the benefit of an empirical study of the diminished responsibility plea in operation by Professor R D Mackay (professor of criminal policy and mental health at De Montfort University). Official homicide statistics show there to have been approximately 171 successful diminished responsibility pleas between 1997

⁹ For examples see Victoria Nourse, "Passion's Progress: Modern Law Reform and the Provocation Defense" (1997) 106 Yale LJ 1331.

and 2001. In recent years there has been a consistent fall in the successful use of the plea. It is not clear why this is so, although one possibility must be that it is connected with the expansion of the plea of provocation. Where there has been a diagnosis of schizophrenia or other psychotic disorder, the prosecution has usually accepted a plea to manslaughter on grounds of diminished responsibility. (In the cases examined by Professor Mackay, 94% of schizophrenia diagnoses resulted in no trial.) We were more surprised by the relatively high percentage of depression cases where a plea of diminished responsibility was accepted. However, in a large number of them there was a history of previous mental illness or there were particular mitigating circumstances (e.g. mercy killing). Of the cases studied by Professor Mackay which resulted in a trial, the plea of diminished responsibility succeeded in only about 40%.

70. "Abnormality of mind" in section 2 of the Homicide Act 1957 was given a broad interpretation in *Byrne* [1960] 2 QB 396, 403, where Lord Parker CJ said that it is:

wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgement as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgement.

71. Stress could induce such a condition, and the cases examined by Professor Mackay include examples of killing where a defendant snapped under stress. In those cases the defence was supported by medical evidence of depression. However, if the defence were extended to cover cases of stress where there was, in the view of the jury, no abnormality of mind within the broad definition of that phrase, it would potentially apply to cases however the stress was induced, e.g. road rage. In short, one would face the same problem as the drafters of the MPC. They have sought to limit the availability of the defence by requiring a reasonable explanation for the emotional disturbance, but that leads into the moral maze of trying to determine what is a reasonable explanation for an impaired emotional condition.
72. There may be cases in which a defendant "snaps" under stress and does a violent act which causes the death of another, without either intending to kill or being recklessly indifferent to causing death, but will be guilty in law of murder because of an intent to cause serious harm at the moment of acting. However, if the law in this regard is over-harsh, we think that the more appropriate course would be to reconsider the mental element required for murder rather than to create a defence in cases of stress falling short of abnormality of mind.
73. There is near unanimity that as long as the mandatory sentence remains the defence of diminished responsibility should be retained, and we agree with this view. From the evidence which we have obtained, we are not presently persuaded that we should recommend any radical enlargement, or reduction, of the scope of the defence.

74. Although the wording of section 2 of the 1957 Act has been much criticised, none of the alternative forms of wording which we put forward for consideration in the Consultation Paper attracted a high level of support. We will think further about the precise form of wording, but we do not presently propose to recommend any radical change pending any wider review of the law of murder.
75. There is one particular group of defendants, namely children, for whom the language of section 2 of the 1957 Act is unsatisfactory. It is framed with adult defendants in mind and contains no reference to developmental immaturity. The law of murder presents special problems in relation to children, but that is a larger subject. We believe that it requires attention, but we do not presently propose to recommend as part of this project a piecemeal change in the defence of diminished responsibility as it applies to children.

Law Commission
1 May 2004