



**Law
Commission**
Reforming the law

Murder, Manslaughter and Infanticide



The Law Commission

(LAW COM No 304)

MURDER, MANSLAUGHTER AND INFANTICIDE

Project 6 of the Ninth Programme of Law Reform: Homicide

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section 3(2) of the Law Commissions Act 1965*

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

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THE LAW COMMISSION

MURDER, MANSLAUGHTER AND INFANTICIDE

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THE LAW COMMISSION

MURDER, MANSLAUGHTER AND INFANTICIDE

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

PART 1

WHY IS A NEW HOMICIDE ACT NEEDED?

THE TERMS OF REFERENCE FOR THE REVIEW OF MURDER

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

How did the Law Commission take forward these terms of reference?

- 1.2 We did not review every issue that could, in theory, be regarded as falling within the scope of the review. The areas of law that seemed to us to give rise to real difficulty or anomalies have guided us in our focus.
- 1.3 Issues that we did not address, even though they fell within our terms of reference, included:
- (1) The prohibited conduct element, including causation, the legal criteria governing when life begins and when life ends and child destruction (the offence of killing a child in the womb who was capable of being born alive).
 - (2) Justifications for killing, such as necessity and self-defence.¹
 - (3) The defences of insanity and intoxication.
 - (4) Aggravating features of an admitted murder, such as an especially evil motive or the fact that a child was intentionally targeted. We have not considered these because we believe that they were adequately addressed by Parliament in the guidelines contained in the Criminal Justice Act 2003.
- 1.4 Three issues warrant special mention. The first issue is the defence of duress.² Duress, like insanity, is a complete defence to any crime to which it applies. At present, there are judicially created rules under which duress is no defence to murder or to attempted murder. We believed that consultees might favour reform of this rule, so we decided to consider the defence of duress in detail rather than leaving it to a separate review of duress as it applies across the board.
- 1.5 The second issue is ‘mercy’ killing. This fell within the scope of our terms of reference only in so far as it related to the grounds for reducing a more serious homicide offence to a less serious one. We considered it carefully in that context both in the Consultation Paper (“the CP”)³ and during the consultation process.
- 1.6 We have decided that a recommendation for a specific partial defence of ‘mercy’ killing should await a further and more detailed consultation exercise specifically concentrating on the issue. We quite simply did not have the time that we would have needed to conduct a full consultation with the necessary groups. Such a consultation would have needed to include, amongst others: the Department of Health; groups representing doctors and patients; care organisations; gerontologists; and groups both ‘pro’ and ‘anti’ euthanasia. We address the matter further in Part 7 and recommend that such a consultation exercise should be undertaken.

¹ These defences are defences to many crimes other than homicide. They, therefore, need to be looked at as part of a review of the general law rather than specifically in a homicide context.

² Paras 1.54 to 1.57 below and Part 6.

³ A New Homicide Act for England and Wales? (2005) Consultation Paper No 177.

- 1.7 The third issue is the fact that there is no draft Homicide Bill reflecting our recommendations. The Law Commission commonly appends a draft Bill to accompany its reports but we have not done so in this report. This is because our report is only the first stage in the current review of the law of homicide. The Home Office will be undertaking the second stage of the review.⁴ Accordingly, it would have been inappropriate for the Commission to produce a draft Bill.

THE EXISTING LAW AND THE PROBLEMS WITH IT

- 1.8 The law governing homicide in England and Wales is a rickety structure set upon shaky foundations. Some of its rules have remained unaltered since the seventeenth century, even though it has long been acknowledged that they are in dire need of reform. Other rules are of uncertain content, often because they have been constantly changed to the point that they can no longer be stated with any certainty or clarity. At the end of the nineteenth century there was a valuable attempt at wholesale reform. This was thwarted largely by quite unconnected political problems. The consequence was that the Homicide Bill did not progress beyond its second reading in Parliament. Moreover, certain piecemeal reforms effected by Parliament, although valuable at the time, are now beginning to show their age or have been overtaken by other legal changes and, yet, have been left unreformed.⁵
- 1.9 This state of affairs should not continue. The sentencing guidelines that Parliament has recently issued for murder cases⁶ presuppose that murder has a rational structure that properly reflects degrees of fault and provides appropriate defences. Unfortunately, the law does not have, and never has had, such a structure. Putting that right is an essential task for criminal law reform.
- 1.10 We will recommend that, for the first time, the general law of homicide be rationalised through legislation. Offences and defences specific to murder must take their place within a readily comprehensible and fair legal structure. This structure must be set out with clarity, in a way that will promote certainty and in a way that non-lawyers can understand and accept.
- 1.11 We will be going into these matters in much greater depth but the following is a brief explanation of the existing law and its flaws.

The current structure of offences

- 1.12 Two general homicide offences – murder and manslaughter – cover the ways in which someone might be at fault in killing. There are also a number of specific homicide offences, for example, infanticide and causing death by dangerous driving (the latter was not within our terms of reference for consideration).
- 1.13 Murder, which carries a mandatory life sentence, is committed when someone (“D”) unlawfully kills another person (“V”) with an intention either to kill V or to do V serious harm.

⁴ This second stage will involve a public consultation on the broader areas of public policy which any review of the law of homicide needs to address.

⁵ Some of the historical background on attempts to reform the law of murder is given in Part 1 of the CP.

⁶ Criminal Justice Act 2003, s 269 and sch 21.

1.14 Manslaughter can be committed in one of four ways:

- (1) killing by conduct that D knew involved a risk of killing or causing serious harm ('reckless manslaughter');
- (2) killing by conduct that was grossly negligent given the risk of killing ('gross negligence manslaughter');⁷
- (3) killing by conduct taking the form of an unlawful act involving a danger of some harm to the person ('unlawful act manslaughter'); or
- (4) killing with the intent for murder but where a partial defence applies, namely provocation, diminished responsibility or killing pursuant to a suicide pact.

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

Problems with these offences

- 1.15 The current definitions of these offences (and, for the most part, of the provocation defence) are largely the product of judicial law making in individual cases over hundreds of years. They are not the products of legislation enacted after wide consultation and research into alternative possibilities. From time to time, the courts have tinkered with the definitions. New cases have then generated further case law to resolve ambiguities or new avenues for argument left behind by the last case.⁸
- 1.16 We identified a number of problems with the homicide offences in the CP. The consultation process has confirmed that numerous problems exist.

The serious harm rule

- 1.17 Under the current law, D is liable for murder not only if he or she kills intentionally but also if he or she kills while intentionally inflicting harm which the jury considers to have been serious. In our view, the result is that the offence of murder is too wide. Even someone who reasonably believed that no one would be killed by their conduct and that the harm they were intentionally inflicting was not serious, can find themselves placed in the same offence category as the contract or serial killer. Here is an example:

D intentionally punches V in the face. The punch breaks V's nose and causes V to fall to the ground. In falling, V hits his or her head on the curb causing a massive and fatal brain haemorrhage.

⁷ It is sometimes argued that manslaughter by recklessness and by gross negligence form one single category of manslaughter with two alternative fault requirements. We will be recommending that any reform of the law should adopt this approach: see Part 3.

⁸ Eg, on murder see *Woollin* [1999] 1 AC 82 and on manslaughter see *Adomako* [1995] 1 AC 171 and *Smith (Morgan)* [2001] 1 AC 146.

- 1.18 This would be murder if the jury decided that the harm that D intended the punch to cause (the broken nose) can be described as ‘serious’.⁹ Whilst it is clear that a person who kills in these circumstances should be guilty of a serious homicide offence, it is equally clear to the great majority of our consultees that the offence should not be the top tier or highest category offence.
- 1.19 As we explained in the CP,¹⁰ Parliament, when it passed the Homicide Act 1957, never intended a killing to amount to murder – at that time a capital offence – unless (amongst other things) the defendant (“D”) realised that his or her conduct might cause death. The widening of the law of murder beyond such cases came about through an unexpected judicial development of the law immediately following the enactment of the 1957 legislation.¹¹ More will be said about this in paragraphs 1.26 to 1.29.
- 1.20 The inclusion of all intent-to-do-serious-harm cases within murder distorts the sentencing process for murder. The fact that an offender only intended to do serious harm, rather than kill, is currently regarded as a mitigating factor that justifies the setting of a shorter initial custodial period as part of the mandatory life sentence.¹² On the face of it, this seems perfectly reasonable. However, there is a strong case for saying that when an offence carries a *mandatory* sentence, there should be no scope for finding mitigation in the way in which the basic or essential fault elements come to be fulfilled.
- 1.21 We have been informed by research, carried out by Professor Barry Mitchell, into public opinion about murder.¹³ This shows that the public assumes that murder involves an intention to kill or its moral equivalent, namely a total disregard for human life.¹⁴ The latter may not be evident in a case where someone has intentionally inflicted harm the jury regards as serious, as when D intentionally breaks someone’s nose. Indeed, some members of the public regarded deaths caused by intentionally inflicted harm that was not inherently life threatening as being in some sense “accidental”.¹⁵

⁹ In a different context, it has been held that a jury is entitled to find that an intentional punch breaking someone’s nose involves the intentional infliction of ‘serious’ harm: *Saunders* [1985] *Criminal Law Review* 230. In a case of non-fatal injury, that conclusion may be acceptable.

¹⁰ Paras 1.119 to 1.123.

¹¹ *Vickers* [1957] 2 QB 664.

¹² Criminal Justice Act 2003, s 269 and sch 21.

¹³ We included Professor Mitchell’s research in Appendix A to the CP.

¹⁴ Above, paras A.7 to A.8.

¹⁵ Above, para A.7.

- 1.22 Having said that, we do not recommend that killing through an intention to do serious injury¹⁶ should simply be regarded as manslaughter. Manslaughter is an inadequate label for a killing committed with that degree of culpability. In any event, to expand the law of manslaughter still further would be wrong because manslaughter is already an over-broad offence.¹⁷
- 1.23 We will be recommending that the intent-to-do-serious-injury cases should be divided into two. Cases where D not only intended to do serious injury but also was aware that his or her conduct posed a serious risk of death should continue to fall within the highest category or top tier offence. This is warranted by the kind of total disregard for human life that such Ds show. They are morally equivalent to cases of intentional killing. Cases where D intended to do serious injury but was unaware of a serious risk of killing should fall (along with some instances of reckless killing) into a new middle tier homicide offence.

Reckless manslaughter

- 1.24 The scope of murder is both too broad and too narrow. Where the scope of murder is too narrow, the scope of manslaughter is correspondingly too broad. In particular, the law is too generous to some who kill by 'reckless' conduct, that is those who do not intend to cause serious harm but do realise that their conduct involves an unjustified risk of causing death. The law is too generous in treating all those who realise that their conduct poses a risk of causing death but press on regardless as guilty only of manslaughter. Again, the problems have arisen from the way that periodic judicial development of the law in individual cases, albeit well-intentioned, has changed the boundaries of homicide offences.
- 1.25 It is necessary to provide some brief background to the discussion. When the Homicide Act 1957 was passed, it was still accepted by both Parliament and by the courts that the archaic language of 'malice aforethought' governed the fault element in murder. But malice aforethought has never been a term with very clear boundaries and differences soon emerged between the courts and Parliament over how it should be understood (as indicated in paragraph 1.19 above).

¹⁶ We are recommending use of the term 'injury' in place of 'harm': see Part 2.

¹⁷ The need to narrow the crime of involuntary manslaughter has already been accepted by Government: Home Office, Reforming the Law on Involuntary Manslaughter: The Government's Proposals (2000).

1.26 At that time, the courts treated malice aforethought as covering cases in which the offender: either (a) intended to kill; or (b) intended to cause serious harm; or (c) had knowledge that the act which causes death will probably cause the death of or grievous bodily harm to some person.¹⁸ However, during the passage of the Homicide Act 1957, Parliament was led to believe that (b) was not a species of malice aforethought and that malice aforethought could not be established without D being proven to have at least been aware that the harm done was life-threatening. This was the basis upon which the Homicide Act 1957 was passed. Parliament's belief was founded on the Lord Chief Justice's evidence to the Royal Commission on Capital Punishment, whose report led to the passing of the Homicide Act 1957.¹⁹

1.27 Defined either way, however, malice aforethought provided sufficient coverage to ensure that the worst kinds of reckless killer could be convicted of murder. Here is an example:

D, intending to cause fear and disruption, plants a bomb. D gives a warning which D believes might be sufficient to permit the timely evacuation of the area but probably would not be. In the ensuing explosion, someone is killed.

1.28 At the time of the enactment of the Homicide Act 1957, such a person would have been regarded by both Parliament and the courts as acting with 'malice aforethought' and would be guilty of murder. As Lord Chief Justice Cockburn, many years before, had put it:

If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to *take* life, yet if it were such that life was necessarily endangered by it, - if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it, that was not only murder by the law of England, but by the law of probably every other country.²⁰

¹⁸ Sir James Stephen, *Digest of the Criminal Law* (1877), Art 223(b).

¹⁹ See the CP, paras 1.119 to 1.121.

²⁰ *Desmond*, *The Times*, April 28, 1868. So far as other countries are concerned, Lord Cockburn CJ was guilty of a little exaggeration. In France an intention to kill was required at that time (and it still is) if the offender was to be guilty of the most serious homicide offence: Sir James Stephen, *History of the Criminal Law of England* (1883), vol III, 90 to 91.

- 1.29 Immediately after the passing of the Homicide Act 1957, however, the Court of Appeal indicated that only an intention to kill or to cause serious harm – ((a) and (b) in paragraph 1.26 above) – would suffice as proof of ‘malice aforethought’.²¹ In 1975, there was what can be interpreted as an attempt by the House of Lords to reconcile this new view with the older and broader understanding of malice aforethought, that is, as including exposing others to a probable risk of serious harm or death.²² It was held that a jury could find that D *intended* to kill or to cause serious harm if he or she foresaw one or other of these results was a highly probable result of his or her conduct.²³ However, developments did not stop there.
- 1.30 In 1985, the use of the label “malice aforethought” to describe the fault element for murder was overtly criticised by the House of Lords, even though it is at the heart of section 1 of the Homicide Act 1957.²⁴ Further, the House of Lords made it clear beyond doubt that intention should not be construed as to automatically include the mere foresight of probable consequences. That development led to a series of further cases on the exact width of the law.²⁵ What has emerged is that murder no longer includes killing by reckless risk-taking, as such, however heinous the killing. Such killings, although they can be encompassed by the woolly language of “malice aforethought”, are not intentional. Consequently, from 1985 onwards, the hypothetical bomber described in paragraph 1.27 above could no longer be guilty of murder because he or she did not intend to kill or to cause serious injury. He or she could only be guilty of (reckless) manslaughter.²⁶
- 1.31 Backed by the vast majority of our consultees, we are recommending that the hypothetical bomber should be guilty of a homicide offence more serious than manslaughter. In Part 2, we give some other examples where the culpability of the offender is similarly so high that a manslaughter verdict is an inadequate label for the offence.²⁷

²¹ *Vickers* [1957] 2 QB 664, 670, by Lord Goddard CJ.

²² *Hyam* [1975] AC 55.

²³ It must be said that the exact basis for the decision of the majority in *Hyam* has always been unclear. There is some indication that, whether or not the state of mind in (c) in para 1.26 above was a sufficient basis for finding an intention to kill or cause serious harm, it constituted malice aforethought, as Stephen had indicated a century before: n 18 above.

²⁴ *Moloney* [1985] AC 905, 920, by Lord Bridge. The Homicide Act 1957, s 1 abolishes so-called ‘constructive malice’ (felony-murder), but assumes that ‘malice’ is still the term for the fault element in murder.

²⁵ Eg *Hancock and Shankland* [1986] AC 455; *Nedrick* [1986] 1 WLR 1025; *Woollin* [1999] 1 AC 82.

²⁶ Unless he or she thought that someone was *virtually certain* to be killed in the explosion, a (foreseen) probability of death being no longer sufficient in itself. Even if a death in the explosion was foreseen as virtually certain to occur, however, the jury would still only be asked whether it was willing to find an intention to kill or cause serious injury. The jury would not be required to find that D intended to kill or cause serious injury.

²⁷ Para 2.98 below.

The 'two category' structure of general homicide offences

- 1.32 The distinction between murder and manslaughter is almost certainly over 500 years old. No further general category of homicide has been developed over the intervening period. So, over the centuries, the two categories of murder and manslaughter have had to bear the strain of accommodating changing and deepening understandings of the nature and degree of criminal fault and the emergence of new partial defences. They have also had to satisfy demands that labelling and sentencing should be based on rational and just principles.
- 1.33 Further, the existence of the death penalty and, then, its successor the mandatory life sentence for murderers, has meant that the argument over who should be labelled a 'murderer' has become identified with who should receive the mandatory sentence for murder. Whilst in some respects understandable, the link with sentencing can distort the argument about labels. For example, it is arguable, and we will recommend that, although a person who kills intentionally in response to gross provocation does not deserve a mandatory sentence, he or she should still be labelled a 'murderer'.
- 1.34 Our consultees almost all agreed that the two-category structure of the general law of homicide is no longer fit for purpose. Consequently, we are proposing to replace the two-tier structure with a three-tier structure. Such a structure will be much better equipped to deal with the stresses and strains on the law and with the issues of appropriate labelling and sentencing. The three tiers in descending order of seriousness would be first degree murder, second degree murder and manslaughter.
- 1.35 Under our recommendations, first degree murder would encompass:
- (1) intentional killing; or
 - (2) killing through an intention to do serious injury with an awareness of a serious risk of causing death.
- 1.36 Second degree murder would encompass:
- (1) killing through an intention to do serious injury (even without an awareness of a serious risk of causing death); or
 - (2) killing where there was an awareness of a serious risk of causing death, coupled with an intention to cause either:
 - (a) some injury;
 - (b) a fear of injury; or
 - (c) a risk of injury.
- 1.37 Second degree murder would also be the result when a partial defence of provocation, diminished responsibility or killing pursuant to a suicide pact is successfully pleaded to first degree murder.

1.38 Manslaughter would encompass:

- (1) where death was caused by a criminal act intended to cause injury, or where the offender was aware that the criminal act involved a serious risk of causing injury; or
- (2) where there was gross negligence as to causing death.

Our recommendations for manslaughter build upon previous Law Commission recommendations and Home Office proposals.²⁸

Complicity in murder committed by another person

1.39 A serious problem has arisen in murder cases with regard to what lawyers call the doctrine of ‘complicity’, that is, involving oneself in a criminal enterprise with another who commits murder. A typical example might be where A, B and C see V (a supporter of a rival football team), walking home alone. They set upon V punching and kicking him. When V falls over, B produces a knife and stabs V through the heart. A and C say that (i) although they knew that B sometimes carried a knife, they did not know he would use it on this occasion, and (ii) they did not have murder in mind when attacking V.

1.40 In this example, B is likely to be found guilty of murder as a principal offender. The question is: are A and C involved in the killing in some way that is sufficiently culpable to warrant being guilty of a homicide offence? The law currently answers this question by telling the jury to ask itself whether there was a ‘fundamental difference’ between what A and C thought might happen and what B did.²⁹ If the jury thinks that there was such a fundamental difference, then A and C are guilty of *no homicide offence* at all. A and C will be guilty of assaulting V, but assault is obviously a much lesser offence than murder or manslaughter.

1.41 We believe that this represents a gap in the law. It should be possible to convict A and C of a homicide offence. This gap appears especially significant when people in A and C’s position knew from the start of the joint criminal venture that the person who eventually commits the murder was armed. In such circumstances, the mere fact that they did not foresee that the armed participant would actually commit murder should not absolve A and C from all responsibility for the homicide.

1.42 In the CP,³⁰ we put forward a proposal for filling this gap. It was that A and C should be guilty of manslaughter if:

- (1) they were engaged in a joint criminal venture with B; and
- (2) it should have been obvious to them that B might commit first or second degree murder in the course of that joint criminal venture.

²⁸ Involuntary Manslaughter (1996) Law Com No 237; Home Office, Reforming the Law on Involuntary Manslaughter: The Government’s Proposals (2000).

²⁹ *Powell and Daniels, English* [1999] 1 AC 1.

³⁰ Para 5.83.

This would mean that A and C could not escape responsibility for the homicide simply by denying that they knew B might commit murder if this should have been obvious to them. This is especially likely to be the case when they knew that the eventual killer was already armed. The vast majority of consultees supported the proposal. In Part 4, we set out and explain the recommendation that we are making.

- 1.43 Moreover, we will also recommend that if A, B and C are engaged in a joint criminal enterprise and A and C *do* realise that B might commit murder in the fulfilment of the joint venture, or intend that B does so, then A and C should be guilty of murder along with B. The crucial difference is A and C's awareness of what B may or will do. This awareness makes it justifiable to convict A and C of murder, not just manslaughter. Again, the issue is discussed in more depth in Part 4.

Partial defences

- 1.44 In this review, we are mainly concerned with partial defences, for example provocation, rather than with complete defences, such as self-defence. Currently, there are three partial defences to murder: provocation, diminished responsibility and killing in pursuance of a suicide pact. If successfully pleaded, they do not result in a complete acquittal but in a conviction of manslaughter rather than murder.
- 1.45 There is also what might be called a 'concealed' partial defence, created by legislation as a specific offence. This is the offence of infanticide which is committed when a mother whose balance of mind is disturbed kills her baby when the baby is less than 12 months old.³¹ Infanticide is both an offence and a partial defence. A mother may be charged with this offence. Alternatively, she may be charged with murder and plead infanticide as a partial defence to murder.

Problems with these partial defences

PROVOCATION

- 1.46 The partial defence of provocation is a confusing mixture of judge-made law and legislative provision. The basic rule has been clear enough for a long time: if D kills, having been provoked to lose his or her self-control, in circumstances in which an ordinary person might also have done so, it is manslaughter not murder. However, the higher courts have disagreed with one another on a number of occasions about the scope of the defence. Consequently, the scope of the defence has become unclear. There appears to be little prospect of the courts resolving this disagreement.

³¹ Infanticide Act 1938.

- 1.47 A particular anomaly is that D is entitled to have evidence that he or she was provoked to lose self-control put before the jury no matter how unlikely it is that the defence will succeed. Thus, if D claims that he was provoked to lose his self-control by V's failure to cook his steak medium rare as ordered, the defence has to be put to the jury even though it has no merit and ought to be rejected. By way of contrast, if instead of being provoked, D's killing was a fear-driven over-reaction to a threat of future serious violence, he or she has no defence to murder at all, however well founded the fear. The courts have declined to create or extend a partial defence to cover such cases. Accordingly, reform of this area now depends upon legislative action by Parliament.
- 1.48 In 2004 we recommended reform of the partial defence of provocation. We set out how we thought the defence should be reformed to create greater certainty and to correct the lop-sided character of the law.³² During the current consultation, consultees have again broadly agreed that the defence should be reformed along the lines we are recommending. We return to this topic in Part 5.

DIMINISHED RESPONSIBILITY

- 1.49 The introduction of the partial defence of diminished responsibility in 1957 was a welcome reform. However, medical science has moved on considerably since then and the definition of diminished responsibility is now badly out of date. We are recommending an improved definition which we have drawn up with the help of the Royal College of Psychiatrists and other expert consultees. The new definition has had wide support amongst consultees. We believe that the new definition has the flexibility to accommodate future changes in diagnostic practice, whilst ensuring that the public remains well protected from those mentally disordered offenders who pose a continuing threat. Detailed discussion can be found in Part 5.

KILLING IN PURSUANCE OF A SUICIDE PACT

- 1.50 Section 4 of the Homicide Act 1957 makes the survivor of a suicide pact who took part in the killing of another person in the pact guilty of manslaughter and not murder. This provision was meant to allow the jury to take pity on those desperate enough to seek to take their own lives along with that of another person or persons. In the CP,³³ we discussed whether the provision should be repealed. We provisionally concluded that it should be. However, in the light of our decision not to take the issue of 'mercy' killing further at this stage, we are not now recommending the repeal of section 4. Its merits should be considered as a part of the broader question of whether there should be a partial defence of 'mercy' killing. The issue is considered in Part 7.

³² Partial Defences to Murder (2004) Law Com No 290, para 1.13.

³³ Part 8, paras 8.19 to 8.35.

INFANTICIDE

- 1.51 Where the offence of infanticide is concerned, the problem is not so much the definition but, rather, the procedure for ensuring that evidence of a mother's mental disturbance at the time of the killing is heard at trial. A mother may be 'in denial' about having killed her infant. She may, therefore, be unwilling to submit to a psychiatric examination if the point of this examination seems to her to be to find out why she did it. This is because she cannot accept that she did do it. In such circumstances, she is unlikely to have another defence and is, therefore, likely to be convicted of murder. This is not in the public interest.³⁴ However, this is not an easy problem to solve. We recommend the adoption of a post-trial procedure designed to do justice in these cases. The procedure is explained in Part 8.

Missing defences

- 1.52 Whereas there has recently been controversy over whether provocation should continue to be a partial defence to murder, other strong claims for mitigation of the offence of murder have failed to gain legal recognition. Judges have decided that they would prefer Parliament to decide whether there should be new partial defences to murder but Parliament has not had the time to consider the matter.

Excessive Force in Defence

- 1.53 We have already mentioned the need for a partial defence when D, fearing serious violence from an aggressor, overreacts by killing the aggressor in order to thwart the feared attack. We are recommending that D's fear of serious violence should be the basis for a partial defence to murder through reform of the provocation defence.³⁵ This has been almost unanimously approved by consultees.

Duress

- 1.54 Circumstances involving duress arise when D becomes involved in the killing of an innocent person but only because D is personally threatened with death or with a life-threatening injury and the only way to avoid the threat is to perpetrate or participate in the killing.³⁶ At present, however, duress is no defence to murder at all. Indeed, the current guidelines do not even mention it as a mitigating factor in sentencing for murder.³⁷ This is not right. Little, if any, blame may attach to someone's decision to take part in a killing under duress. Take the following example:

A taxi driver has his vehicle commandeered by a gunman who holds a gun to the driver's head and tells him to drive to a place where the gunman says he may shoot someone. The taxi driver does as the gunman demands and the gunman goes on to shoot and kill someone.

³⁴ *Kai-Whitewind* [2005] EWCA Crim 1092, [2005] 2 Cr App R 31.

³⁵ Part 5 below.

³⁶ Alternatively, D may be threatened that members of his or her family will be killed or seriously harmed.

³⁷ Criminal Justice Act 2003, s 269 and sch 21.

- 1.55 Under the existing law the taxi driver is complicit in the killing and stands to be convicted of murder. Just like the gunman, he will receive the mandatory life sentence. In certain circumstances, a claim of duress should provide a defence to first degree murder in this and in other cases. We explain the circumstances in which duress should be a defence in Part 6.
- 1.56 Almost all our consultees were agreed that duress should be a defence to murder in some manner or form. We had provisionally proposed that duress should have the effect of reducing first degree murder to second degree murder. That proposal had majority support amongst consultees. However, we have concluded that, whatever the merits of that solution considered in isolation, it would lead to undue complexity or even anomaly in other areas of the law of homicide. There could be no principled and straightforward way of applying or dis-applying the defence of duress to second degree murder, attempted murder and manslaughter. For this reason it is not a solution that we now recommend. Instead, we are recommending that duress should be a full defence to first degree murder, second degree murder and attempted murder.
- 1.57 However, stringent conditions will have to be satisfied before the defence can succeed. The burden of proof will be on D to show that he or she was threatened with death or life-threatening harm,³⁸ had no realistic opportunity to seek the police's protection and had not already unjustifiably exposed him or herself to the risk of being threatened. Further, the jury must judge that a person of ordinary courage might have responded as D did by committing or taking part in the commission of the crime.

Sentencing and sentencing reform

- 1.58 All persons convicted of murder must be sentenced to imprisonment for life. A life sentence commonly consists of three periods or phases.
- (1) The first phase is the 'minimum term': this is the period that the offender must spend in prison before he or she is eligible for release. Its length is meant to reflect the seriousness of the offence and hence the demands of retribution and deterrence. The length of the minimum term is set by the trial judge. In deciding upon the length of that term, the judge must refer to guidelines that Parliament has provided in the Criminal Justice Act 2003.
 - (2) When that minimum term has expired, the second phase begins (assuming that the offender is not released immediately). The second phase is the period in custody during which the offender may be considered for parole: the decision whether or not to release an offender is made by reference to considerations of public protection. The Parole Board will not release the offender if he or she still poses a danger to the public. Offenders may, therefore, spend considerably longer in prison than the minimum term recommended by the judge at trial.

³⁸ Or that he or she was threatened that a person for whom he or she reasonably felt responsible would be killed or seriously harmed.

- (3) Finally, there is the third phase: being 'out on licence'. When the offender is deemed safe to release, he or she is released on licence until the end of his or her life. That means that he or she must comply with the conditions of the licence – conditions that may involve, for example, staying away from certain places – or risk recall to prison.
- 1.59 The guidelines that judges follow in deciding what the first phase – the minimum term – should be are relatively new and very important. The guidelines are found in schedule 21 to the Criminal Justice Act 2003.
- 1.60 Under these guidelines, the length of the minimum term will depend upon the gravity of the murder. There are three starting points for adult offenders:
- (1) a whole life term for exceptionally serious cases, such as premeditated killings of two or more people, sexual or sadistic child murders or politically motivated murders;
 - (2) 30 years' minimum for serious cases such as murders of police or prison officers, murders involving firearms, sexual or sadistic killings or killings aggravated by racial or sexual orientation; and
 - (3) 15 years' minimum for murders not falling within the two higher categories.³⁹
- 1.61 The issue of sentencing is not within our remit. However, we do not intend our proposals for reform to undermine or weaken the existing guidelines. For example, the use of a firearm to kill a police officer on duty may be regarded as an aggravating factor so serious that the same sentence (life imprisonment) and the same minimum amount of time in custody (thirty years) may be appropriate whether the offender is convicted of first or second degree murder. We expect that guidelines for sentencing in second degree murder cases will be set down by Parliament as a part of any reforms to the law. Some of the issues are addressed in more detail in Appendix A.
- 1.62 What is clear to us is that the setting down of different recommended minimum terms for custody, depending on the nature or circumstances of a murder, makes it vital to rationalise and clarify the law of murder itself.

AN OVERVIEW OF THE STRUCTURE THAT WE ARE RECOMMENDING

- 1.63 **We recommend that there should be a new Homicide Act for England and Wales. The new Act should replace the Homicide Act 1957. The new Act should, for the first time, provide clear and comprehensive definitions of the homicide offences and the partial defences. In addition, the new Act should extend the full defence of duress to the offences of first degree and second degree murder and attempted murder, and improve the procedure for dealing with infanticide cases.**

³⁹ For further analysis see, Andrew Ashworth, *Sentencing and Criminal Justice* (4th ed 2005) pp 116 to 118.

1.64 In structuring the general homicide offences we have been guided by a key principle: the 'ladder' principle. Individual offences of homicide should exist within a graduated system or hierarchy of offences. This system or hierarchy should reflect the offence's degree of seriousness, without too much overlap between individual offences. The main reason for adopting the 'ladder' principle is as Lord Bingham has recently put it (in a slightly different context):

The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted...⁴⁰

1.65 The 'ladder' principle also applies to sentencing. The mandatory life sentence should be confined to the most serious kinds of killing. A discretionary life sentence should be available for less serious (but still highly blameworthy) killings.

1.66 Partial defences currently only affect the verdict of murder. This is because a verdict of murder carries a mandatory sentence. That sentence is not appropriate where there are exceptional mitigating circumstances of the kind involved in the partial defences. These mitigating circumstances necessitate a greater degree of judicial discretion in sentencing. The law creates this discretion by means of the partial defences which reduce what would otherwise be a verdict of murder, which carries a mandatory sentence, to manslaughter, which does not. Therefore, our recommended scheme does not extend the application of the partial defences to second degree murder or manslaughter. These offences would permit the trial judge discretion in sentencing and they therefore lack the primary justification for having partial defences.⁴¹

The structure of offences

1.67 We believe that the following structure would make the law of homicide more coherent and comprehensible, whilst respecting the principles just set out above:

- (1) **First degree murder** (mandatory life penalty)
 - (a) Killing intentionally.
 - (b) Killing where there was an intention to do serious injury, coupled with an awareness of a serious risk of causing death.
- (2) **Second degree murder** (discretionary life maximum penalty)
 - (a) Killing where the offender intended to do serious injury.

⁴⁰ *Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 at [12].

⁴¹ This argument is pursued further in Part 2 where we will explain why a secondary justification for partial defences – the labelling argument – is insufficiently weighty to justify permitting partial defences to reduce homicide offences below first degree murder to offences further down the ladder.

- (b) Killing where the offender intended to cause some injury or a fear or risk of injury, and was aware of a serious risk of causing death.
 - (c) Killing in which there is a partial defence to what would otherwise be first degree murder.
- (3) **Manslaughter** (discretionary life maximum penalty)
- (a) Killing through gross negligence as to a risk of causing death.
 - (b) Killing through a criminal act:
 - (i) intended to cause injury; or
 - (ii) where there was an awareness that the act involved a serious risk of causing injury.
 - (c) Participating in a joint criminal venture in the course of which another participant commits first or second degree murder, in circumstances where it should have been obvious that first or second degree murder might be committed by another participant.

Partial Defences reducing first degree murder to second degree murder

- 1.68 The following partial defences would reduce first degree murder to second degree murder:
- (1) provocation (gross provocation or fear of serious violence);
 - (2) diminished responsibility;
 - (3) participation in a suicide pact.

Other specific homicide offences

- 1.69 There will remain a number of specific homicide offences, such as infanticide, assisting suicide and causing death by dangerous driving.

CONCLUSION

- 1.70 The Criminal Justice Act 2003 (“the 2003 Act”) one of the most important pieces of legislation in the history of criminal justice reform, brought in a new sentencing regime for murder.⁴² However, the radical reforms effected by the 2003 Act stand upon shaky foundations because the offence of murder, and the partial defences to it, do not have defensible definitions or a rational structure. Unfortunately, although twentieth century legislation on murder brought many valuable reforms, the definitions of murder and the partial defences remain misleading, out-of-date, unfit for purpose, or all of these. Quite simply, they are not up to the task of providing the kind of robust legal support upon which the viability of the 2003 Act depends.

⁴² Section 269 and sch 21 - see paras 1.58 to 1.62 above.

1.71 As we indicated in the CP,⁴³ it is worth noting that many of the problems we discuss were identified by a Parliamentary Select Committee as long ago as 1874. The Committee said:

If there is any case in which the law should speak plainly, without sophism or evasion, it is where life is at stake; and it is on this very occasion that the law is most evasive and most sophistical.⁴⁴

1.72 A few years later, former Prime Minister W. E. Gladstone indicated his willingness to promote the enactment of a Homicide Act to rationalise the law, based on what the Criminal Law Commissioners had at that time proposed. However, nothing was done.⁴⁵ That led one criminal lawyer to remark, at the beginning of the twentieth century, that a belief that a criminal code would be passed in the House of Commons was as naive as “expecting to find milk in a male tiger”.⁴⁶

1.73 We hope that, at the beginning of the twenty-first century, an expectation that the law of homicide should be rationalised by statute is not quite that naive. In the Parts that follow, we will explain in detail why we have decided to recommend a structure for the law of homicide in this form.

⁴³ Paras 1.129 to 1.131.

⁴⁴ Special Report from the Committee on the Homicide Law Amendment Bill (1874) 314.

⁴⁵ K J M Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (1998) p 149.

⁴⁶ Above.

PART 2

STRUCTURE WITHIN THE LAW OF HOMICIDE

A THREE-TIER STRUCTURE

- 2.1 **We recommend the adoption of a three-tier structure of general homicide offences to replace the current two-tier structure of ‘murder’ and ‘manslaughter’. In descending order of seriousness, the offences should be ‘first degree murder’, ‘second degree murder’ and ‘manslaughter’.**
- 2.2 There was strong and widespread support amongst our consultees for the division of general homicide offences into a three-tier structure. It was supported by the permanent judges at the Central Criminal Court; the Association of Chief Police Officers; the Police Federation; Victims’ Voice; the Criminal Bar Association; the Law Society; the Criminal sub-Committee of the Council of HM Circuit Judges; the Justices’ Clerks’ Society; Justice; Refuge; Justice for Women; the Ministry of Defence; the Crown Prosecution Service; and the Mission Affairs Council of the Church of England, amongst many others.

Why a further tier is necessary

- 2.3 In Part 1 we explained that the law of murder has not developed systematically. Whether or not a killer falls to be labelled as guilty of murder or of manslaughter reflects historical accident more than it does rational principles. Past attempts to introduce greater order, fairness and clarity to the law through statutory reform and codification have failed because Parliament has been faced with more pressing business at the time. Twentieth century reforms, whilst valuable, have been piecemeal. Many of these reforms might have awaited more wide-ranging and integrated law reform were it not for the existence of the death penalty for murder until 1965.
- 2.4 To bring greater order, fairness and clarity to the law of homicide, the scope of and distinctions between individual homicide offences must be made clearer and more intelligible, as well as being morally more defensible. Achieving this goal has not proved possible within a two-tier structure of general homicide offences. As we have seen, the constraining effect of the two-tier structure gives rise to a definition of murder that leaves it in one respect too broad and in another respect too narrow.
- 2.5 The definition is too broad in so far as it encompasses killings committed through an intention to do harm the jury judges to be serious, even if the defendant (“D”) had no intention to endanger life and did not imagine that his or her acts might lead to the victim’s (“V”) death.
- 2.6 The definition is too narrow in that it excludes cases where D, without intending to kill or to cause serious injury, nonetheless realised that his or her conduct posed a serious risk of causing death and went ahead regardless.

- 2.7 The over and under-inclusiveness of murder's current definition inevitably has the undesirable consequence of making it unduly difficult to devise a fair sentencing structure for both murder and manslaughter. We believe that the introduction of a further tier into the general law of homicide will do a great deal to resolve this problem.

Approaches for reform that we reject

Retaining a two-tier scheme but re-aligning murder and manslaughter

- 2.8 A minority of our consultees preferred to retain the two-tier structure but to change the definitions of murder and manslaughter. However, we do not believe that the difficulties with the law of murder can be adequately resolved by adopting this approach.
- 2.9 If murder is confined narrowly, either on policy grounds to restrict the scope of the mandatory sentence or in order to preserve its status as an offence of 'unique' gravity, manslaughter becomes far too broad and uncertain in scope. Manslaughter is itself a very serious crime and should not be devalued by being left as the residual, amorphous 'catch-all' homicide offence. If, by way of contrast, murder is defined more expansively, there is an ever-increasing risk of arbitrariness in whether an offender will fall on one side or the other of the line dividing murder from manslaughter.

RESTRICTING MURDER TO INTENTIONAL KILLING

- 2.10 A minority of consultees would have liked to see us recommend that murder be confined to intentional killing, with all other culpable homicides falling within manslaughter (or 'culpable homicide'). In our view, that proposal, whilst having the virtue of bringing great simplicity to the law, would entail far too broad a law of manslaughter. Manslaughter would then encompass killings brought about through the most extreme recklessness or an intention to endanger life, intentional killings perpetrated under provocation or diminished responsibility and spontaneous 'one-punch' killings or killings through serious neglect. No non-fatal offence against the person has such breadth. We do not believe that such breadth should be tolerated in a fatal offence against the person.

EXPANDING MURDER TO INCLUDE ALL KILLINGS WHERE THERE WAS AN INTENTION TO CAUSE SOME HARM

- 2.11 By way of contrast, some suggestions we received for an expanded law of murder would have made it difficult to explain the moral importance of distinguishing between murder and manslaughter. One consultee would have liked to see murder cover any killing where there was an intent to do harm of *any* kind, with manslaughter covering all killings through recklessness (however extreme) or negligence. On this view, if D pushes V intending to cause V minor harm and V, by misfortune, falls over, hits his head and dies, that is murder. However, if D sets fire to V's house when V is asleep, for the thrill of watching V run for his life, but V trips, falls unconscious and is consumed by the flames, that is manslaughter.

- 2.12 On this view, the conceptual basis for the distinction (whether or not there was an intent to harm) between murder and manslaughter is clear enough. It is the intention to cause harm that differentiates between the two offences. Even so, we do not believe that there is sufficient moral significance to the distinction. It cannot sustain the view that murder is, in principle, the graver crime.

DEFINING MURDER TO INCLUDE KILLING WHERE THE DEFENDANT IS 'RECKLESS' AS TO CAUSING DEATH

- 2.13 Perhaps the best that can be made of the two-tier structure is the suggestion that murder should include not only those who intend to kill but also those who are reckless as to causing death. We have carefully considered this suggestion. However, we have rejected it because we do not believe that it will sustain a morally defensible boundary between murder and manslaughter.
- 2.14 As we argued in Part 1,¹ one of the things wrong with the inclusion of killing through an intention to do serious harm within murder is that this makes murder both too broad and too narrow. It is too broad in that it currently covers death unforeseeably caused during a 'punch up' that gets out of hand through to death caused by prolonged use of excruciating torture. It is too narrow in that it does not cover the case of someone who intends to expose another person to a risk of death without as such intending them to suffer serious harm, as in the example where the killer plants a bomb and gives a warning that unexpectedly turns out to be insufficient.²
- 2.15 If 'reckless' killing replaced killing through an intention to do serious harm as the fault element for murder, the law would remain both in some respects too broad and in some respects too narrow, but in different ways.
- 2.16 The law would be too narrow because someone intending to cause injury, however serious, could not be found guilty of murder unless he or she was aware that the injury might lead to V's death. So, someone who subjected another to severe bodily torture, believing he or she was a long way from obtaining the information required from V because of V's toughness, could be convicted only of manslaughter if V unexpectedly died. The law would be too broad because reckless drivers or electricians who knew that their work had been sloppy would almost automatically become murderers if their conduct led to a death.
- 2.17 We do not believe that it will prove possible to re-draw the line between murder and manslaughter to eliminate arbitrariness or anomaly without creating a middle tier of homicide. Broadly speaking, fault elements with a wide ambit, such as the intention to do 'serious' harm (or recklessness, in some form, as to death) are best attached to crimes with a discretionary sentence. In that way, the wide variety of circumstances in which the crimes come to be committed with that fault element can be reflected in the sentence. Accordingly, these fault elements are more suited to our recommended middle tier offence of second degree murder.³

¹ Paras 1.17 to 1.31 above. See also paras 2.5 to 2.6 above.

² See para 1.27 above.

³ Under our recommended structure, only first degree murder would attract the mandatory life sentence.

A single homicide offence

- 2.18 By way of contrast, Sir Louis Blom-Cooper QC and Professor Terence Morris, whilst recognising that their proposals would not fall within our terms of reference, advocate a structure consisting of a single homicide offence. This offence would be committed, “on proof that the death was unlawful and that it was the outcome of the intrinsically unlawful conduct of the offender”. The offences of murder and manslaughter would cease to exist.
- 2.19 The murder label is one of the highest moral and social significance. It is widely used not only in England and Wales but also in many other jurisdictions across the world. It is central to the public perception and evaluation of the seriousness of homicide. We believe that it would be wrong to abandon it and that for very similar reasons the manslaughter label should also continue to be used.
- 2.20 Sir Louis Blom-Cooper QC and Professor Morris’ proposal would have the virtue of introducing simplicity into the law, and there would be few contested charges. However, the proposed offence is excessively broad. It is at odds with basic principles of fairness observed in the way that other serious offences against the person are defined in English law and in almost all other jurisdictions world-wide.
- 2.21 The proposed offence has no fault requirement of any kind. Indeed, Sir Louis Blom-Cooper QC and Professor Morris suggest that, “it is just as logical to exclude the mental element from criminal responsibility, as is done in crimes of strict liability”. So, on this approach, the surgeon who makes an error that leads to the death of the patient would be guilty of the same offence as the psychopathic, serial or contract killer. It is hard to see why this unitary approach to homicide is warranted when the law’s approach to other species of wrong (non-fatal offences against the person, property crimes and driving offences) is to divide them up. The division between offences, within a hierarchical structure, makes it possible to provide different sentencing possibilities for each crime. This provides some important guidance to judges on sentencing that they would lack where a single offence carries a maximum sentence of life imprisonment.
- 2.22 Further, we do not believe that judges would welcome the proposal. They would have to shoulder the entire burden of determining the gravity of the offence through post-trial sentencing procedures. Key issues, such as the intent with which the offender acted, would cease to be matters to be tested before the jury. We do not believe that such an approach would inspire confidence in the criminal law’s integrity.

The approach that we recommend

A three-tier structure

- 2.23 There should be a three-tier structure to the law of homicide, with the new offence forming the middle tier of the three. In deciding this issue, there is a need to balance competing considerations.
- 2.24 On the one hand, there is the need to ensure that the law is structured in a fair way which accords with common sense as well as legal principle. Important differences between kinds and degrees of fault in killing must be accommodated within any revised structure.

- 2.25 On the other hand, there is a need to ensure that the law does not become so complex that it cannot be applied by juries, especially when they are faced with a number of defendants running different defences (perhaps in the alternative). There must be clarity and simplicity in the distinctions drawn between offences. A lack of clarity, or excessive reliance on fine-grained distinctions, would mean that the prosecution might feel compelled in some cases to accept a plea of guilty to a lesser offence even when the evidence suggests that D is guilty of a more serious offence.
- 2.26 Having consulted widely with experienced legal practitioners, amongst others, we are confident that a three-tier structure strikes the right balance. Most significantly, prosecutors, defence advocates and judges have not objected to the three-tier structure on the grounds that it would prove to be too complex. There is already a tiered structure in place for non-fatal offences that has for many years been understood in much the same way that we anticipate our scheme for fatal offences would be understood.⁴ Although the content of the non-fatal offences has been frequently criticised, the three-tier statutory structure in which they are situated has not been the subject of criticism.
- 2.27 Our confidence that a three-tier structure would be workable is bolstered by the existence of an already developed practice amongst judges of providing written directions to juries in murder cases. These directions commonly explain how the facts relate to the law of murder in simple terms and give an indication of the order in which the jury should address the issues arising at trial. It has been shown that written directions, as opposed to purely oral ones, are more frequently understood, remembered and followed correctly.⁵
- 2.28 As we have indicated, we are recommending that the new offence forms the middle tier of the three-tier structure. The most pressing need for reform is at the border between murder and manslaughter, at the ‘bottom end’ of murder and at the ‘top end’ of manslaughter. As we argued in Part 1, it is here that the limits of the two-tier structure have, during the last 40 years, resulted in a continual shifting of the borderline. This has led to some improvements but also to uncertainty and a lack of clarity. A new middle tier offence should put an end to the perceived need constantly to tinker with the definitions of murder and manslaughter through judicial law-making. The substance of the new and revised offences is explained further below.
- 2.29 Far from over-complicating the law, moving to a three-tier structure will greatly improve the prospects for a sentencing structure for homicide that the public can readily understand. As the Chairman of the Sentencing Advisory Panel has said:

⁴ The offences in question are attempted murder (at the top), then the offences under the Offences against the Person Act 1861, s 18, s 20, and s 47, with common assault (Criminal Justice Act 1988, s 39) as the lowest tier. See further C. Clarkson, A. Cretney, G. Davies, and J. Shephard, “Assaults: the relationship between Seriousness, Criminalisation and Punishment” [1994] *Criminal Law Review* 4.

⁵ See HHJ Nic Madge, “Summing-Up: A Judge’s Perspective” [2006] *Criminal Law Review* 817.

[T]he principled development of sentencing guidelines requires the avoidance of overly broad offences. Such offences fail to make explicit the moral distinctions which should be reflected in the law, and they lump together very different forms of conduct under a single, misleading offence label. Sentencing coherence in homicide, it seems, depends on offences being arranged hierarchically, and with gradations within those offences being clearly based upon the different degrees of offender culpability for causing death.⁶

- 2.30 Some consultees thought that our provisional proposals were (albeit understandably, given our terms of reference) unduly influenced by our obligation to assume retention of the mandatory life sentence for murder. They thought that a very different proposed structure might have emerged had the retention of the mandatory sentence been one of the issues left to us to consider along with the structure of the law.
- 2.31 So far as the structure of offences is concerned, we disagree with this hypothesis. There is a four-tier structure to the Home Office's proposed reforms of non-fatal offences of violence even though none of the offences carries a mandatory sentence.⁷ Even if there were minimum or maximum rather than mandatory sentences for homicide offences, we would still recommend that such offences should be tiered according to their seriousness.
- 2.32 Under our recommendations, there would continue to be specific offences of homicide, such as infanticide, which would buttress the general homicide offences.⁸
- 2.33 **We recommend the adoption of a three-tier structure of general homicide offences to replace the current two-tier structure of 'murder' and 'manslaughter'.**

An alternative three-tier scheme including an 'aggravated' offence of murder

- 2.34 A minority of the consultees who favoured a three-tier law of homicide favoured creating a tier above what is currently regarded as murder, namely a form of 'aggravated' murder. Such a higher tier is to be found, in different forms, in many American state codes, in France and in Germany. One consultee suggested that this higher category could include those who committed murder on more than one occasion and those who use torture or starvation or otherwise kill cruelly. Two other consultees suggested that aggravated murder could cover those whose killing causes fear amongst a group within society because members of the group are led to believe that they could be the next target. This is liable to happen when a killing has, for example, a racist motivation.

⁶ Martin Wasik, "Sentencing in Homicide", in Andrew Ashworth and Barry Mitchell (eds) *Rethinking English Homicide Law* (2000) p 192.

⁷ Home Office, *Violence: Reforming the Offences Against the Person Act 1861* (1998).

⁸ These offences, which include causing death by dangerous driving or causing the non-accidental death of a child or vulnerable adult, can be thought of as constituting a fourth tier to the law of homicide.

- 2.35 Whilst there could be no doubt that these are all aggravated forms of murder, we regard the aggravating features as best reflected through an uncompromising approach to the length of the minimum custodial sentence imposed for murder. This is the law's approach at present.⁹ We explain in paragraphs 2.166 to 2.169 below our belief that the difficulty in settling the precise scope of the 'aggravated' murder category would cause as many problems as the creation of the category solves. We do not favour a three-tier structure that includes an offence of 'aggravated' murder.

OFFENCE LABELS

- 2.36 In the CP, we employed (in descending order of seriousness), the terms 'first degree murder', 'second degree murder' and 'manslaughter'. The idea of distinguishing between first and second degree is not unprecedented. It is currently used in American law, although we are not using it in the same way as it is used in the various criminal state codes in the United States.
- 2.37 There was, understandably, no unanimity on the question of the right name for different offences. Having said that, a clear majority supported the use of the terms first degree murder and second degree murder to express the distinction between the two most serious general offences of homicide. This was supported, for example, by the permanent judges at the Central Criminal Court; Victims' Voice; the Association of Chief Police Officers; the Criminal sub-Committee of the Council of HM Circuit Judges; the Police Federation; the Justices' Clerks' Society; the Criminal Bar Association; the London Criminal Courts' Solicitors' Association; Rights of Women; the Ministry of Defence; and the Crown Prosecution Service.
- 2.38 The use of the term second degree murder to describe the verdict the jury must reach when a plea of provocation or diminished responsibility is successful as a defence to first degree murder was strongly supported by groups representing victims' families. We believe that both terms would be acceptable, and indeed are already familiar, to the general public.
- 2.39 Some consultees preferred different labels. The Higher Court Judges' Homicide Working Party suggested a division (in descending order of seriousness) between murder, 'grave homicide' and manslaughter. The organisation Justice suggested a division between murder, 'culpable homicide'¹⁰ and manslaughter. Nicola Padfield suggested a division between murder, manslaughter and 'unlawful killing'.

⁹ Criminal Justice Act 2003, s 269 and sch 21.

¹⁰ A term in use in Scottish law.

- 2.40 What unites these different viewpoints is a judgement that, even after (or perhaps because of) more than 500 years of usage, the terms ‘murder’ and ‘manslaughter’ still have a role to play as terms distinguishing between offences. The same or broadly analogous terms (whatever their substantive content) are in use in almost all English-speaking jurisdictions.¹¹
- 2.41 Of those who objected to the terminology of first and second degree murder, one consultee thought that the drawing of a distinction between first and second degree murder was a fundamentally flawed exercise because it undermined the claim that murder was a ‘uniquely’ grave crime. The CP’s use of the term ‘unique’ to describe murder as a crime was liable to mislead in this respect. We do not regard the fact that murder is an especially heinous offence as requiring law reformers to work with a single offence, if it is to have the term ‘murder’ in it. No such constraint has bound those who have reformed American state codes, where the distinction between first and second degree murder is commonplace. Adjectives such as ‘unique’, or ‘especially serious’, when applied to murder, should be understood as doing no more than indicating the need for any offence or offences of murder to be clearly distinct, in point of gravity, from lesser homicide offences further down the ladder that do not have the murder label.
- 2.42 **We recommend the retention of the terms ‘murder’ and ‘manslaughter’ to describe at least two of the three tiers in the new structure for the law of homicide.**
- 2.43 **We also recommend the division of murder into two tiers, called ‘first degree murder’ and ‘second degree murder’. Second degree murder should be the middle tier offence between first degree murder and manslaughter. Second degree murder will encompass some killings currently regarded as murder and some killings currently regarded as manslaughter.**
- 2.44 We acknowledge that the labels that ought to be attached to offences is not just a question for legal experts but is something on which anyone may have a well-informed and persuasive opinion. Accordingly, although we have set out our recommendations, it is a matter that could be further addressed in the next stage of the review.

HOW SHARPLY DO OFFENCES NEED TO BE DISTINGUISHED?

- 2.45 Naturally, consultees’ views on what the offences should be called often depended on what was to be included within each offence. It is to this matter that we will turn to in the next section. However, before doing so, it is important to place emphasis on a point easily forgotten when deciding which kinds of homicide should be included in each tier.

¹¹ It is also worth noting that in Germany (through use of the term *mord*) and in France (through the use of the term *meurtre*) very similar terms to “murder” are in use to identify the most serious forms of homicide.

- 2.46 There will inevitably be individual instances of homicide at the top end (in terms of seriousness) of one tier that may in a broader sense be thought of as being as or more serious than individual instances of homicide at the bottom end of the tier above. This will be true of any sophisticated system for grading offences even before one comes to consider the applicability of defences to offences within each tier. The fact that one can think of such instances does not necessarily undermine the case for drawing the lines between the tiers where they have been drawn.
- 2.47 It may, for example, be possible to think of a case of gross negligence manslaughter where the negligence was so gross that the killing could justifiably be regarded as equally as bad as a case of second degree murder, even though our criteria for satisfying the fault elements of the latter crime have not been met.¹² This does not necessarily mean that there has been any mistake in the way in which the tiers of homicide have been divided. A ladder of offence seriousness is defensible so long as, by and large, the cases that fall within a particular tier are, other things being equal, more serious than the cases that, by and large, fall within the tier below.¹³
- 2.48 This point is illustrated by the way in which the non-fatal offences are currently broadly divided, according to a ladder principle of offence seriousness.¹⁴ Generally, ‘malicious wounding with intent to do grievous bodily harm’¹⁵ can be regarded as more serious than ‘maliciously wounding or inflicting grievous bodily harm’.¹⁶ The way that these offences are distinguished (a lesser fault element sufficing for the latter offence) ensures that, by and large, morally less heinous cases of doing injury will fall only within that latter offence where no specific intent to do grievous bodily harm need be proved.¹⁷
- 2.49 That does not exclude the possibility that some individual instances of maliciously inflicting grievous bodily harm at the top end of that offence may be more serious than some individual instances of wounding with intent to do grievous bodily harm. An example might be the infliction on V of severe and permanent injury where D lacked the specific intent to do such an injury because of intoxication.

¹² Such a judgement of offence seriousness can, of course, be reflected in the sentence handed down for manslaughter - eg *Wacker* [2003] 1 Cr App Rep (S) 92. For further discussion see the valuable article by Victor Tadros, “The Homicide Ladder” (2006) 69 *Modern Law Review* 601, 610 to 613.

¹³ We do not say that this is the only test of the defensibility of a ladder of offence seriousness. It may be that a ladder must be so structured that certain ‘key’ cases fall within one tier rather than another whatever the position ‘by and large’ in terms of seriousness.

¹⁴ The offences are to be found in, respectively, the Offences Against the Person Act 1861, ss 18 and 20. For the courts’ interpretation of those sections, that makes it right to think of them in terms of a ladder of ascending seriousness, see *Mowatt* [1968] 1 QB 421; *Belfon* [1976] 3 All ER 46.

¹⁵ Contrary to Offences Against the Person Act 1861, s 18.

¹⁶ Contrary to Offences Against the Person Act 1861, s 20.

¹⁷ In saying this we are not, of course, endorsing these offences as currently defined. We have previously proposed root-and-branch reform of these offences whilst retaining and indeed reinforcing the ‘ladder’ principle: *Offences Against the Person and General Principles* (1993) Law Com No 218.

FIRST DEGREE MURDER

2.50 **We recommend that first degree murder should encompass:**

- (1) **intentional killings, *and***
- (2) **killings with the intent to do serious injury where the killer was aware that his or her conduct involved a serious risk of causing death.**

The provisional proposal in the CP

2.51 In the CP, our provisional proposal was that first degree murder should be restricted to cases in which there was an intentional killing.

2.52 At present, murder includes not only intentional killing but also killing through an intention to do serious harm. We explained in Part 1¹⁸ that this can lead to some killers who did not intend to kill being inappropriately labelled as murderers rather than guilty of a lesser homicide offence. This can happen when the offender neither intended to kill nor thought that the harm he or she was intentionally inflicting involved any risk of causing death (although the harm intended was adjudged serious by the jury).

Responses to the provisional proposal

2.53 There was a good deal of support for our proposal. It was supported by the resident judges of the Central Criminal Court; the Criminal sub-committee of the Council of HM Circuit Judges; Victims' Voice; Justice; the Crown Prosecution Service; the Law Society; the teachers of criminal law at the London School of Economics and Political Science; and the Criminal Bar Association, amongst others.

2.54 There was also opposition to the provisional proposal. The Higher Court Judges' Homicide Working Party thought the restriction made first degree murder too narrow, as did Justice for Women, the Police Superintendents' Association, and the Association of Chief Police Officers. Some groups who supported our provisional proposal, because they could see the logic of it, would also almost certainly be content with a broader definition of 'first degree murder' so long as it did not involve undue complexity. Some consultees supported the provisional proposal only because it entailed a severe restriction on the scope of the mandatory life sentence (that sentence being what they really disliked) and not because they believed there was intrinsic merit in narrowing the scope of murder to intentional killings.

¹⁸ Paras 1.17 to 1.18 above

The impact of the responses on our thinking: a wider definition of first degree murder

- 2.55 In the light of these responses, we have sought to create a greater measure of consensus over the scope of first degree murder. We have sought to do so by extending its fault element beyond the provisionally proposed limit of intentional killing whilst retaining the robust distinction between the three tiers within the law of homicide that proved popular with consultees. We believe that the suggestion of the Higher Court Judges' Homicide Working Party has provided us with a means of achieving this.
- 2.56 The Higher Court Judges' Homicide Working Party thought that first degree murder should be extended beyond cases of intentional killing so as to cover homicides in which the offender acted on an intention to do serious injury *and* was recklessly indifferent as to causing death. By way of contrast, in the CP, we took the view that such cases, falling just short of intentional killing, could be adequately dealt with through a severe sentence for second degree murder. We have been persuaded that the Higher Court Judges' proposed extension of first degree murder is the right approach. For reasons explained in paragraphs 2.105 to 2.111 below, however, we will be substituting for the phrase 'recklessly indifferent as to causing death' the words, 'aware that his or her conduct involved a serious risk of causing death.'
- 2.57 On a matter such as the fault element in murder, it is important to ensure that our proposals reflect the broadest possible consensus of opinion. We believe that the suggestion of the Higher Court Judges' Homicide Working Party (as amended) will gain the broadest measure of support whilst maintaining clarity within the three-tier structure for the law. Although the suggestion goes beyond cases of intentional killing, it nonetheless excludes those cases of intentional infliction of harm (causing death) that should fall within second degree murder or manslaughter rather than within first degree murder.

The advantages of our recommendation compared to our provisional proposal

- 2.58 The advantages of the fault element that we are recommending for first degree murder over the provisional proposal that first degree murder should be restricted to intentional killing are as follows.
- 2.59 First, we are mindful of the fact that, after extensive thought and consultation, a similar fault element to the one we are now recommending was proposed for the law of murder in the Draft Criminal Code of 1989. With adjustments made to the Code team's formulation to make it fit with the three-tier structure for homicide offences that we are now recommending, we believe that it would be right to continue to endorse the broad thrust of the formulation in the Draft Criminal Code.¹⁹

¹⁹ Clause 58 reads, "A person is guilty of murder if he causes the death of another – (a) intending to cause death; or (b) intending to cause serious person harm and being aware that he may cause death."

2.60 Secondly, we accept the arguments that some kinds of killings that were not intended are so especially heinous that they should be regarded as, morally speaking, virtually indistinguishable from intentional killings (putting aside questions of justification and excuse). Consultees such as Professor Wilson, for example, argued that, ‘some reckless killings attract far more revulsion and indignation than some intentional killings’.²⁰ The degree of emotional agitation a killing generates may not in itself be a good or reliable measure of how serious that killing really is but we have tried to accommodate this ‘moral equivalence’ argument in the revised structure. We have sought to do this by including within first degree murder, alongside intentional killing, killing through an intention to do serious harm aware that one’s conduct poses a serious risk of causing death.²¹ The argument for doing so was well put over 120 years ago by judge and jurist Sir James Stephen, when he said:

[I]s there anything to choose morally between the man who violently stabs another in the chest with the definite intention of killing him, and the man who stabs another in the chest with no definite intention at all as to his victim’s life or death, but with a feeling of indifference whether he lives or dies? It seems to me that there is nothing to choose between the two men, and that cases may be put in which reckless indifference to the fate of a person intentionally subjected to deadly injury is, if possible, morally worse than an actual intent to kill.²²

2.61 To continue with Stephen’s example, the revised definition should give reassurance that when D stabs (or shoots) another in the head or chest, a charge of first degree murder will be perfectly appropriate. In such cases, it can usually be readily found that D intended to do serious injury and was aware of a serious risk of causing death, especially, but not solely, when the stabbing (or shooting) is repeated. For the purposes of defining murder, we do not believe that people would see any significant moral difference between someone who repeatedly shoots or stabs another in the chest intending to kill and someone who does these self-same actions both intending to cause serious injury and aware of a serious risk of causing death.

²⁰ “The Structure of Criminal Homicide” [2006] *Criminal Law Review* 471, 474. See further, A P Simester, “Why Distinguish Intention from Foresight?” in A P Simester and A T H Smith (eds), *Harm and Culpability* (1996) p 71.

²¹ There was also criticism of our attempts to justify confining first degree murder to intentional killing through the claim that this was the highest offence against the ‘sanctity of life’. As Sir Louis Blom-Cooper QC and Professor Morris pointed out, what is at issue in all homicide offences is a violation of the right to life, and references to ‘sanctity of life’ considerations can be misleading. See further, Alan Norrie, “Between Orthodox Subjectivism and Moral Contextualism: Intention and the Consultation Paper” [2006] *Criminal Law Review* 486, 488 to 491.

²² Sir James Stephen, *History of the Criminal Law of England* (1883), vol III, at 92. Stephen goes on to list examples of an intention to do serious injury coupled with ‘reckless indifference’ as to causing death that he believes might be viewed as worse than intentional killing, such as killing in the course of prolonged torture.

2.62 Once one has stepped beyond intentional killings within the first degree murder category, one must continue to respect the need for ‘moral equivalence’ between fault elements within that category. For that reason, we have not gone further and recommended making reckless killing in some form (that is, without a further fault element based on the intention to do serious injury) a variety of first degree murder. To do that would be to exchange one kind of over-inclusiveness in the current law for a different kind, as indicated in paragraphs 2.15 to 2.16 above. In answer to the objection that our recommended fault elements for murder will make the crime too difficult to prove, we point to the recent observations of Lord Bingham:

[T]here is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time.²³

How our recommendation would be an improvement on the existing law

2.63 The fault element we are recommending for first degree murder improves on murder’s existing fault element in several ways.

2.64 First, as further recommendations which we set out below make clear,²⁴ our recommendation for what should constitute first degree murder forms part of the creation of a proper ‘ladder’ of homicide offences, in order of seriousness, which the present law fails to provide. The recommendation would do this by eliminating the legal anomalies identified in Part 1 which result in the definition of murder being in some respects too narrow and in some respects too broad.

2.65 Secondly, implementation of the recommendation for what should constitute first degree murder would bring the law somewhat closer to what Parliament (mistakenly, as it turned out) thought the law was when it decided against providing a comprehensive definition of the fault element for murder in the Homicide Act 1957.²⁵

2.66 Thirdly, under our recommendations, if the jury found that one or other of the fault elements for first degree murder ((1)) or (2) in paragraph 2.50) was present and convicted of murder, the judge would no longer have to go on to decide for sentencing purposes which one of those fault elements the jury had found proven. This seemingly technical but important point needs addressing in more detail.

²³ G [2003] UKHL 50, [2004] 1 AC 1034 at [39].

²⁴ See para 2.70.

²⁵ See the discussion in Part 1, paras 1.19 and 1.25 to 1.30 and in the CP at paras 1.119 to 1.123.

2.67 Under the present law, Parliament has acknowledged that there is potentially a large gap in point of culpability within murder, namely between an intention to kill and an intention to do serious harm (where there was no awareness of a risk of death). In consequence, Parliament now requires a judge to decide which of these intentions D acted on and to take that into account when determining the length of the initial period in custody of the mandatory life sentence.²⁶ In one way, that is a commendable attempt to see that justice is done. It is, however, open to the objection that it requires the judge to trespass on what should be a question for the jury: the question of D's intent (whether there was an intention to kill or only an intention to do serious harm).²⁷

2.68 Under our recommendations, there would no longer be such a large gap in the degree of culpability involved, as between the alternative fault elements in first degree murder ((1) and (2) in paragraph 2.50 above). This is because a conviction for murder would require a finding that there was at least an intention to do serious injury in the awareness that there was a serious risk of causing death. The two alternative fault elements for first degree murder should be regarded as morally equivalent. Consequently, there would be no need for the judge, when sentencing, to determine which fault element it was that D acted on in killing.

2.69 **We recommend that first degree murder should encompass:**

- (1) **intentional killings, and**
- (2) **killings with the intent to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death.**

SECOND DEGREE MURDER

2.70 **We recommend that second degree murder should encompass:**

- (1) **killings intended to cause serious injury; or**
- (2) **killings intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death; or**
- (3) **killings intended to kill or to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death but successfully pleads provocation, diminished responsibility or that he or she killed pursuant to a suicide pact.**

2.71 **We also recommend that second degree murder should attract a maximum sentence of life imprisonment, with guidelines issued on appropriate periods in custody for different kinds of killing falling within second degree murder (see Appendix A).**

²⁶ See Criminal Justice Act 2003, s 269 and sch 21.

²⁷ Under our recommendations, that crucial question of fact would be turned over to the jury. The jury would make that decision in determining whether D is guilty of first or of second degree murder.

The different functions that second degree murder would perform

- 2.72 Second degree murder would be a new offence, constituting a second or middle tier in the structure of general homicide offences. As an offence, second degree murder would perform three functions.
- 2.73 First, it would capture some cases that, to date, have been treated as plain murder, namely cases in which someone killed when intending to do an injury that the jury regards as serious but which D had no idea might cause death. This could be referred to as the new offence's 'mitigating' role.
- 2.74 Secondly, the new offence would capture some cases that, to date, have been treated as only manslaughter, namely cases in which someone has killed intending to cause harm or fear or risk of harm and was aware of a serious risk of causing death. This could be referred to as the new offence's 'aggravating' role.
- 2.75 Second degree murder would perform a third function. It would capture those who successfully raise a partial defence and who are currently convicted of manslaughter. This could be referred to as the new offence's 'labelling' role.

Why killing through an intention to do serious injury (but without awareness that there was a risk of causing death) should be treated as second degree murder

- 2.76 The provisional proposal to treat as second degree murder killing done through an intention to cause serious injury received a very large measure of support from consultees. It was supported by the permanent judges at the Central Criminal Court; the criminal Sub-Committee of the Council of HM Circuit Judges; the Criminal Bar Association; the Law Society; the London Criminal Courts Solicitors' Association; the Police Federation; Liberty; the Ministry of Defence; Southall Black Sisters; Victims' Voice; and the Crown Prosecution Service.
- 2.77 Some of those who opposed treating as second degree murder killing through an intention to do serious harm, such as the Association of Chief Police Officers, thought that it should be treated as first degree murder. Our revised and expanded definition of first degree murder now covers cases in which an intention to do serious injury was accompanied by an awareness of a serious risk of causing death.
- 2.78 Conversely, other consultees, such as Justice, Dr Hoyano and the Law and Criminology post-graduate students at Cambridge University, thought that killing through an intention to do no more than serious harm should be treated as either manslaughter or as a middle tier offence without the 'murder' label attached to it. We accept that this is a controversial matter on which judgements may understandably lead people in different directions.

- 2.79 The main objection to placing killings where there was an intention to do serious harm within (second degree) murder is that this would be a breach of the so-called ‘correspondence’ principle.²⁸ This is the principle that the fault element must correspond (relate) to each and every element of the prohibited conduct. In homicide cases (and especially in murder cases), it is said to mean that, whatever D’s actual intention, he or she must have been at least aware of a risk of causing death. In our view, to have acted on an intention to do serious harm, and thereby killed, is already to have shown such a high degree of culpability that liability for second degree murder is justified. Nonetheless, it is a mistake to suppose that the correspondence principle cannot be satisfied in such cases.
- 2.80 Where someone kills having intended to do serious harm, in all but the most exceptional instances such a person will have made V’s death a foreseeable consequence of his or her conduct. This provides sufficient connection or ‘correspondence’ in point of fault between what D intended and the killing, whether or not there was actual awareness that death might be caused.²⁹
- 2.81 **We recommend that killing through an intention to cause serious injury should be placed within the category of second degree murder, one tier below first degree murder.**

The meaning of ‘injury’

- 2.82 In both fatal and non-fatal offences against the person, the law has traditionally employed the term ‘bodily harm’ to describe the kind of harm that must be intended. In recent years, the courts have extended the term ‘bodily harm’ to include a recognised psychiatric disorder or illness.³⁰ The Court of Appeal justified this, saying:

The first question ... is whether the inclusion of the word “bodily” in the phrase “actual bodily harm” limits harm to harm to the skin, flesh and bones of the victim The body of the victim includes all parts of the body, including his organs, his nervous system and his brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties ... it does not include mere emotions such as fear or distress or panic nor does it include, as such, states of mind that are not themselves evidence of some identifiable clinical condition.³¹

- 2.83 Significantly the Court of Appeal turns to the word ‘injury’ to help explain the width of the older term ‘bodily harm’. A focus on *bodily* harm may imply a firm distinction between body and mind. This distinction cannot stand up to philosophical or legal analysis.

²⁸ See the CP, para 3.15.

²⁹ As we will see from para 2.95 onwards, in murder cases where there was only an intention to cause some injury or a fear or risk of injury, foresight of a serious risk of death is a necessary part of the fault element if the correspondence principle is adequately to be satisfied.

³⁰ *Chan-Fook* [1994] 1 WLR 689; *Ireland* [1998] AC 147.

³¹ *Chan-Fook* [1994] 1 WLR 689, 690, by Hobhouse LJ.

2.84 However, the continued use of the term ‘harm’, has meant that there has been a further appeal to stretch the meaning of ‘bodily harm’. There has been a claim that it should include severe or persisting emotional states, such as a severely depressed state of mind that does not amount to a recognised psychiatric illness or injury. Although the courts rejected this claim,³² we still think that the word ‘injury’ is more certain in scope than ‘bodily harm’ and should put an end to such speculative appeals.

2.85 **We recommend that the term ‘injury’ should be used instead of the words ‘bodily harm’.**

Should ‘serious’ injury be defined?

2.86 An important question for us in the CP was whether consultees thought that ‘serious’ harm (our preferred term is now serious ‘injury’) should be defined by law. At present, when someone is charged with murder on the basis that they killed through an intention to do ‘serious harm’, the jury is entrusted with the decision whether the harm intended was indeed serious.³³ By way of contrast with the position in some other jurisdictions,³⁴ ‘serious’ injury or harm has no legal definition. So, in law, D cannot avoid conviction for murder by showing that he had no idea that the harm intentionally inflicted would lead to death or that it would be regarded by a jury as serious in itself. At best, such a claim is simply a piece of evidence that the harm was not serious.

2.87 We will now consider two different answers to this question.

APPROACH 1: DEFINING ‘SERIOUS’ INJURY

2.88 The first approach involves providing a legal definition of ‘serious’ harm or injury. The aim is to introduce a greater degree of certainty and predictability by giving the jury something by which to guide their thinking on the matter. We asked consultees whether they thought the following definition of ‘serious’ harm or injury would achieve that aim:

[H]arm is not to be regarded as serious unless it is harm of such a nature as to endanger life or to cause, or to be likely to cause, permanent or long term damage to a significant aspect of physical integrity or mental functioning.³⁵

2.89 We are rejecting this approach. The opinions of consultees were divided on its merits. Tellingly, many of those who endorsed it did so only in a qualified way, because they found some fault with the definition we put forward. The Law Society, along with Professor Taylor, thought that the definition did not introduce much greater clarity in so far as it stretched beyond life-endangering harm. Other consultees, such as Professor Leigh, Dr Jones and Dr Hiscock did not think that there should be any reference to impairment of mental functioning.

³² *Dhaliwal* [2006] EWCA Crim 1139, [2006] 2 Cr App R 236.

³³ *DPP v Smith* [1961] AC 290.

³⁴ See the CP, Part 3.

³⁵ The definition was an amalgamation of attempts in other jurisdictions to define serious harm: see the CP, Part 3 paras 3.115 to 3.120.

- 2.90 Those who opposed this approach thought it might introduce a new set of uncertainties. The Criminal Bar Association objected to what they thought would be the introduction of a difficult hypothetical question: was the harm intended, as opposed to that inflicted, life-threatening? Perhaps that objection could be met if what was required was that the harm done be judged by the jury to have met the definitional criteria, at the time that it was done, whether or not D intended a harm of just that kind.
- 2.91 However, the Criminal Bar Association and Mr Justice Calvert-Smith (a former Director of Public Prosecutions), also thought that a weakness of the definitional approach to 'serious' harm or injury was that it would sometimes, perhaps often, require expert testimony to resolve questions such as whether an injury was by its nature 'life-threatening'. Questions would also be bound to arise concerning whether an injury can be said to be 'life-threatening' when the threat comes from the difficulty V was always likely to experience in obtaining treatment rather than from the nature of the injury in itself. Expert testimony bearing on such questions may also be required to resolve them.
- 2.92 All in all, opponents of this approach thought that it would add to the length, complexity and cost of trials without (in their view) adequate justification. We agree. Given that there is an alternative approach, we do not regard this approach as having sufficient merit to warrant taking it forward, even though we recognise that something like it has been made to work satisfactorily in some other jurisdictions.³⁶

APPROACH 2: NOT DEFINING 'SERIOUS' INJURY

- 2.93 The alternative approach is to leave 'serious' harm or injury undefined, and trust that (a) the jury will not bring in a murder verdict unless the harm intended was very serious indeed, and (b) the judge will reflect the degree of harm actually intended in the sentence passed. This is to be our approach to cases of second degree murder.
- 2.94 We are recommending that second degree murder should attract a discretionary maximum life sentence. This means that, where appropriate, judges can take account of the kind and degree of injury actually intended in determining the sentence that they pass.³⁷ That is not possible, at present, because the life sentence is mandatory when the jury has brought in a verdict of murder on the basis that there was an intention to do harm they (the jury) regard as serious.³⁸ The discretion the judge would have, in sentencing in cases of second degree murder, means that it is not necessary to complicate the law further by seeking to fix a definition of 'serious' injury.

³⁶ As, eg, under the Indian Penal Code, and the Singapore Penal Code, Cap 224, 1985 Rev Ed, § 300(c).

³⁷ Bearing in mind that the injury inflicted will, *ex hypothesi*, already have been judged serious by the jury.

³⁸ Although, under the present law, it is possible for the judge to decide that a convicted murderer's initial period of custody should be shorter because he or she did not intend to kill or to inflict the very worst kinds of serious injury: see para 2.67 above.

Why killing through an intention to cause injury or fear or risk of injury while aware of a serious risk of causing death should be second degree murder

Introduction

- 2.95 In the CP we provisionally proposed that within second degree murder, alongside killing through the intention to do serious injury, there should be killing by 'reckless indifference'.
- 2.96 Under the present law, killing through reckless conduct, however culpable, can be treated as nothing more serious than manslaughter. In Part 1,³⁹ we said that we believe that this constitutes a significant anomaly or weakness within the law. Some reckless killers ought to be convicted of second degree murder and not simply of manslaughter.
- 2.97 Under our recommendations, if someone foresaw death as virtually certain to occur if he or she acted as intended, and death did thereby occur, he or she could be convicted of first degree murder.⁴⁰ Under the current law, if someone sees the causing of death as a serious risk from their conduct (even if it is not considered to be virtually certain to result), they can only be convicted of manslaughter. However, in certain circumstances it ought to be possible to convict them of the middle tier offence, second degree murder and not merely of manslaughter.
- 2.98 The example of the bomber who gives an inadequate warning is a case that ought to fall within the ambit of the middle tier offence.⁴¹ Some other examples (based on real cases) which at present commonly fall within manslaughter but ought to be candidates for treatment as second degree murder are:
- (1) D sets fire to V's house at night, knowing that V is asleep inside. His intention is to give the occupants a severe fright. V is killed trying to escape.
 - (2) D burgles the house of an elderly man, tying him up securely and leaving him, although she appreciates that the house is isolated and that the man has few visitors. V, unable to escape his bonds or summon help, dies.
 - (3) D injects V with an illegal drug that D realises may contain impurities dangerous to life. V goes into a coma, and consequently dies.
 - (4) D intentionally accelerates his car towards a police officer standing in the road at a roadblock. His intention is to frighten the officer by swerving the car out of the way only at the last possible second. D's attempt to swerve out of the way is unsuccessful and the officer is killed.

³⁹ Paras 1.24 to 1.31 above.

⁴⁰ See Part 3. This is also murder under the present law.

⁴¹ See Part 1, para 1.27 above.

The provisional proposal in the CP

- 2.99 To this end, in the CP we sought to distinguish between simple recklessness – being aware that there is an unjustified risk of killing but going ahead anyway – and ‘reckless indifference’. Killing through simple recklessness was to be manslaughter. That would remain the case under our recommendations.⁴² By contrast, we proposed that reckless indifference was to be second degree murder because it involved, over and above an appreciation that there was a risk of causing death, an attitude towards that risk along the lines of, ‘if death occurs so be it’, or ‘if death occurs, so what’? The jury would, in effect, be asked whether they were satisfied that D would still have gone ahead even if he or she had thought death to be virtually certain to occur.

Responses to the provisional proposal

- 2.100 There was widespread agreement amongst consultees that killing through reckless indifference in some form should fall within second degree murder. This was assented to by, amongst others, the Permanent Judges at the Central Criminal Court; the Criminal Sub-Committee of the Council of HM Circuit Judges; the Criminal Bar Association; the Crown Prosecution Service; the Law Society; the Association of Chief Police Officers; the Police Federation; Liberty; Justice; the Ministry of Defence; Refuge; Southall Black Sisters; Victims’ Voice; and a number of academics and individual judges in the higher courts.
- 2.101 At present, in these kinds of cases, the prosecution frequently feels constrained to accept a plea of guilty to manslaughter because they do not believe they can prove that there was an intention to do serious injury. If that happens, the sentence D receives may well be considerably shorter than it would be if D was convicted of a ‘middle tier’ offence between murder and manslaughter. The creation of a middle tier offence may, thus, make it possible to take a tougher line in sentencing in such cases, even when D pleads guilty to that middle tier offence. We believe that in many such cases taking that tougher line would be fully warranted.
- 2.102 What troubled some consultees about our provisional proposal was not the principle that at least some reckless killers should be guilty of second degree murder. It was the nature of the term for the fault element used as the means to achieve that goal: ‘reckless indifference’. Academic critics and some judges regarded the term as unacceptably vague and liable to create a very blurred line between second degree murder and manslaughter.
- 2.103 Professor Wilson, an acknowledged authority on this area of the law, said that:

⁴² We see no reason to distinguish between simple recklessness and gross negligence. One of the things that can make negligence gross is the fact that D went ahead to pose the risk in question in spite of the fact that he or she knew it existed: see Part 3.

[T]he view taken by successive reform bodies is that ‘wicked recklessness’ is too imprecise a concept to sustain a differentiated law of homicide. I do not think that the concept of ‘reckless indifference’, without more, is any better placed ... Whether someone has committed murder is not a matter of simple moral judgment. It is a matter of satisfying an offence definition with a sufficiently high degree of specificity to justify the hugely symbolic label and the penalty range.⁴³

2.104 In a similar vein, the Editor of the *Criminal Law Review* suggested that:

[T]he case for including ‘reckless indifference’ looks under-argued. The Paper distinguishes reckless indifference from ‘reckless stupidity’ by reference to the defendant’s attitude to foreseen consequences of the act that caused death, but whether this philosophical distinction can generate a workable test for a lay jury is problematic.⁴⁴

A new formulation

2.105 We agree with these criticisms that have been levelled at ‘reckless indifference’. It now seems to us undesirable that, save in exceptional cases, a term used to define a fault element in murder should need significant further explanation from the trial judge before its basic meaning becomes clear to the jury. In addition, we are concerned about the likelihood that the introduction of a term hitherto never formally adopted for use in the definition of murder – ‘indifference’ – would lead to a series of challenges and questions about its meaning in the Appeal Courts. There would then be a risk of, as yet, unforeseen problems in connection with its definition, thereby generating further appeals and uncertainty.

2.106 Consequently, we have tried to express the essence of reckless indifference in a form that is on its face more readily comprehensible to judges and juries alike. We have tried to use uncontentious, clear language with which the courts will already be very familiar, reducing the likelihood that a series of appeals will be needed to settle its meaning.

2.107 As we have said,⁴⁵ we recommend replacement of the reckless indifference formula with a formula in which what matters is whether D *intended to cause injury or fear or risk of injury and was aware that his or her conduct involved a serious risk of causing death*.⁴⁶

⁴³ William Wilson, “The Structure of Criminal Homicide” [2006] *Criminal Law Review* 471, 477 to 479. For another penetrating critique, see Jonathan Rogers, “The Law Commission’s Proposed Restructuring of the Law of Homicide” [2006] *Journal of Criminal Law* 223.

⁴⁴ Professor Ian Dennis, “Reviewing the Law of Homicide” (Editorial) [2006] *Criminal Law Review* 187 to 188. See also Victor Tadros, “The Homicide Ladder” (2006) 69 *Modern Law Review* 601, 610 to 613.

⁴⁵ Para 2.70(2) above.

⁴⁶ The element of ‘serious risk’ in this formula is considered in more detail in Part 3.

ADVANTAGES OF THE NEW FORMULA

- 2.108 We believe that the recommended formula will make the place of second degree murder within the overall structure, or 'ladder', of offences much clearer than 'reckless indifference' would do. We also believe that the recommended formula will keep faith with the viewpoint of those who endorsed the inclusion of reckless indifference within second degree murder. We anticipate that the recommended formula will produce results at variance with the reckless indifference formula only in very rare or unusual kinds of case. In such cases, the offender can expect to receive a long prison sentence for manslaughter.
- 2.109 As important as what the recommended formula includes is what it excludes. It will not be sufficient for conviction of second degree murder simply that the killer was aware that his or her conduct involved a serious risk of causing death (recklessness as to causing death). If the killer was aware that his or her conduct involved a risk of death, he or she stands to be convicted only of manslaughter.⁴⁷ To be convicted of second degree murder, in addition to showing that the offender had this awareness, it must also be shown that the killer intended to cause injury or fear or risk of injury.⁴⁸
- 2.110 We regard this extra element as of great importance in preventing a large and uncertain overlap developing between second degree murder and gross negligence manslaughter. Many of those currently convicted of gross negligence manslaughter will, in fact, have been aware that their conduct posed a risk of causing death. They will, however, have foolishly acted in the belief that the chance of the harm materialising was remote. That would be true, for example, of an electrician who is mistakenly confident that he or she can cut corners on health and safety's 'bureaucratic requirements' (as he or she sees them) without posing undue risks to customers. We do not believe that such an offender should necessarily be guilty of second degree murder if he or she kills. The electrician will almost certainly be guilty of, and can be punished severely for, manslaughter, if the cost-cutting measures lead to someone's death. That will usually be punishment enough.
- 2.111 The extra element ensures that those who kill through simple carelessness or disregard, but without anything that could (speaking very loosely) be called a hostile or aggressive act directed at someone, should be guilty only of manslaughter.⁴⁹ The degree of their carelessness or disregard can be reflected in the sentence received upon conviction for manslaughter. In the electrician example just given, the electrician does not *intend* to cause injury or fear or risk of injury. So, in spite of his or her awareness of the possibly fatal consequences of corner-cutting, he or she should not be convicted of second degree murder if death results.

⁴⁷ Unless the killer thought that someone's death was *almost certain* to result from his or her conduct: see part 3. Then the killer stands to be convicted of first degree murder.

⁴⁸ An intention to cause injury or fear or risk of injury is different from intentionally doing an act that in fact creates an unintended risk of injury.

⁴⁹ In analysing our recommendations in this way, we are drawing in part on the theoretical structure advocated by Professor William Wilson, "The Structure of Criminal Homicide" [2006] *Criminal Law Review* 471.

RESURRECTING THE 'FELONY-MURDER' APPROACH?

- 2.112 We consulted on an alternative 'extra element' to limit the scope of liability for second degree murder. This would have involved the restriction of killing by reckless indifference to cases in which the reckless indifference to death was shown in the course of the commission of a serious offence. In effect, this would constitute a resurrection of the 'felony-murder' rule by virtue of which causing death in the course of committing a range of criminal offences was murder whether or not D realised that someone might be killed. Only two consultees supported this approach.
- 2.113 Most consultees rejected it on the basis that the reasons why Parliament abolished the felony-murder rule 1957 remain as compelling now as they were then. The list of offences that would count (that is, the offences in the course of committing which it would be murder to kill by reckless indifference) would inevitably be arbitrary in scope. In some cases, it would be difficult to distinguish the offence in the course of which the killing occurred and the conduct manifesting the reckless indifference.⁵⁰ Difficult questions would arise, as they did at common law prior to 1957, over whether the killing was committed 'in the course of' or 'arose from' the commission of another offence.
- 2.114 The 'felony-murder' approach is superficially attractive but the problems with it run very deep. In the way that the recommended crime of second degree murder is defined, we have sought to avoid these problems. However, we have also done something to capture what attraction the 'felony-murder' approach does have. Under our recommendations, to commit second degree murder either the offender must kill whilst intentionally causing serious injury or must kill when not only aware of a serious risk of causing death but also intending to cause injury or a fear or risk of injury. In both instances, an offence against the person is either constitutive of, or the foundation for, a second degree murder conviction.

Conclusion

- 2.115 We believe that, although the recommended formula seems narrower than reckless indifference, when it is fully explained to a jury it will in practice be found to cover the examples we sought to capture with the phrase 'reckless indifference'.⁵¹ In that regard, it must be kept in mind that when deciding whether an accused person intended to cause injury or a fear or risk of injury, intention would be given the meaning we assign to it in Part 3. D can be found to have intended to cause injury or a fear or risk of injury if he or she foresaw one or other of those results as virtually certain to occur.
- 2.116 **We recommend that second degree murder should encompass killing where the defendant intended to cause injury or fear or risk of injury aware that his or her conduct involved a serious risk of causing death.**

⁵⁰ This is the problem of so-called 'felony-merger': see C Finkelstein, "Merger and Felony-Murder", in S Green and R A Duff (eds.), *Defining Crimes* (2005) p 218; Kimberly K Ferzan, "Murder after the Merger: A Commentary on Finkelstein" (2006) 9 *Buffalo Criminal Law Review* 561.

⁵¹ See para 2.98 above.

THE THREE-TIER STRUCTURE AND 'SPLIT' JURIES'

- 2.117 Our view is that it is important that the introduction of a three-tier structure to the general law of homicide does not lead to more trials in which juries cannot reach a verdict. More 'split' juries will inevitably entail more retrials ordered in the hope of finding a jury that can agree. More re-trials also mean more costs incurred and more delay, not only in relation to the trial in question but also in relation to other trials that have to be put back. Even if the increase in the number of re-trials ordered in any year turns out to be relatively small, the adverse consequences for the individuals concerned should be of paramount importance. More re-trials will mean more cases in which defendants, witnesses and the families of victims and defendants alike will have to go through the trauma of the trial once again, with no guarantee that a single re-trial will resolve matters.
- 2.118 In that regard, our recommended division between first and second degree murder raises an important point of procedure. If members of a jury are irreconcilably split over the question whether D had the fault element for first degree murder or only the fault element for second degree murder, what should happen next? We believe that this situation is already adequately catered for.⁵²
- 2.119 Under the existing law, a jury should ordinarily only consider the offence of manslaughter when they have positively decided that the accused is not guilty of murder.⁵³ However, when a jury cannot agree on a verdict of murder, it can be discharged from the obligation to give a verdict on murder if the justice of the case so requires. The jury can, if need be, be asked to consider a count of manslaughter newly added to the indictment without the need once more to arraign D on a charge of manslaughter.
- 2.120 It follows that, under a three-tier structure, on a charge of first degree murder, it would be perfectly acceptable in an appropriate case to discharge a jury that cannot agree on a verdict of first degree murder from giving a verdict on that charge. The jury can instead be invited to consider a new count of second degree murder. A similar procedure can be followed in any case where a jury is split on the question whether D had one of the fault elements for second degree murder or only one of the fault elements for manslaughter.
- 2.121 It is important to emphasise, however, that the adding of new counts in such cases should not become a routine procedure. Adopting that procedure precludes a re-trial and so it is not always in the interests of justice.⁵⁴ The important point for present purposes is that we do not believe that the introduction of a middle tier to the general law of homicide will lead to a large number of cases in which there *must* be a re-trial because the jury cannot agree that D had a specific fault element at the time of the offence.

⁵² *Saunders* [1988] AC 148.

⁵³ See Criminal Law Act 1967, s 6(2).

⁵⁴ See Archbold, *Criminal Pleading, Evidence and Practice* (2006 ed) para 4-460.

PARTIAL DEFENCES

Introduction

2.122 At present, a successful plea of provocation, diminished responsibility or killing pursuant to suicide pact reduces murder to manslaughter. If a three-tier structure to the law of homicide were introduced, with a middle tier of homicide above manslaughter, a different outcome would be possible when these (or other) partial defences are in issue.

2.123 There are four issues:

- (1) Should the law of homicide retain partial defences?
- (2) If the answer to (1) is “yes”, should each partial defence have the same effect?
- (3) Should the operation of the partial defences be confined to first degree murder?
- (4) If the answer to (3) is “yes”, should a partial defence reduce first degree murder to second degree murder or to manslaughter?

The provisional proposals in the CP

2.124 Our proposals were:

- (1) as long as there is a mandatory sentence of life imprisonment, there is a need to retain the partial defences;
- (2) each partial defence, if successfully pleaded, should have the same effect;
- (3) the operation of the partial defences should be confined to first degree murder. They should not operate as partial defences to second degree murder; and
- (4) a partial defence, if successfully pleaded, should reduce first degree murder to second degree murder.

Responses to our proposals

2.125 We were not surprised to find that our proposals met with a wide divergence of opinion amongst consultees.

2.126 They were supported by, amongst others, the Crown Prosecution Service; the Association of Chief Police Officers; the Police Federation; Victims’ Voice; the Royal College of Psychiatrists; the Mission Affairs Council of the Church of England; and a number of academics and individual judges in the higher courts.

2.127 They were not supported by, amongst others, the Criminal Bar Association; the Law Society; the London Criminal Courts Solicitors’ Association; Liberty; NACRO; Refuge; Rights of Women; and Southall Black Sisters.

- 2.128 Some consultees – for example Justice; Southall Black Sisters; Rights of Women; Mr Virgo; the Criminal Bar Association; and Liberty - agreed that a successful plea of either provocation or diminished responsibility should end in the same verdict. They considered, however, that that verdict should be something other than second degree murder, such as manslaughter.
- 2.129 Some consultees – the Law Society, NACRO, Professor Mackay, the criminal law teachers at the London School of Economics and Political Science; and Dr Hoyano – thought that a distinction should be drawn between different partial defences in terms of the effect they should have on the verdict if successfully pleaded.

Should the law of homicide retain partial defences?

- 2.130 Only a small minority of consultees favoured abolishing partial defences altogether. We agree with the majority opinion. While the mandatory sentence of life imprisonment for murder remains, the partial defences should remain.
- 2.131 As we indicated in the CP,⁵⁵ if a life sentence has to be passed on an offender with no previous criminal record who was driven to kill on the spur of the moment by very grave provocation, the sentence that must be passed will have a ‘topsy-turvy’ character. The offender will, on current guidelines, be required to spend perhaps only two to four years in prison for the offence because of the gravity of the provocation and the fact that he or she acted spontaneously. Yet, when released from prison, he or she will then remain on licence, liable to be recalled to prison for, perhaps, another 40 years or more. This is a feature of ‘life’ sentences that the public finds hard to understand.⁵⁶

Should each partial defence have the same effect?

The problem of ‘split’ juries

- 2.132 We have already referred to the problems that result from a jury being unable to agree on a verdict.⁵⁷ This problem has shaped our thinking in relation to the recommendations that we should make in relation to the partial defences.
- 2.133 This aspect of our provisional proposal – ‘multiple pleas, single verdict’ – was supported by the Criminal Bar Association; the Crown Prosecution Service; the London Criminal Courts Solicitors’ Association; the Police Federation; Justice; Liberty; Victims’ Voice; the Criminal Cases Review Commission; a number of individual judges in the higher courts; and some academics.

⁵⁵ Paras 2.95 to 2.96.

⁵⁶ See the CP, Appendix E.

⁵⁷ See paras 2.117 to 2.121 above.

- 2.134 By contrast, some consultees thought that a distinction should be drawn between different partial defences in terms of the effect they should have on the verdict if successfully pleaded. The Law Society, NACRO, Professor Mackay, the teachers of criminal law at the London School of Economics and Political Science and Dr Hoyano would have diminished responsibility reduce first degree murder to manslaughter even if provocation only reduced first degree murder to second degree murder (or was abolished). To some consultees our provisional proposals seemed crude and insensitive to considerations of fair labelling. They ask: why cannot some partial defences reduce first degree murder to manslaughter if manslaughter would be a more appropriate label?
- 2.135 We recognise that there may be advantages to this more nuanced approach to partial defences in terms of labelling offenders more accurately. However, we believe that the benefits of that approach are outweighed by the drawbacks. In particular, we cannot countenance a situation in which a jury is agreed D is not guilty of first degree murder but there must nonetheless be a re-trial because (say) half the jury thinks that a defence that ends in a manslaughter verdict succeeds whereas the other half think that a defence that ends in a verdict of second degree murder succeeds. Quite simply, it would be wrong to put all those involved through a re-trial in such a case except in the most exceptional of circumstances. Fair labelling considerations are not a sufficient justification for risking more frequent re-trials, especially given that the sentence for second degree murder and for manslaughter is the same, namely a maximum sentence of life imprisonment.
- 2.136 In that regard, we note that research, kindly made available to us by Professor Barry Mitchell and Dr Sally Cunningham,⁵⁸ indicates that three in every four provocation pleas were combined with another defence. By way of contrast, a 'lack of intent' plea on a murder charge was twice as likely to be pleaded on its own rather than with another defence.
- 2.137 D may plead both lack of intent to commit murder and provocation, or provocation and diminished responsibility, or provocation and self-defence.⁵⁹ At least some of the same evidence will commonly be deployed in relation to each plea. Here is an example. D may say that a sudden loss of self-control meant that there was not only no relevant intent (the 'evidential' provocation plea), but also that there was a case for reducing the offence to manslaughter by virtue of section 3 of the Homicide Act 1957 (the 'substantive' provocation plea).

⁵⁸ See Appendix C: Defences to Murder.

⁵⁹ R.D. Mackay, "Pleading Provocation and Diminished Responsibility Together" [1988] *Criminal Law Review* 411. See also Appendix C for an analysis of the range of defences commonly employed in murder trials.

- 2.138 There is nothing wrong with a system in which pleas overlap or involve reliance on the same evidential basis. Under the current law, however, it is not easy to raise a doubt that, in a case where (say) V was stabbed in the chest, following a loss of self-control on the part of D, there was at least an intention to do serious harm. So, in practice, a 'substantive' provocation plea under section 3 will be the more plausible plea in such a case. That may not remain true under our recommendations. If the fault element for murder is changed in the way that we recommend, the 'evidential' provocation plea may become as plausible as the 'substantive' provocation plea.⁶⁰ In a case where there was a loss of self-control, great rage or fear, D is quite likely to couple a substantive plea of provocation with a claim that he or she did not intend to kill, or, despite admitting intentionally inflicting serious injury, did not advert to the serious risk of causing death.
- 2.139 In such cases, the lack of an intent plea (assuming it is not a plea D had the fault element only for manslaughter) should not lead to a verdict other than that to be reached if the partial defence plea of provocation is successful. The overlapping nature of the pleas dictates this.
- 2.140 The same is true of cases in which provocation and diminished responsibility are pleaded together. Success in pleading either of these pleas must entail the same verdict (on our recommendations, second degree murder). D may attribute a loss of self-control and angry retaliation to provocation and to the effects of a serious mental disorder (diminished responsibility). Suppose that a jury, having heard the evidence on each of these (overlapping) pleas, agrees that D is not guilty of first degree murder. They should not then be required to agree that either the provocation defence succeeds or that the diminished responsibility defence succeeds, because each defence when successfully pleaded leads to a different verdict (say, second degree murder in the case of provocation, and manslaughter in the case of diminished responsibility). As we have already indicated, this would be unacceptable, because it is likely that very many juries would be divided on the question of which defence succeeds, perhaps necessitating a retrial even though the jury is agreed that D is not guilty of first degree murder.⁶¹ The jurors should be allowed to come to the same verdict without having to agree on which ground.
- 2.141 Dr Rogers has argued that a problem with the 'multiple pleas, single verdict' approach is that it would leave the evidential basis for sentencing unclear.⁶² The jury might be very divided over the evidential plausibility of one or other of D's pleas, even if this is concealed behind the agreed verdict of second degree murder.

⁶⁰ It will also become more difficult to plead provocation successfully under our proposals for that defence: see Part 5.

⁶¹ See para 2.117 above.

⁶² Jonathan Rogers, "The Law Commission's Proposed Restructuring of the Law of Homicide" [2006] *Journal of Criminal Law* 223.

- 2.142 This problem has always existed in the law, and judges have dealt with it using common sense, experience and judgement. Take a case where it is unclear whether lack of intent, diminished responsibility or provocation is the basis for a manslaughter verdict. A judge will (a) try to form a defensible view on that question for him or herself, but also (b) frequently conclude that the sentence D is to receive should not differ materially whatever the basis was for the verdict. The judge is also entitled to indicate to members of the jury, before they retire to consider their verdict, that he or she will be asking them to indicate, if they can, what the basis for their verdict was.⁶³
- 2.143 In cases where diminished responsibility and provocation are pleaded together, it has been considered especially important (but still not absolutely essential) that the judge should ask the jury for the basis of their verdict.⁶⁴ This is understandable. Diminished responsibility, unlike provocation, requires D to satisfy a burden of proof, and the sentencing options are wider. Even so, a judge is in as good a position as anyone to decide whether the evidence favours a hospital order or another treatment-based sentencing option, when diminished responsibility has been pleaded and a manslaughter verdict brought in. There may be cases where the judge would be assisted by an indication from the jury as to the thinking that lay behind their verdict, but that will not be true in all cases.
- 2.144 It would be possible to require a jury to return a 'special' verdict if D discharged the burden of proof in relation to a claim of diminished responsibility, as well as pronouncing on verdict more generally. However, that might lead a jury to attribute too much significance to the defence, when it is only one of two – or more – defences that D is running and is perhaps very much second or third best from D's point of view.
- 2.145 In France, issues such as these are tackled in a different way. When the most serious crimes are being tried, although there is a presiding judge, three professional judges take their place alongside nine lay people as members of the jury and the jury members vote together on both verdict and sentence.⁶⁵ So, there is no need to have precisely the same kind of rules of law and practice governing the relationship between judge and jury as one finds in England and Wales.⁶⁶ We can see both advantages and disadvantages to this approach. However, to take it further would raise large questions about the composition of juries, and their role in sentencing, taking us well outside our terms of reference.

⁶³ Eg, see *Cawthorne* [1996] 2 Cr App Rep (S) 445.

⁶⁴ See *Matheson* [1958] 1 WLR 474; *Cawthorne* [1996] 2 Cr App Rep (S) 445

⁶⁵ Catherine Elliott, *French Criminal Law* (1991) p 49.

⁶⁶ The French Penal Code, Articles 348 to 364 sets out in detail how the jury's decisions are to be made. They are based on a sheet of questions prepared by the President of the court. This is, then, analogous to the common practice followed by judges in England and Wales of providing the jury with such a sheet (see para 2.27 above). Rather different from English law is the requirement for the French jury vote on the answer to each question by secret ballot. We are very grateful to Professor John Spencer QC, of Cambridge University, for the guidance he has provided us on the law of homicide in France.

Should the operation of partial defences be confined to first degree murder?

- 2.146 We do not see a role for partial defences in reducing second degree murder to manslaughter. There are two reasons for this. One reason concerns the relationship between verdicts affected by partial defences and sentencing options. The other reason concerns the constraints on the way that evidence for the partial defence must be presented if it is to bear on verdict as opposed to sentence.
- 2.147 The primary importance of partial defences should be seen as lying in the impact they have on sentence rather than on verdict. This is what could be called the 'sentence mitigation' principle. Matters of verdict and of sentence are effectively fused in murder cases. Partial defences affect the verdict of murder, and only that verdict, because a verdict of murder is the only one that carries in its wake a mandatory sentence of such gravity (life imprisonment). Therefore, in our view, the argument for partial defences that is based on fair labelling - avoiding the label 'murderer' - is of secondary importance compared to the sentence mitigation principle.⁶⁷
- 2.148 The secondary importance of labelling considerations explains, in part, why partial defences do not reduce other crimes that carry discretionary maximum sentences, such as attempted murder, to lesser included offences, such as, in appropriate cases, wounding with intent to do grievous bodily harm.⁶⁸ We found it significant that those consultees who thought labelling considerations ought to have played more of a role in structuring our proposals for partial defences to homicide, did not extend the logic of their arguments to those homicide-related crimes that have lesser included offences.
- 2.149 Our view is that when the offender has killed with the fault element for first degree murder but pleads a 'partial defence' successfully, he or she still ought to be convicted of an offence of 'murder' (second degree murder). It is not imperative that there should be partial defences to second degree murder, just because it is an offence of 'murder', because second degree murder would attract a discretionary life maximum sentence.
- 2.150 The idea of 'partial defence' is in reality something of a misnomer. Historically, the way that the law has created space for discretion in sentencing in murder cases has been by permitting the mitigating circumstances to reduce murder to manslaughter (the latter crime, unlike the former, having a discretionary element to the sentence). The creation of such space could equally have been achieved by making proof of the exceptional mitigating circumstances relevant to whether the *sentence* for murder was still mandatory, without affecting the *verdict* of murder. However, the consideration of such an option for reform of the law was beyond our remit, as it would have involved a departure from the mandatory life sentence principle in top-tier homicide cases.

⁶⁷ Although the importance of labelling considerations does in part support our recommendation that the effect of partial defences should be to reduce first degree murder to second degree murder.

⁶⁸ Contrary to the Offences Against the Person Act 1861, s 18.

- 2.151 It follows that we do not support the case for applying partial defences to any offence other than what would, under our scheme, be first degree murder. This is because under our scheme, only first degree murder would carry the mandatory life sentence. Offences below first degree murder would attract a discretionary sentence. So, the primary justification for having 'partial defences' is absent, when offences below first degree murder are in issue. The sentence upon conviction for both second degree murder and manslaughter is a matter for the judge. There is no need to reduce the more serious offence to the less serious one in order to secure this flexibility in point of sentence.
- 2.152 That brings us to the second reason for recommending that partial defences should have no application to homicide offences other than first degree murder. This is that when partial defences are made relevant to verdict, this brings in its wake undesirable constraints on the way that evidence for the partial defence must be presented.
- 2.153 The Royal College of Psychiatrists has argued that psychiatric evidence of diminished responsibility is inevitably distorted when it must be made relevant to verdict rather than to sentence.⁶⁹ Victim Support have argued⁷⁰ that in cases where provocation is pleaded, the fuller picture of the relationship between offender and the deceased is much easier to portray at the sentencing stage than in the adversarial context of the trial.
- 2.154 By making evidence of diminished responsibility relevant to verdict, when (as in cases of second degree murder) it could simply be made relevant to sentence, one would needlessly force experts to distort the relevance of their evidence. Likewise, by making evidence of provocation relevant to verdict, one also forces the jury to work with only a partial picture of the context in which the provocation was alleged to have been given, a partial picture largely provided (usually uncontested) by D. These drawbacks may be something that we must live with when the verdict would otherwise entail the passing of an inappropriate mandatory sentence but they should not be tolerated outside that context.
- 2.155 The restriction of the partial defences to first degree murder cases also inevitably makes matters much more straightforward for everyone involved in the trial of other homicide offences, especially second degree murder trials. This is for the simple reason that it reduces the range of matters that the jury has to consider and the number of complex rules and standards that they have to apply.

⁶⁹ See the CP, para 6.26 and Part 5 below.

⁷⁰ See the CP, para 2.68 which refers to the formal response of Victim Support to our consultation paper Partial Defences to Murder (2003) Law Commission Consultation Paper No 173.

Should a successful partial defence plea to first degree murder result in a verdict of second degree murder or manslaughter?

- 2.156 We believe that someone who unjustifiably kills with the fault element for first degree murder deserves to be labelled as a ‘murderer’. Even if successful in pleading a partial defence to first degree murder, an offender who intentionally kills or kills having intended to cause serious harm realising that his or her conduct involved a serious risk of death is appropriately convicted of second degree ‘murder’. This view was strongly supported by amongst others the Crown Prosecution Service, the Association of Chief Police Officers, the Police Superintendents’ Association, the Police Federation and groups representing the interests of victims.
- 2.157 In addition, we have set out our reasons why we do not favour the partial defences reducing second degree murder to manslaughter. That being so, it would be illogical if a partial defence, successfully pleaded, reduced first degree murder to manslaughter. Those charged with second degree murder who had been provoked or who suffered from diminished responsibility would irrationally be treated too harshly. Evidence of provocation or diminished responsibility, however compelling, would be relevant only to sentence in their case even though they would have a lesser fault element than someone charged with first degree murder. Yet, someone charged with first degree murder would have the chance to reduce his or her offence to manslaughter through the use of such evidence.

Conclusion

- 2.158 We believe that a successful partial defence plea should reduce first degree murder to second degree murder but that there should be no partial defences to second degree murder or manslaughter.

MANSLAUGHTER

Introduction

- 2.159 Under the current law, there are two kinds of manslaughter: voluntary and involuntary. Under our recommendations, if implemented, the category of voluntary manslaughter would disappear because a plea of partial defence to first degree murder would, if successful, result in a conviction for second degree murder.
- 2.160 At common law, there are three types of involuntary manslaughter:
- (1) reckless manslaughter;
 - (2) gross negligence manslaughter; and
 - (3) ‘unlawful and dangerous act’ manslaughter.

- 2.161 Our terms of reference did not include consideration of the substantive law of manslaughter. The substantive law has been considered by the Law Commission and by the Home Office in previous reports.⁷¹ We did not think it appropriate to re-visit that ground in a detailed way, except in so far as it had an impact on the structure of the law of homicide in general.⁷² In that regard, of course, we are recommending that some cases of so-called ‘reckless manslaughter’ should be moved up from the bottom to the middle tier of the three tiers within the law of homicide, when they involve an intention to cause injury or a fear or risk of injury coupled with an awareness of a serious risk of causing death.
- 2.162 We received some critical comment on the substantive law of involuntary manslaughter from academic consultees although not from practitioners. Additionally, groups representing victims’ families considered that, in general, sentences for manslaughter were too low. That is an issue we hope will be addressed in part by moving many instances of reckless killing into the middle tier of the law of homicide.

The scope of manslaughter within the three-tier structure

2.163 We recommend that manslaughter should encompass:

- (1) killing another person through gross negligence (“gross negligence manslaughter”);⁷³ or**
 - (2) killing another person:**
 - (a) through the commission of a criminal act intended by the defendant to cause injury, or**
 - (b) through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury (“criminal act manslaughter”).**
- 2.164 Our recommendation with regard to gross negligence manslaughter reflects the current legal position. Our recommendation with regard to criminal act manslaughter is almost identical to the proposal put forward by the Government for replacing ‘unlawful and dangerous act’ manslaughter.⁷⁴ In Part 3, we consider and explain the fault elements of both gross negligence manslaughter and criminal act manslaughter.

⁷¹ Involuntary Manslaughter (1996) Law Com No 237; Home Office, Reforming the Law on Involuntary Manslaughter: The Government’s Proposals (2000).

⁷² However, in the CP, para 3.2(4), departing from the recommendation that we made in our earlier report Involuntary Manslaughter (1996) Law Com No 237, we did provisionally propose that the gross negligence form of manslaughter should only be committed where there was gross negligence as to a risk of causing death as opposed to causing serious harm. That change reflects the current legal position – *Adomako* [1995] AC 171.

⁷³ In Part 3, paras 3.58 to 3.60, we set out the fault element for gross negligence manslaughter.

⁷⁴ Home Office, Reforming the Law on Involuntary Manslaughter: The Government’s Proposals (2000) para 2.11.

2.165 As we have already indicated, not all reckless killings will fall into the category of second degree murder.⁷⁵ Will they be covered by the concept of gross negligence, within manslaughter? We believe that they will. If someone realises that there is a risk of causing death, but unjustifiably carries on with his or her conduct, that can be regarded as a kind of ‘gross’ negligence. It can be regarded as a failure to take account of the interests of potential victims so highly culpable that it should amount to a homicide offence against the person killed. There is, in consequence, no need for the addition of ‘reckless killing’ to killing by gross negligence in the lower tier of homicide, manslaughter.

SHOULD KILLING A POLICE OFFICER ON DUTY BE FIRST DEGREE MURDER EVEN IF THE KILLER DID NOT HAVE THE FAULT ELEMENT FOR FIRST DEGREE MURDER?

2.166 This approach, which is common in American state criminal codes, was supported by the Police Federation, amongst some others. We, however, do not recommend it.

2.167 We fully acknowledge and appreciate the difficult and dangerous circumstances in which police officers (and prison officers, amongst others) have to operate. It is almost always right to impose very long – retributive and deterrent – sentences of imprisonment on those who kill those they know to be police officers, whether they are convicted of first or of second degree murder.⁷⁶ Our concern is with the real potential for arbitrariness and legalism in the interpretation of when a police officer is ‘on duty’ if a special exception for them is created.

2.168 As one serving police officer put it to us, “In one sense, we [the police] are always on duty”. What he meant was that a police officer may justifiably feel obliged to intervene in an incident even when he or she is not, formally, on duty. If the officer is then killed, the killer would not automatically be guilty of first degree murder because the officer was not killed when on duty. That would remain the case even if the killer knew that V was an off-duty police officer. Yet, in some respects, it is even more admirable that a police officer is prepared to risk his or her life by intervening in an incident even when not formally on duty and even more detestable that he or she was intentionally killed in these circumstances.

2.169 In our view, the point-and-distinction making and legalism that would inevitably accompany the creation of special categories of persons whose killing is to be automatically regarded as ‘first degree murder’ should not be regarded as an acceptable aspect of the way in which categories of homicide are divided.

⁷⁵ See the discussion in paras 2.108 to 2.111 above.

⁷⁶ See Appendix A.

PART 3

THE FAULT ELEMENT

INTRODUCTION

How different fault elements fit the new structure

- 3.1 The element of fault or culpability in committing wrongs, including homicide, is a key factor in shaping how people assess a wrong's seriousness. Accordingly, it has always been a crucial factor in distinguishing between homicide offences.
- 3.2 In our recommended three-tier structure of homicide offences, there are different culpability or fault elements. For the most part, the structure uses existing culpability or fault elements as defined in the common law, such as 'intention' or 'gross negligence'. There is one new fault element: 'awareness of a serious risk'.
- 3.3 However, we do not believe that the new fault element will lead to a series of cases being taken to the Court of Appeal or the House of Lords ("the Appeal Courts") to determine its meaning (although there are bound to be some such cases). 'Awareness of a serious risk' is a phrase expressed in perfectly ordinary language and is meant to be understood according to such usage. We expect the Appeal Courts to affirm that this is the case and say that the understanding of the phrase is a matter for the jury with common sense guidance from the trial judge. We would not expect the Appeal Courts to subject the phrase to any gloss. Nor do we expect the Appeal Courts to embark upon a refined analysis of the phrase from case-to-case with a view to constructing a precise legal meaning for it.

The different fault elements and the 'ladder' approach

- 3.4 In this Part, we consider the meanings of 'intention', 'awareness' of risk, and 'serious' risk.¹ We set out what we believe should be the fault element of what hitherto has been known as 'unlawful and dangerous act' manslaughter. Finally, we recommend the adoption of our existing recommendations for the meaning of 'gross negligence' manslaughter's fault element.²
- 3.5 Different fault elements serve to create a 'ladder' of crime seriousness, both in the existing law and in our recommendations. It is of vital importance to remember that any scheme that divides offences using varying fault elements will necessarily involve some degree of overlap: the most culpable cases in a lower tier may well appear worse than the least culpable cases in the next tier up. This phenomenon will occur in any sophisticated system for grading offences. This overlap does not weaken the case for having clear boundaries between offences. Neither does it necessarily mean that the boundaries have been drawn in the wrong place nor that the wrong terms have been used to mark those boundaries.

¹ The question whether a meaning should be given in law to 'serious injury' was considered in Part 2, paras 2.86 to 2.92.

² Involuntary Manslaughter (1996) Law Com No 237, draft Bill, cl 2.

- 3.6 Under our recommendations, the fault elements create a ‘ladder’ of crime seriousness in one or both of at least two important ways.³ First, the less serious crimes typically have less grave fault elements. So, for example, manslaughter can be committed by gross negligence whereas murder cannot.
- 3.7 Secondly, the ‘ladder’ of crime seriousness is shaped by the nature or degree of harm or injury to which a fault element relates. Where death has been caused, a simple intention to do some injury is sufficient for a manslaughter conviction. However, if an awareness of a serious risk of causing death accompanied that intention, a conviction for second degree murder is justified. Further up the ladder, whilst an intention to do serious injury suffices to convict a killer of second degree murder, something more is required to justify a first degree murder conviction. First degree murder requires nothing short of an intention to kill or the morally equivalent intention to do serious injury in the awareness that this involves a serious risk of causing death.
- 3.8 This ‘ladder’ approach produces the following structure (discussed in more detail in Part 2 above):⁴

(1) First degree murder

- (a) An intention to kill; or
- (b) an intention to do serious injury, aware that one’s conduct involves a serious risk of causing death.

(2) Second Degree Murder

- (a) An intention to do serious injury; or
- (b) an intention to cause:
 - (i) injury;
 - (ii) a fear of injury; or
 - (iii) a risk of injuryin the awareness that one’s conduct involves a serious risk of causing death.

(3) Manslaughter

- (a) Manifesting gross negligence as to a risk of causing death;
- (b) doing a criminal act that the defendant intends to cause injury, or that he or she is aware involves a serious risk of causing some injury.

³ For further discussion of the points made here, see the CP, paras 2.97 to 2.109.

⁴ Excluding the fault element for participation in another’s crime, considered in Part 4.

INTENTION

- 3.9 One or more of the fault elements for first degree murder, second degree murder and manslaughter use the term ‘intention’. The courts have often struggled with the meaning of this key term. However, the law has now reached a reasonably stable state. The question is whether a definition is needed that significantly alters the common law understanding of intention. We have concluded that there is no such need but that the existing law governing the meaning of intention should be codified.⁵

The common law

- 3.10 The existing law gives a partial definition of intention. A jury is obliged to follow that definition when it applies. The law also gives guidance on when a jury has the power – or discretion – to find that a result was brought about intentionally, even when the case falls outside the partial definition. It is important, however, to note that juries are not thought to need to have ‘intention’ explained to them in the trial judge’s directions, even though it is an essential element of the crime of murder. Lord Bridge has indicated that:

When directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent and leave it to the jury’s good sense to decide whether the accused acted with the necessary intent.⁶

- 3.11 A similar approach to intention has been taken, for example, by the Court of Criminal Appeal in Queensland.⁷
- 3.12 At common law, someone must be taken to have intended something if they acted in order to bring it about. In that respect, ‘intention’ is partly defined by the common law. However, in unusual cases, typically murder cases, that definition has proven to be too narrow. It excludes from murder those cases that should be murder given D’s especially high level of culpability.⁸
- 3.13 Accordingly, the following rule has been developed at common law. The jury *may* – but not *must* – find that the defendant (“D”) intended the result if D thought it would be a certain consequence (barring some extraordinary intervention) of his or her actions, whether he or she desired it or not. Take the following examples:

D is in the process of stealing V’s car. V leaps onto the car bonnet to deter D from driving off. D accelerates to 100 miles per hour and continues at that speed. Eventually V’s grip loosens and V falls off the car. The fall kills V. D claims he did not intend to kill V or to cause V serious injury but was simply determined to escape come what may.

⁵ Given that we are not engaged in a drafting exercise, we will not distinguish in what follows between the phrases ‘foresight of virtual certainty’, ‘foresight of certainty (barring some extraordinary intervention)’ and ‘foresight that X will/would happen’.

⁶ *Moloney* [1985] AC 905, 926.

⁷ *Willmot (No 2)* [1985] 2 Qd R 413.

⁸ Such cases would without question have been regarded as ones involving ‘malice aforethought’ before the use of that term was judicially disapproved of and fell out of use.

D is jogging along a narrow path that follows a cliff edge. V is walking slowly ahead of him. D wantonly barges V over the cliff rather than slowing down and asking V to step aside so that D can pass. V is killed by the fall. D says that his intention was to keep running at the same speed at all costs, and he was not concerned with whether V lived or died.

3.14 In both these examples, the jury should be directed that they may find that D intended to kill V or to cause V serious injury, if they are sure that D realised that V was certain (barring an extraordinary intervention) to die or suffer serious injury, if D did what he or she was set upon doing.⁹ We would expect the jury to find a intention to kill or cause serious harm in both cases.

3.15 The reason that the law of murder, in particular, has developed in this way is well explained by Professor Kaveny, when she says:

His [the defendant's] gross disregard for the human lives foreseeably ended as a certain side-effect of his decision seems, in fact, aptly described ... with the broad but more specific moral terms 'homicidal' or 'murderous'.¹⁰

The options set out in the CP

3.16 In the CP, we offered consultees two choices: effective codification of the existing law¹¹ or a fuller statutory definition of intention that sought to address a range of problems that might arise in difficult cases.¹²

Responses to the CP

3.17 Most academic consultees, and some practitioners (such as the Law Society), favoured the fuller statutory definition. By way of contrast, the approach of the existing law was favoured by most judges in the higher courts who responded (including a former Director of Public Prosecutions); the Criminal Bar Association; the London Criminal Courts Solicitors' Association; the Police Federation; Justice; and Liberty. The latter group of consultees did not favour a statutory definition of intention that sought to tackle all foreseeable difficult cases because they thought it would complicate the law and confuse juries.

⁹ In our view, a person will think that a consequence is virtually certain to occur so long as he or she thinks that it will be virtually certain *if they do as they mean to do*. Eg, if someone plants a home made bomb on a plane intending to detonate it when the plane is in mid-air, given that they mean to detonate it, they can be taken to foresee the deaths of the passengers as virtually certain to occur even if they realise that the home made bomb is unreliable and might fail to detonate as planned. See CP paras 4.17 to 4.19 and 4.29 to 4.31.

¹⁰ M. Cathleen Kaveny, "Inferring Intention from Foresight" (2004) 120 *Law Quarterly Review* 81, 86. Of course, some instances of recklessly indifferent killing may seem rightly called 'homicidal' or 'murderous' whether or not they involve actual foresight that someone will be killed. That, however, is a question relevant to the categorisation of offences, addressed in Part 2, rather than to the definition of intention.

¹¹ We would not support simply leaving the common law governing the meaning of intention uncodified.

¹² For the fuller definition, see the CP, para 4.3.

Our conclusions

3.18 We have been persuaded that when dealing with a term of ordinary language, like intention, the latter approach is the right one.¹³

3.19 Someone should be taken to 'intend' a result if they act in order to bring it about. That is the basic definition of intention. It does not demand too much of the prosecution because, as Lord Bingham has put it:

There is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the defendant rarely admits intending the injurious result in question, but the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the defendant did and said at the time.¹⁴

3.20 Very occasionally, there will be cases where the judge believes that justice may not be done unless an expanded understanding of intention is given (two examples were given in paragraph 3.13 above). In such cases, the judge should direct the jury that they may find intention to kill if D thought that his or her action would certainly (barring an extraordinary intervention) kill, even if the death was undesired.

3.21 We acknowledge that this approach gives the jury an element of discretion in deciding whether, in cases such as those within the examples in paragraph 3.13 above, a verdict of (first degree) murder can and should be returned. The result in such cases will not be wholly determined by legal rules governing the meaning of intention. We believe that it is sometimes necessary and desirable that juries should have that element of discretion if the alternative is a more complex set of legal rules that they must apply. It is the price of avoiding complexity. Complexity must be kept to a minimum if the new structure of homicide offences is to be acceptable to Parliament, the public and the legal profession.

3.22 Some academics have suggested that it would be simpler to abandon the pretence, as they see it, that it is true 'intention' that is found by the jury when it exercises this discretion. They claim it would be simpler and more honest to say that someone can be found guilty of first degree murder either if they intend to kill (or to cause serious injury aware of a serious risk of causing death) or if they know or believe that death or serious injury (aware of a serious risk of death) will occur.¹⁵ On this view, intention, knowledge and belief, are alternate forms of fault element. This is the approach, for example, of French law¹⁶ and the American Model Penal Code.

3.23 Naturally, we recognise that there are differences between intention, knowledge and belief. The law would certainly be little worse off for taking an alternative

¹³ Accordingly, we will not address in detail the objections levelled at the more complex definition, such as its incorporation of what looked like a concealed defence of necessity. For an analysis, see Alan Norrie, "Between Orthodox Subjectivism and Moral Contextualism" [2006] *Criminal Law Review* 486.

¹⁴ G [2003] UKHL 50, [2004] 1 AC 1034 at [39].

¹⁵ Eg, Victor Tadros, "The Homicide Ladder" (2006) 69 *Modern Law Review* 601, 605.

¹⁶ J Pradel, *Droit Pénal Général*, (14th ed 2002) § 502.

approach in which these mental states are carefully separated. However, we do not believe that this approach would be a substantial improvement, at least in the context of homicide. There is, for example, no evidence that the existing law gives rise to any confusion in the jury room. If the law confused juries we would expect juries to be consistently sending notes to judges asking for further explanation. We have not received reports that this has occurred.¹⁷

3.24 In some areas of the law it may be necessary to distinguish between intention and knowledge or belief that something will happen. This may be necessary where criminal liability depends upon which of these alternate fault elements is established.¹⁸ It is not clear that the distinction between these fault elements does or should serve this purpose in homicide cases.

3.25 For example, the distinction between intentionally and knowingly killing would matter if the defences of necessity or duress of circumstances were available to those who knowingly killed (that is, where death was foreseen as certain to occur) but not in cases where someone acted in order to kill. If duress and necessity became defences to first degree murder,¹⁹ we do not believe that this approach would attract the courts. There can be cases of intentional killing that these defences should cover. Conversely, there can be cases where death was foreseen as certain to occur in which the defence should be denied. In many instances, D's exact state of mind would simply affect the jury's assessment of whether the reasonable person might have done as D did. So, distinguishing formally between these states of mind would increase, rather than reduce, the complexities involved in deciding whether these defences should apply in first degree murder cases.

3.26 Giving the jury the power to find intention when they find that D foresaw the result as virtually certain widens the fault element in the law of homicide. However, it does this whilst avoiding the much greater uncertainty involved in the use of evaluative terms such as 'recklessness' or 'extreme indifference'. That the law expands the fault element through letting the jury decide when intention should be found, rather than through requiring the jury to apply yet further legal rules governing inference-drawing, can thus be regarded as a strength and not a weakness.

3.27 **We recommend that the existing law governing the meaning of intention is codified as follows:**

- (1) A person should be taken to intend a result if he or she acts in order to bring it about.**
- (2) In cases where the judge believes that justice may not be done unless an expanded understanding of intention is given, the jury should be directed as follows: an intention to bring about a result**

¹⁷ We believe that this casts serious doubt on claims that the current law's approach, to use Professor Tadros's phrase, "can only confuse juries": Victor Tadros, "The Homicide Ladder" (2006) 69 *Modern Law Review* 601, 604.

¹⁸ Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300. *Gillick v West Norfolk and Wisbech Area Health Authority* [1984] QB 581.

¹⁹ See Part 6 below.

may be found if it is shown that the defendant thought that the result was a virtually certain consequence of his or her action.

'AWARENESS' OF RISK

3.28 In Part 2, we recommended that a person should be guilty of first degree murder if he or she killed intending to do serious injury and was aware that his or her conduct involved a serious risk of death. We also recommended that a person should be guilty of second degree murder if he or she intended to cause some injury or a risk or a fear of serious injury and was *aware* that his or her conduct involved a serious risk of death.

3.29 We do not believe that the use of the terms 'aware' and 'awareness' will give rise to practical difficulties. However, to avoid doubt, we stress that awareness involves conscious advertence to the risk. In particular, someone should not be said to have been aware of a risk at the time of the alleged offence, unless it was brought to mind at the relevant time. Merely having knowledge of the risk stored in one's memory ought not to suffice. Take the following example:

D is told that V is a haemophiliac, whose life is endangered by any serious flesh wound. Some months later, D has a violent argument with V, picks up a knife and stabs V once in the leg. V bleeds to death in spite of being taken promptly to hospital.

3.30 In this example, it may well be that the prosecution can show (a) that D intended to do serious injury (the stab to the leg) and (b) that D was aware that V consequently faced a serious risk of bleeding to death because of his haemophilia. If so, under our recommendations, D would be guilty of first degree murder.

3.31 However, it should not be enough for the prosecution to simply show that D had been told of V's condition in the past. The prosecution should have to show that D was aware of V's condition and the resulting risk of death at the time of the stabbing. It is a matter for the jury whether, on the particular facts, D consciously adverted to, or thought of, the risk when stabbing V. In that regard, however, as Lord Bingham has observed:

... it is not to be supposed that the tribunal of fact will accept a defendant's assertion that he never thought of a certain risk when all the circumstances and probabilities and evidence of what he did and said at the time show that he did or must have done.²⁰

3.32 A final point. Both first and second degree murder should be regarded as crimes of 'specific intent'. This means that if D did not kill with the requisite fault element, he or she must be acquitted of murder although he or she may still be guilty of manslaughter. In particular, D should be entitled to rely on any evidence tending to show that he or she did not have the intent or awareness in question, including evidence of intoxication.²¹

²⁰ G [2003] UKHL 50, [2004] 1 AC 1034 at [39].

²¹ *DPP v Beard* [1920] AC 479.

- 3.33 This is the normal rule for murder cases and there is no reason to change it simply because murder has been divided into degrees. The rule does not give rise to difficulties in practice. It will, of course, remain no defence to claim that intoxication – whether voluntary or involuntary – made one disposed to commit murder (or any other crime) or more disposed to commit it than one would otherwise have been.²²
- 3.34 Further, manslaughter should remain a crime of ‘basic intent’. This means that D should not be able to rely on evidence of voluntary intoxication to suggest that he or she was unaware of a serious risk of injuring another person through his or her criminal act. It also entails that D should be unable to rely on evidence of voluntary intoxication to show that he or she was not grossly negligent in failing to appreciate and avoid a risk.
- 3.35 **We recommend that ‘awareness’ of risk should be understood to involve consciously advertent to a risk.**

‘SERIOUS’ RISK

- 3.36 By ‘serious’ risk, we mean a risk that ought to be taken seriously. We do not mean a risk that by definition is ‘likely to’, or ‘probably will’ result in harm done. Probability may come into the question of whether a risk is ‘serious’ but it is not determinative of the question. It is merely one factor determining whether the risk ought to be taken seriously. The Australian High Court has succinctly and clearly expressed what we mean by serious risk in *Bouhey*,²³ with the following formulation: “a substantial or real chance, as distinct from a mere possibility”.²⁴
- 3.37 Unlike some common law jurisdictions,²⁵ English law is averse to the use of degrees of probability to shape or confine fault elements. In a civil law context, Lord Reid has said:
- Chance probability or likelihood is always a matter of degree. It is rarely capable of precise assessment. Many different expressions are in common use. It can be said that the occurrence of a future event is very likely, rather likely, more probable than not, not unlikely, quite likely, not improbable, more than a mere possibility, etc. It is neither practicable nor reasonable to draw a line at extreme probability.²⁶
- 3.38 Drawing on this observation, Lord Hailsham has said that degrees of probability should play no part in the definition of fault elements in homicide. If degrees of probability played such a role, in Lord Hailsham’s view lawyers would be ‘driven

²² *Kingston* [1995] 2 AC 355.

²³ *Bouhey* (1986) 161 CLR 10.

²⁴ Above, at 15.

²⁵ See, eg, the Singapore Penal Code (Cap 224, 1985 Rev Ed), s. 300(b).

²⁶ *Southern Portland Cement Ltd v Cooper* [1974] AC 623, 640, cited with approval by Lord Hailsham in *Hyam* [1975] AC 55, 76 to 77.

to draw the line in a criminal case of high importance at precisely the point at which it was said to be neither practicable nor reasonable to do so'.²⁷ We agree.

- 3.39 A risk may be serious even though it is not a high risk. The notion of 'serious risk' is one that a jury can safely be left to apply to the facts of a case with a minimum amount of legal embellishment.²⁸ Therefore, there is no need for case law to develop a legal meaning for this phrase.
- 3.40 **We recommend that a risk is to be regarded as 'serious' if it is more than insignificant or remote.**

THE FAULT ELEMENTS OF MANSLAUGHTER

Introduction

- 3.41 In our terms of reference, we were not asked to give detailed attention to the fault elements for what under the current law is involuntary manslaughter. These matters have already been fully considered both by the Law Commission and by the Home Office.²⁹ Accordingly, we have not returned to the questions of what 'gross negligence' means or to the detail of what is currently known as 'unlawful and dangerous act' manslaughter.
- 3.42 Unlawful and dangerous act manslaughter has attracted criticism. A person is guilty of unlawful and dangerous act manslaughter if he or she causes the death of another person by a criminal act that was objectively dangerous. An act is objectively dangerous if a reasonable person would have realised that there was a risk of some harm resulting from it.
- 3.43 It can be seen, therefore, that a person can be convicted of a very serious offence even though he or she was not aware that their criminal act posed a risk of any harm occurring. It suffices if a reasonable person would have been aware.
- 3.44 In the CP we invited views as to whether manslaughter should encompass the commission of a criminal act causing death if the perpetrator of the act was aware that there was a risk of injury arising from the act. The great majority of consultees who addressed the issue thought that it should. A very small number of academics thought that manslaughter should not extend to such cases.
- 3.45 In Part 2 we recommended that manslaughter should consist of:

- (1) killing another person through gross negligence ("gross negligence manslaughter"); or
- (2) killing another person:

²⁷ *Hyam* [1975] AC 55, 77.

²⁸ For that reason we have said that, in criminal act manslaughter cases, D must either intend to cause injury or be aware of a 'serious risk' of causing injury, simply in order to maintain consistency with the use of the phrase 'serious risk' in both first degree murder and second degree murder. We do not mean, by the inclusion of the word 'serious' to narrow the fault element in criminal act manslaughter further than will be achieved by substituting the word 'criminal' for the word currently in use, 'unlawful'.

²⁹ Involuntary Manslaughter (1996) Law Com No 237; Home Office, Reforming the Law on Involuntary Manslaughter: The Government's Proposals (2000).

- (a) through a criminal act intended to cause injury, or
- (b) through a criminal act in the awareness that it involved a serious risk of causing some injury (“criminal act manslaughter”).

Criminal act manslaughter

- 3.46 The organisation Justice suggested to us that, in the absence of an intention to injure, manslaughter should require an awareness of a risk of *serious* injury. We can see considerable force behind this suggestion as a way of limiting the scope of the offence.
- 3.47 However, we are not recommending that manslaughter, in the absence of an intention to injure, should require the awareness of a risk of serious injury. This is because we believe that such a limitation would introduce excessive complexity into the law. The jury would have to be told that whilst a criminal act that causes death and which was intended by D to do some injury is manslaughter, if the criminal act was one that D was only aware might cause some injury, D could only be convicted of manslaughter if he or she was aware that it might cause *serious* injury.³⁰
- 3.48 Such a definition would encourage forensic disputes about whether an assault (say, a punch) causing death was actually intended to cause injury or was only a criminal act that D thought might cause some injury (but not serious injury). If the former, D would be guilty of manslaughter, but if the latter, D would only be guilty of an assault. We do not believe liability for manslaughter should turn on such fine distinctions. D’s lack of awareness that serious harm or death might occur can be taken into account in sentencing. So we, along with almost all of our consultees, support the wider formulation endorsed by the Home Office in 2000.³¹
- 3.49 However, while we are not attracted to liability for criminal act manslaughter being dependent on awareness of a risk of serious injury, we do believe that liability should be dependent on the *risk* of injury being a *serious* risk.

Gross negligence manslaughter

- 3.50 There was also overwhelming support for a crime of manslaughter by gross negligence. Only four individual consultees thought that this crime should be abolished. One of those in fact agreed that grossly negligent killing should continue to be a homicide offence, but thought it should be labelled ‘unlawful homicide’ rather than manslaughter.
- 3.51 In the context of the current review of homicide it was necessary to reconsider at least some of the elements of gross negligence manslaughter. We took as our template the Home Office’s own proposals in 2000 for reform.³² Our recommendation for gross negligence manslaughter reflects the essence of those proposals. However, there are two significant changes.

³⁰ If D intends to cause serious injury, under our proposals he or she is guilty of second degree murder if death results.

³¹ Home Office, Reforming the Law on Involuntary Manslaughter: The Government’s Proposals (2000).

³² Above.

The first change - structure³³

- 3.52 Under our recommendations, some forms of ‘reckless’ killing would constitute second degree murder and not merely manslaughter. A ‘reckless’ killing involves an unjustified killing where the killer was aware that there was a risk of killing but nonetheless went on to engage in the risky conduct. Under our recommendations, explained in Part 2,³⁴ if D is reckless, in the sense that he or she realises that there is a serious risk that his or her conduct may kill, he or she can be guilty of second degree murder but *only if*, additionally, he or she intended by his her conduct to cause some injury or a fear or risk of injury.
- 3.53 Under our recommendations, not all cases of ‘reckless’ killing will fall into second degree murder. These will be killings where there is an awareness of a risk that conduct may cause death but the extra element is missing: there is no intention to cause injury or a fear or risk of injury. Almost all of our consultees were in favour of treating ‘reckless’ killing (without any further aggravating factor) as manslaughter. We believe that such cases should be treated as falling within gross negligence manslaughter. In other words, there should cease to be a separate category of ‘reckless manslaughter’. The Crown Prosecution Service and Professor Taylor expressly said that they would favour this course.
- 3.54 We believe that there would be little point in continuing with a category of ‘reckless manslaughter’ when the worst cases of recklessness (those in which there was also an intention to cause injury or a fear or risk of injury) are accounted for within second degree murder. Under our recommendations, ‘reckless manslaughter’ would become a very narrow category, in many cases all but indistinguishable from gross negligence manslaughter. The Crown Prosecution Service thought that the law would become too complicated if reckless manslaughter were retained as a separate category. We agree.
- 3.55 In many cases treated as ones of gross negligence manslaughter, D would be hard-pressed to deny that he or she was in broad terms perfectly well aware of the risk of his or her conduct killing someone. In other words, in many cases it would be hard for D (if pushed) to deny that he or she was reckless as well as grossly negligent, unless he or she had, in his or her own mind, positively ruled out the possibility that death might be caused. An example is *Lidar*,³⁵ where D drove off knowing that the victim was hanging from the car window with his body half in the car. In such a case, D would be hard-pressed to deny being both grossly negligent and reckless.
- 3.56 Recent case law has reinforced our belief that reckless manslaughter can be subsumed within gross negligence manslaughter. For example, the Court of Appeal has said that D’s state of mind can be “relevant to the jury’s consideration when assessing the grossness and criminality of his conduct”.³⁶ This cuts both ways. On the one hand, the fact that D was aware of a risk but pressed on

³³ See Part 2.

³⁴ See Part 2, paras 2.108 to 2.111.

³⁵ November 11, 1999, CA, No 9900339 Y4. The case was decided on a now out-of-date understanding of recklessness as including an ‘objective’ strand involving a failure to appreciate an obvious risk.

³⁶ *A-G’s Reference (No 2 of 1999)* [2000] *Criminal Law Review* 475.

regardless strengthens the case for saying that his or her conduct was grossly negligent (in the sense of showing a blatant disregard for the safety of others). On the other hand, the fact that D genuinely (albeit stupidly) thought that there was little or no risk weakens, without wholly undermining, the case for saying that his or her conduct showed such disregard or was grossly negligent.³⁷

- 3.57 The term ‘reckless’ has an unhappy history in the context of homicide. Although the House of Lords brought some welcome clarity to the definition of that term in another context,³⁸ we now believe that the law of homicide is better off without it.

The second change - fault

- 3.58 The second change relates to gross negligence manslaughter’s fault element. We recommend that the prosecution be required to show that there was gross negligence as to the risk of *causing death* (not merely as to causing serious injury). That change in effect means our recommendations restate, rather than extend, the common law.³⁹ We do not believe that this recommendation will prove controversial in any significant way. This change was supported by the vast majority of consultees.

- 3.59 Gross negligence manslaughter can be committed even when D was unaware that his or her conduct might cause death, or even injury. This is because negligence, however gross, does not necessarily involve any actual realisation that one is posing a risk of harm: it is a question of how glaringly obvious the risk would have been to a reasonable person. If liability for an offence as serious as manslaughter is to be justified in the absence of an awareness that one is posing a risk, D’s negligence must relate to the risk of bringing about the very harm he or she has caused: the risk of causing death. Otherwise, the crime of manslaughter becomes unduly wide and a misleading label for what the offender has done.

- 3.60 **We recommend the adoption of the definition of causing death by gross negligence given in our earlier report on manslaughter:**

- (1) a person by his or her conduct causes the death of another;**
- (2) a risk that his or her conduct will cause death...would be obvious to a reasonable person in his or her position;**
- (3) he or she is capable of appreciating that risk at the material time;
and**
- (4) ... his or her conduct falls far below what can reasonably be expected of him or her in the circumstances⁴⁰**

³⁷ *Andrews v DPP* [1937] AC 576.

³⁸ *G* [2003] UKHL 50; [2004] 1 AC 1034.

³⁹ *Adomako* [1995] 1 AC 171; *Gurphal Singh* [1999] *Criminal Law Review* 582.

⁴⁰ *Involuntary Manslaughter* (1996) Law Com No 237, para 5.34 (some passages omitted).

PART 4

COMPLICITY IN MURDER

OUR RECOMMENDATIONS

- 4.1 Our recommendations in this Part address the liability of “D” (the secondary party or accomplice) for a homicide offence committed by “P” (the perpetrator) upon “V” (the victim).
- 4.2 D’s liability may arise through assistance or encouragement that he or she has provided to P to commit the homicide offence. Alternatively, D’s liability may arise through engagement in a joint criminal venture with P (and possibly others), in the course of which a homicide offence is committed by P.
- 4.3 We set out our policy on D’s liability for first degree murder and second degree murder in cases where P has committed one (or both) of these offences. We have two key recommendations.
- 4.4 **D should be liable to be convicted of P’s offence of first or second degree murder (as the case may be) if**
 - (1) **D intended to assist or encourage P to commit the relevant offence; or**
 - (2) **D was engaged in a joint criminal venture with P, and realised that P, or another party to the joint venture, might commit the relevant offence.**
- 4.5 In addition, we recommend remedying an important defect in the common law. As the law stands, if D and P are involved in a joint criminal venture, in the course of which P commits a murder that D did not foresee as a possibility, D may escape all liability for V’s death. This treats D too generously if D was aware that P meant to do *some* harm to V, even if D did not realise that P might commit murder.
- 4.6 **We therefore recommend that D should be liable for manslaughter if the following conditions are met:**
 - (1) **D and P were parties to a joint venture to commit an offence;**
 - (2) **P committed the offence of first degree murder or second degree murder in relation to the fulfilment of that venture;**
 - (3) **D intended or foresaw that (non-serious) harm or the fear of harm might be caused by a party to the venture; and**
 - (4) **a reasonable person in D’s position, with D’s knowledge of the relevant facts, would have foreseen an obvious risk of death or serious injury being caused by a party to the venture.**

- 4.7 We will be publishing a full report with recommendations on the law governing complicity in crime more generally at the beginning of 2007.¹

D'S LIABILITY FOR FIRST DEGREE MURDER

- 4.8 Our first, and most fundamental, proposal on complicity in the CP was that D should be liable for the first degree murder committed by P, and therefore subject to the mandatory sentence of life imprisonment, if any one of the following conditions is satisfied:
- (1) D intended that first degree murder should be committed;
 - (2) D was a party to a joint venture with P to commit first degree murder;
 - (3) D was a party to a joint venture with P to commit some other crime and D foresaw that P or another party might commit first degree murder in the course of that venture.²
- 4.9 Our view is that the concept of 'joint venture' should be defined broadly to cover criminal ventures following on from a conspiracy or an informal 'tacit agreement' involving two or more individuals; but it should also extend to the type of situation where D encouraged or assisted P to commit a crime (such as an offence of violence outside a public house) and they acted with a common purpose notwithstanding the absence of any prior agreement between them.
- 4.10 With only a few exceptions, this proposal was supported by our consultees, including the Criminal Bar Association, the Criminal Cases Review Commission, the Crown Prosecution Service, Justice, Justice for Women, the Law Society, Liberty, the London Criminal Courts' Solicitors' Association, the Police Federation, the Society of Labour Lawyers and all the senior judges who addressed the question.
- 4.11 We expected the third basis for determining D's liability³ to be the most controversial aspect of our proposals on complicity, given that D would be guilty of first degree murder on the 'mere' basis that D foresaw that another party to the joint venture might commit it.⁴ However, this third basis, reflecting the position at common law, was strongly supported by most of our consultees who addressed the issue. Our view continues to be that this foundation for liability is fully justifiable, on the following basis:

¹ Participating in Crime (forthcoming, January 2007).

² Although this crude summary refers to D intending or foreseeing the commission of first degree murder, our policy, in line with the CP (paras 5.41 to 5.52) is that for D to be liable for a first degree murder committed by P, it is sufficient that D intended that a person should, or foresaw that a person might, commit the conduct element of first degree murder with the required fault for first degree murder. For further analysis of this point, see Law Commission Participating in Crime (forthcoming, January 2007).

³ Para 4.8(3) above.

⁴ Both Justice and Liberty, while supporting this category of liability, made the important point, which we accept, that D should be guilty of P's murder on this basis only if he or she foresaw a realistic – as opposed to a fanciful – possibility that P would commit murder.

- (1) We are recommending a narrower fault requirement for the offence of first degree murder than currently applies to murder, albeit broader than the definition we originally proposed in the CP. The prosecution would have to prove beyond reasonable doubt, first, that both D and P were parties to a joint criminal venture and, secondly, that D foresaw that P or another party might act with the intention to kill (or with the intention to cause serious injury allied with awareness of a serious risk of death). What justifies D's liability for first degree murder is not simply that D was aware that P might act with extreme violence in the course of their joint venture, but that P might do so with one of these intentions.
- (2) D carries additional fault on account of being involved in a joint venture with P to commit a crime. Individuals who perform criminal acts in groups have been shown to be more disposed to act violently than those who act alone,⁵ and this can be taken to be common knowledge.
- (3) A test of foresight of a realistic possibility is an acceptable basis for joint venture liability, given the increased culpability that comes with being involved in a criminal venture; but it is in any event the only practicable test for criminal proceedings in England and Wales. In particular, D should not be able to avoid liability for first degree murder on the mere basis of a mistaken understanding of the degree of likelihood involved, and the prosecution should not be expected to prove (beyond reasonable doubt) the actual degree of likelihood D contemplated.⁶

4.12 Nevertheless, we accept that some consultees regard this test of foresight as unduly harsh, given that a perpetrator can be liable for first degree murder under our proposals only if he or she intended to kill or intended to cause serious injury with awareness of a serious risk of death. In the response provided by the London School of Economics' criminal law teachers it was noted that a number of academic lawyers at a seminar organised by the Society of Legal Scholars objected to this "tough" principle. The LSE teachers cited two specific concerns:

- (1) Is it right that the timid D should be liable for P's first degree murder committed during a joint venture to burgle a house when D expressly begged P not to use violence?

⁵ Jill Dando Institute of Criminal Science (University College, London), *Rationalisation of Current Research on Guns, Gangs and other Weapons: Phase 1* (2005), 3.4 (Gangs and Crime). See further, Law Commission, *Participating in Crime* (forthcoming, January 2007), Part 3. See also *Powell, Daniels and English* [1999] 1 AC 1, 14, where Lord Steyn said: "Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed."

⁶ See further, Law Commission, *Participating in Crime* (forthcoming, January 2007), Part 3, where tests of liability based on degrees of probability are criticised. The difficulties faced by the prosecution could also be insurmountable in the type of case where it is possible to prove that the various accused persons were all parties to the joint venture but it is impossible to prove their respective roles.

- (2) Could there not be a less vague test for determining whether there is a joint venture?⁷
- 4.13 With regard to the first concern, it is hard to see why D's liability for P's murder should be affected by the expressed opposition to it if, in the course of their joint venture, D actually provided P with assistance connected to its commission. In such cases, D's expressed opposition cannot undo the effect of the assistance or the moral culpability associated with providing it. An example might be where D drives P to the house where a planned burglary is to take place and where, as D foresaw, the murder of a householder is also committed. The help D gave in driving P to V's house assisted both the burglary and the murder. D's expressed opposition to the murder should not therefore affect his or her liability for that murder if the conditions for liability set out in paragraph 4.8(3) above are met.
- 4.14 It is only where D's involvement in the joint venture takes the form of bare assent to the agreed offence (and, perhaps, presence at the scene) that the first concern has some force. Even so, we do not believe that D should be relieved of liability in such cases, on the mere ground that he or she has expressed opposition to an intentional killing by another participant in the joint venture.
- 4.15 There are several bases on which D's liability for P's murder might be defended. First, the simple fact that there has been agreement on a joint criminal venture can make it acceptable to hold D liable for what he or she foresees as a realistic consequence of that venture. On this view, it is permissible to hold D liable for the offence foreseen, as well as for the agreed offence, irrespective of whether D's contribution to the agreed offence assisted or encouraged the foreseen offence.⁸
- 4.16 Alternatively, D's assent to the agreed offence, and even more so – where relevant – his or her continued presence at the scene, can be regarded as providing assistance or encouragement in the form of continuing 'moral' support for P. This support could, ironically, be reinforced by D's expression of opposition: P will know that D does not intend to withdraw from the agreed offence, even though D clearly believes that there is a realistic possibility that P may act with extreme violence. It must be kept in mind that even a minimal degree of assistance or encouragement can be sufficient to ground D's liability for P's offence. The law is entitled to take the view that, from P's perspective, D's continued assent to the agreed offence (and, where relevant, continued presence) meant that D accepted that it was, metaphorically, 'in for a penny; in for a pound'.⁹
- 4.17 Further, and perhaps more importantly, D should not be able to pick and choose between the harmful consequences of a joint venture for which D is, or is not, to be liable simply by expressing, in advance, opposition to those of which he or she personally disapproves.

⁷ The LSE teachers recognised that it is not easy to define a joint venture, but suggest an alternative 'authorisation' test on the ground that this provides the moral key to the doctrine of joint venture.

⁸ For a defence of this view, see A P Simester, "The mental element in complicity" (2006) 122 *Law Quarterly Review* 578, 592 to 600

⁹ In Part 3 of Law Commission, *Participating in Crime* (forthcoming, January 2007), we give a fuller explanation of the justification for holding D liable for some offences committed in the course of an otherwise joint criminal venture.

- 4.18 Finally, as we have already indicated, in many cases it will be impossible to know for sure whether D did nothing more than provide assent to the agreed offence or whether D provided actual assistance. It would be wrong to expect the prosecution to prove liability on one basis rather than another.
- 4.19 That said, we do agree that there may be some circumstances where it could be inappropriate for D to be liable for an offence committed by P, even though D was engaged in a joint venture with P or D encouraged or assisted P with the fault required for secondary liability. Although there was no realistic opportunity to set the matter out in the CP, our policy on reforming complicity generally – of which complicity in first degree murder is nothing more than an important example – does include special defences to cover situations where D ought not to be liable for a crime committed by P.
- 4.20 As mentioned above, our recommendations, along with draft legislative provisions, are scheduled to be published early in 2007 but, to summarise briefly, we have recommended (amongst other defences and exemptions) defences of:
- (1) acting in order to prevent the commission of an offence; and
 - (2) acting in order to prevent or limit the occurrence of harm.
- 4.21 If the jury accepts that D acted with either of these purposes, and it was reasonable for D to act as he or she did in all the circumstances, D will not be convicted of P's offence even though D is prima facie liable for it.¹⁰ Consider the following example:
- D and P are parties to a conspiracy to commit burglary, and burglary is subsequently committed by P during which P kills the householder with the intention to kill, a first degree murder contemplated by D as a realistic possibility. D's defence at trial is that his or her only purpose in becoming involved in the venture was to obtain sufficient information about the burglary to be able to inform the police in advance.
- 4.22 If the jury accepts that D's explanation is more likely than any other explanation to be true, and that it was reasonable for D to act as he or she did, then D will not be guilty of burglary or first degree murder even though D provided P with encouragement or assistance with the fault required for liability for the two offences.
- 4.23 On the second point raised by the LSE teachers,¹¹ they suggested a test for D's liability of whether D had 'authorised' the commission of murder by P. We are not persuaded that this test for determining the existence of a joint venture is desirable. Our view remains that the test must be sufficiently broad and flexible to encompass a wider range of cases than those covered by 'authorisation'.

¹⁰ The burden of proof for these defences would lie with D.

¹¹ Para 4.12(2) above.

- 4.24 If an alternative test based on 'authorisation' were to be used, as suggested by the LSE teachers, the timid D in their example¹² would indeed avoid liability, even though D freely participated in a burglary believing, correctly, that P might attack another person with the intention to kill (or the intention to cause serious injury allied with awareness of a serious risk of death). We should say that we see little if any reason for exonerating D on the basis of his or her preliminary entreaties, and a real possibility of fabricated defences resulting in unjustifiable acquittals if a test of 'authorisation' were to become the basis of joint venture liability. At best, the fact that D begged P not to use the violence D realised P might use (and that P did in fact go on to use) is a reason to impose on D a shorter 'minimum term' than might otherwise be the case.
- 4.25 Furthermore, a test based on 'authorisation' would prevent D from being liable for first degree murder committed by P in the type of situation where D and P acted in concert with a common purpose but not pursuant to any express or tacit agreement. Our view is that D should be liable for the first degree murder committed by P in this sort of situation, even though there is no authorisation by D, as in the following example:
- D is personally hostile to V and wishes to cause V some harm. D finds P attacking V in the street and, although D recognises that P might well be acting, or about to begin acting, with the intention to kill, D nevertheless joins in unasked with P's attack on V.
- 4.26 Importantly, moreover, it is to be noted that not every crime committed by P, and foreseen by D, will result in D's being liable for the crime in question. First, in the context of our third basis for determining D's liability,¹³ our policy is that D should be liable for the first degree murder committed by P only if the murder was within the scope of their joint venture.
- 4.27 For example, suppose D and P agree to burgle H's house, and D provides P with a jemmy believing that P might use it to commit first degree murder if confronted by H. Our policy is that D should not be liable for a first degree murder committed by P with the jemmy in a quite different context, such as where P uses it to kill V during an unrelated fight some hours after the burglary. The killing has too insubstantial a connection with the joint venture.
- 4.28 Furthermore, even in cases where D has been involved in a joint criminal venture in the course of which someone is intentionally killed, D should not be regarded as complicit in P's murder where P's intentional killing falls outside the scope of the joint venture. D avoids liability for murder in such cases even if the murder is committed in the course of the joint venture.

¹² Para 4.12(1) above.

¹³ Para 4.8(3) above.

- 4.29 An example might be where D and P agree to commit burglary, in the course of which D realises that P may shoot any householder or occupier P encounters. During the course of the burglary, P sees an enemy walking down the street outside, leans out of the window and shoots the enemy dead. Under our recommendations for reform of the law of complicity, D will be able to argue that the murder fell outside the foreseen scope of the joint venture. The argument will be that the circumstances in which the murder came to be committed were too remote from what D anticipated to make it right to regard the murder as within the foreseen scope of the joint venture. The question will be a matter of fact and degree for the jury to decide.¹⁴
- 4.30 Our recommendations for complicity in first degree murder therefore remain broadly as described in the CP¹⁵ and summarised in paragraph 4.8 above.

D'S LIABILITY FOR SECOND DEGREE MURDER

- 4.31 Some of our consultees wondered what the position would be under our proposals in relation to second degree murder. The answer, of course, is that the general principles of our proposed doctrine of secondary liability would apply in this context too.
- 4.32 Suppose D assists or encourages P, or agrees with P, to attack V with a view to causing V serious harm, but not death; or suppose that D and P agree to commit burglary and D foresees that P might intentionally attack a householder (V) with the intention to cause serious harm, but not death. Then, if P committed second degree murder against V by virtue of P's having the intention to cause serious harm and causing V's death, D too would be liable for second degree murder.
- 4.33 A similar position obtains with respect to our recommended alternative fault element for second degree murder (see Part 2). Under our recommendations D would be liable for second degree murder if P killed V with the intention to cause harm or fear or risk of harm, in the belief that his or her conduct involved a serious risk of causing death, if D acted with the same state of mind or D believed that P might act with that state of mind during the course of the burglary.

¹⁴ See further, Law Commission, *Participating in Crime* (forthcoming, January 2007), Part 3.

¹⁵ Paras 5.39 to 5.52.

- 4.34 D is also guilty of second degree murder if he or she assists or encourages P, or agrees with P, to inflict serious harm on V, but P goes on to commit first degree murder in consequence. In committing first degree murder P also necessarily commits second degree murder and D possessed the fault element for the latter offence. The discretionary life sentence, which would apply to second degree murder, will ensure that justice is done in these types of case, in terms of the appropriate penalty D should suffer bearing in mind what he or she intended or contemplated.¹⁶

PERIPHERAL INVOLVEMENT IN THE JOINT VENTURE

- 4.35 In the CP¹⁷ we expressed the view that D should not be granted a partial defence to first degree murder simply on the basis that he or she was not a perpetrator and had only a peripheral role in the joint venture.
- 4.36 This was also the view of the vast majority of consultees who addressed the issue. Our policy therefore remains unchanged.

DURESS

- 4.37 In the CP¹⁸ we expressed the view that D should be able to rely on a partial defence of duress to first degree murder to the same extent that a perpetrator would be able to under our proposals.¹⁹ This was also the view of many of the consultees who addressed the issue, although a significant number favoured duress as a full defence and a few consultees expressed the view that it should not be a defence to any extent.
- 4.38 We explain elsewhere in this report²⁰ our recommendation that duress can be a full defence to first degree murder²¹ where it is relied on by P, excusing him or her from all liability for V's death. P would have to prove this defence on the balance of probabilities.

¹⁶ For the avoidance of doubt, we should add that if P committed first degree murder against V, notwithstanding P's earlier agreement with D to cause only serious harm, but P is (or would be) convicted of second degree murder on account of having the benefit of a partial defence, D would be liable for second degree murder. Of course, if D believed that P might act with the fault element for first degree murder, following normal principles, D would be liable for first degree murder regardless of the fact that P has the benefit of a partial defence and would him or herself be convicted of second degree murder.

¹⁷ Para 5.58.

¹⁸ Paras 5.66 to 5.78.

¹⁹ The question did not arise in the context of second degree murder or manslaughter, where the full defence would be available.

²⁰ Part 6.

²¹ And second degree murder.

4.39 With regard to duress as a defence for D against an allegation of first degree murder by the application of our recommendations on complicity, our view continues to be that the defence should be available to D to the same extent that it would be available to P. Indeed our policy that duress should be a full defence for both P and D has been influenced by the particular problems which may arise in the context of secondary liability, where in some cases D clearly ought not to be liable at all for a death caused by P. Certainly D ought not to be liable for first degree murder or any other offence in the situation where:

- (1) D is only a party to a joint venture on account of being an unwilling party from the outset because of duress,²² and
- (2) D's prima facie liability for first degree murder is based solely on having contemplated the possibility that P or another party to the venture might commit that offence.²³

4.40 By providing D with a full defence of duress he or she would be able in principle to avoid liability for all offences arising out of V's death. Liability could be avoided in the type of situation where D has been forced, under duress, to participate in the venture of one or more criminals (with whom he or she has not previously been criminally involved) and D believes that one of those criminals might commit first degree murder during the course of their venture. Here are two examples:

- (1) D, a taxi driver, is forced at gunpoint by a stranger to take him or her to a public house. D's purpose in driving the stranger there is not to encourage or assist the commission of an offence, although D believes that first degree murder may be committed by the stranger.
- (2) D, the manager of a depot storing millions of pounds in cash, co-operates with robbers under a threat that, if D does not, his or her children will be shot.²⁴ D believes that one of the robbers may commit first degree murder during the course of their criminal venture, but D also knows or believes that the gang are holding his or her children hostage.

4.41 Prima facie, in each case D could be said to be a party to the joint venture on account of agreeing to go along with the venture,²⁵ and liable for first degree murder by virtue of D's contemplation of that offence as a possibility.²⁶ However, in each case it is right in principle that the duress D is acting under should completely excuse D from liability.²⁷ As the Criminal Bar Association rightly noted, in this type of situation D should not be condemned *at all*.

²² The defence would not be available to any person who voluntarily became involved in the criminal gang which embarked on the joint venture, in accordance with the limitation established at common law (*Z* [2005] UKHL 22, [2005] 2 AC 467).

²³ Para 4.8(3) above.

²⁴ An example provided by the Criminal Bar Association.

²⁵ See paras 5.72 and 5.73 of the CP.

²⁶ Para 4.8(3) above.

²⁷ In reality, of course, it is unlikely that D would be prosecuted in cases of this sort, reinforcing our view that D should have a full defence. D is more likely to be a prosecution witness against P than a defendant.

A NEW APPLICATION OF MANSLAUGHTER

4.42 We proposed in the CP²⁸ that D should be guilty of a new homicide offence (“complicity in an unlawful killing” or “manslaughter”) if:

- (1) D and P were parties to a joint venture to commit an offence;
- (2) P committed the offence of first degree murder or second degree murder in relation to the fulfilment of that venture;
- (3) D intended or foresaw that (non-serious) harm or the fear of harm might be caused by a party to the venture; and
- (4) a reasonable person in D’s position, with D’s knowledge of the relevant facts, would have foreseen an obvious risk of death or serious injury being caused by a party to the venture.

4.43 The majority of our consultees who addressed the issue supported this proposal. In the light of the responses received on this issue, our recommendation is that there should be a homicide offence committed by D in these circumstances.

4.44 **We now recommend the label ‘manslaughter’ for D’s homicide offence.**

4.45 The Law Society supported the offence but questioned whether it ought not to be second degree murder. On this point, we remain of the view that it should be regarded as a less serious offence than second degree murder, even though there is an obvious risk of death or serious injury, because D contemplates nothing more serious than minor harm. That is to say, D does not him or herself believe there is a serious risk of death and D does not believe that P might act with the intention to cause harm or the fear or risk of harm in the belief that there is a serious risk of death.

4.46 Some consultees suggested that reference should be made to D’s own character in the criterion of ‘reasonable person in D’s position’ (that is, reference should be made to D’s personal characteristics such as age, but not voluntary intoxication). We agree that characteristics such as D’s age ought to be taken into consideration, but are of the view that this is an area best left to the courts to determine on a case-by-case basis.

CONCLUSIONS

4.47 **We recommend that D should be liable to be convicted of P’s offence of first or second degree murder (as the case may be) if**

- (1) **D intended to assist or encourage P to commit the relevant offence;
or**
- (2) **D was engaged in a joint criminal venture with P, and realised that P, or another party to the joint venture, might commit the relevant offence.**

²⁸ Paras 5.79 to 5.88.

4.48 **We recommend that D should be liable for manslaughter if the following conditions are met:**

- (1) D and P were parties to a joint venture to commit an offence;**
- (2) P committed the offence of first degree murder or second degree murder in relation to the fulfilment of that venture;**
- (3) D intended or foresaw that (non-serious) harm or the fear of harm might be caused by a party to the venture; and**
- (4) a reasonable person in D's position, with D's knowledge of the relevant facts, would have foreseen an obvious risk of death or serious injury being caused by a party to the venture.**

PART 5

PROVOCATION AND DIMINISHED RESPONSIBILITY

THE EFFECT OF A PLEA OF PROVOCATION

5.1 **We recommend that:**

provocation should be a partial defence, with a successful plea having the effect of reducing first degree murder to second degree murder.

5.2 We undertook a thorough review of the defence in 2004. We continue to believe that the recommendations we made at that time for reform of the defence are the right ones.¹ However, at that time we had not been asked to consider the role of the defence in a reformed law of murder. For that reason, along with the need to take account of recent developments and consultees responses, some of the arguments in favour of reforming the defence along the lines we recommended will be repeated here.

5.3 The defence is a confusing mixture of common law rules and statute, but the gist of the defence can be found in section 3 of the Homicide Act 1957:

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

5.4 Provocation is currently a partial defence that, if successful according to the terms of section 3, reduces murder to manslaughter. Following a successful provocation plea, the judge has discretion over the sentence and can impose a sentence up to and including life imprisonment. The Sentencing Advisory Panel has given advice to the Sentencing Guidelines Council that sentences for manslaughter in successful provocation cases should be broadly (and in outline) as follows:

Low degree of provocation: sentencing range of 9 to 15 years.

Substantial degree of provocation: sentencing range of 4 to 9 years.

High degree of provocation: sentencing range of up to 4 years.²

¹ Detailed supporting argument for those recommendations can be found in the report itself, *Partial Defences to Murder (2004)* Law Com 290.

² Much fuller detail can be found in *Sentencing Advisory Panel: Manslaughter by Reason of Provocation (2005)*, 18 to 19.

- 5.5 Research conducted by Professor Barry Mitchell and Dr Sally Cunningham showed that, either on its own or in combination with another defence, provocation was the second most popular plea in the sample of murder cases examined (22.3% of cases) after denial of intent (39.4%).³ It is our belief that the adoption of our recommendations for reform of the defence should ensure that, in practice, cases involving a low degree of provocation never reach the jury (or are unsuccessful if they do reach the jury). The details of our recommendations are set out from paragraph 5.11 onwards.
- 5.6 During the consultation process, some consultees continued to express the view that there is no place in the law of murder for the provocation defence. We believe that the restrictions on the defence that we recommend will meet many of these concerns. Moreover, the narrowing of the fault element for first degree murder, under our recommendations, means that the provocation defence would come into play in fewer cases than it does at present. The fact that a provocation plea will have to provide some excuse for an intention to *kill*, or an intention to do serious injury *aware of a serious risk of causing death*, should also mean that the hurdle that must be surmounted successfully to plead the defence will be higher.
- 5.7 In defence of the provocation plea, it is important to bear in mind the great range of offenders and kinds of provocation that may be at issue in murder cases. A life sentence⁴ for first degree murder in a case involving a high degree of provocation may be considered especially unjust when the offender is a young person or is of low intelligence.⁵ In *Camplin*,⁶ for example, D was a 15-year-old boy who claimed he had been provoked to lose self-control and kill a man who had raped him in spite of his (Camplin's) resistance, and then laughed at him. If a jury believes that a story like Camplin's may be true, it is hard to see what purpose would be served in passing a mandatory sentence for first degree murder of indefinite detention at her Majesty's pleasure.
- 5.8 In Part 2 we explained why we are recommending that provocation (along with the other partial defences) should operate as a defence only to first degree murder, reducing the offence to second degree murder. The main reason was the intrinsic nature of the link between the plea's existence and the mandatory life sentence for murder (first degree murder, under our proposals). The fact that there is a mandatory life sentence for murder is the *raison d'être* of the provocation plea in England and Wales, although we recognise that the defence exists in a minority of jurisdictions in which there is no mandatory life sentence for the top tier offence.⁷ We do not believe that it would serve the interests of justice to extend the application of this complex defence to any crime where the existence of sentencing discretion already makes it possible to reflect the nature and degree of the provocation in the sentence itself. We gave our reasons for this in Part 2. Under our recommendations, second degree murder, attempted

³ See Appendix C.

⁴ Or, depending on the age of the offender, a sentence of custody for life, or detention at her Majesty's pleasure.

⁵ See *Scott* (unreported, 20 October 2000), cited by the Sentencing Advisory Panel: *Manslaughter by Reason of Provocation* (2005), 11; *Atland* [2003] EWCA Crim 474.

⁶ [1978] AC 705.

⁷ Germany is an example of such a jurisdiction.

murder, and manslaughter would all have a discretionary life sentence maximum. So, there is no compelling reason to extend the defence to these offences.

- 5.9 By way of contrast, there should be a defence of provocation in some form to first degree murder. The defence of provocation has played a part in helping a small minority of offenders to avoid the mandatory penalty for murder for over 400 years. As we indicated in Part 2, whilst the mandatory sentence is retained, abolition of the defence might create a greater set of problems for the law of homicide than are posed by its continued existence. It is worth briefly re-iterating the argument to that effect here.
- 5.10 Imagine a case involving what the Sentencing Advisory Panel regards as a high degree of provocation, warranting a sentence for manslaughter of 4 years' imprisonment or less (see paragraph 5.4 above). If there were no defence of provocation to reduce the offence to manslaughter, the offender would have to be sentenced to life imprisonment. However, the initial period the offender would spend in custody before being eligible for release might only be a year or two, given the Sentencing Advisory Panel's guidance. Accordingly, an offender given a life sentence would spend the vast majority of that sentence (perhaps in excess of 40 years) out on licence. The proliferation of such sentences would only increase the public's confusion over the nature and significance of the 'life' sentence.

THE SUBSTANCE OF THE DEFENCE

- 5.11 In our review of the defence of provocation in 2004, we concluded that the circumstances in which it should in future be available ought to be changed, in the ways indicated below.⁸ Our conclusions were reached after widespread and detailed consultation. We see no compelling reason to depart from them in substance, although we will indicate below where our conclusions remain controversial and, therefore, where there is an issue that could profitably be taken further in the next stage of the review. **We are recommending that the defence be reformed as follows:**

- (1) **Unlawful homicide that would otherwise be first degree murder should instead be second degree murder if:**
- (a) **the defendant acted in response to:**
- (i) **gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or**
- (ii) **fear of serious violence towards the defendant or another; or**
- (iii) **a combination of both (i) and (ii); and**
- (b) **a person of the defendant's age and of ordinary temperament, i.e., ordinary tolerance and self-restraint, in the**

⁸ Partial Defences to Murder (2004) Law Com No 290.

circumstances of the defendant might have reacted in the same or in a similar way.

- (2) **In deciding whether a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reacted in the same or in a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.**
 - (3) **The partial defence should not apply where:**
 - (a) **the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or**
 - (b) **the defendant acted in considered desire for revenge.**
 - (4) **A person should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.**
 - (5) **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.**
- 5.12 We asked consultees whether they still supported these recommendations and a clear majority of them did, either as a whole or in part. There was broad support for them from (amongst others) a number of individual judges in the higher courts; the Criminal Cases Review Commission; the Crown Prosecution Service; the Law Society; the London Criminal Courts Solicitors' Association; the Association of Chief Police Officers; the Police Federation; the teachers of criminal law at the London School of Economics and Political Science; Justice; Liberty; Rights of Women; Refuge; Southall Black Sisters; and the Royal College of Psychiatrists.
- 5.13 Those who supported our proposals only in part rarely disagreed with the reforms we proposed for the basic elements and structure of the defence. One area of disagreement centred on the scope of the defence. Some consultees thought it ought to apply only in cases of so-called 'excessive defence' (1(a)(ii) above, in paragraph 5.11), and not in the wider set of circumstances (permitted by 1(a)(i) above in paragraph 5.11). 14 consultees responded to the specific question whether the defence should be restricted to 'excessive' defence cases. Seven responded saying it should be so restricted and seven responded saying it should not be so restricted. Those who disagreed with our own view that it should not be so restricted included the Crown Prosecution Service, Justice for Women, and Victims' Voice. We take up the issue in paragraph 5.61 onwards below.

- 5.14 The range of legal problems to which the current defence gives rise have led us to adopt these recommendations for change.⁹ We will concentrate here on the most important of these problems and on how we recommend dealing with them.

An absence of judicial control over when the plea is considered by the jury

- 5.15 Under the existing law, the judge must put the defence to the jury, whenever there is evidence that the defendant (“D”) was provoked to lose self-control, however unlikely the defence is to succeed. This judicial obligation was probably not intentionally created by Parliament when the doctrine of provocation was reformed in 1957. The current position does not serve the interests of justice because the need to put the defence to the jury in these circumstances increases the likelihood that an unmeritorious claim may succeed. The current position may not even serve the interests of every D. Even if there is evidence of a loss of self-control, D may not want the jury to be side-tracked by a partial defence if his or her main claim is for a complete acquittal.
- 5.16 We address this issue in (5) in paragraph 5.11 above. (5) seeks to restore the common law position prior to 1957, under which the trial judge had the task of filtering out purely speculative and wholly unmeritorious claims. Clearly, a judicial ruling that a provocation plea should not be put to the jury could have a major influence on the way in which the defence case is run. Accordingly, we suggest that consideration is given to the creation of an interlocutory appeal against a judge’s ruling that the defence should not be put to the jury. This appeal should be permitted only before the trial (the basis of the defence should be considered at a pre-trial hearing under modern case management procedures), so that the trial itself is not substantially delayed by the use of the interlocutory procedure. The Higher Court Judges’ Homicide Working Party could see no special problems arising from the provision of such an appeal.

The unnecessary and undesirable loss of self-control requirement

- 5.17 For 250 years or more, the law took the uncomplicated view that the defence of provocation could be pleaded whenever D was provoked into a towering rage or temper and killed before the rage or temper subsided. In the 19th century, this subjective requirement was turned into a requirement that D ‘lost self-control’ at the time of the killing.¹⁰ Judges have since struggled to interpret and apply this notion as a description of the necessary state of mind.¹¹ It remains unclear to

⁹ See our earlier report, *Partial Defences to Murder (2004) Law Com No 290*.

¹⁰ Indeed, the Court of Appeal has said that when the offence has been reduced to manslaughter by the jury on the grounds of provocation, the judge should not treat the case as one involving mere jealous rage, for example, but as one involving nothing less than loss of self-control: *A-Gs Reference (Nos 74 to 76 of 2002) (Suratan & Others)* [2002] EWCA Crim 2982, [2003] 1 Cr App R (S) 42.

¹¹ See, for example, the contrast between the views of Devlin J in *Duffy* [1949] 1 All ER 932n, and of Lawton LJ in *Ibrams* (1982) 74 Cr App R 154 (both taking a narrow view of the requirement) and the views of Lord Lane CJ in *Ahluwalia* [1992] 4 All ER 859 (taking a broader view of the requirement).

what extent a delay between the provocation and the loss of self-control will undermine a provocation plea.¹²

5.18 In addition, the requirement of a loss of self-control has been widely criticised as privileging men's typical reactions to provocation over women's typical reactions. Women's reactions to provocation are less likely to involve a 'loss of self-control', as such, and more likely to be comprised of a combination of anger, fear, frustration and a sense of desperation. This can make it difficult or impossible for women to satisfy the loss of self-control requirement, even where they otherwise deserve at least a partial defence.

5.19 This is why in our previous report and in the CP, we took the view that a positive requirement of loss of self-control was unnecessary and undesirable. Our current recommendations have not sought to resurrect it.¹³ Professor Mitchell and Dr Cunningham's research¹⁴ shows that, in cases where provocation has been pleaded, whilst there may be uncorroborated evidence that the killing took place in anger, evidence of the 'loss of self-control' that the law requires was much harder to find:

whilst sometimes there was evidence of a loss of self-control as the law requires, it was impossible to know whether the court felt that the defendant had lost his self-control at the critical moment, or whether more reliance was being placed on the reasonableness of the defendant's reaction. In at least nine cases where provocation was pleaded it was unclear whether the defendant had lost his self-control at any stage. However, it appeared that there was usually very little time lapse between the provocation and the defendant's reaction to it...¹⁵

5.20 That being so, as (3) above in paragraph 5.11 makes clear, we have sought to express the so-called subjective condition negatively, avoiding reliance on a positive requirement of loss of self-control. D's reaction must not have been 'engineered' by him or her through inciting the very provocation that led to it. Further, it should not reflect a considered desire for revenge. This second element of the restriction will be given further consideration here.

5.21 It may be argued that our approach to the problems caused by the loss of self-control requirement goes too far the other way, by not replacing the requirement with a more broadly based subjective condition. An example of such a condition would be the term used in the American Model Penal Code, 'extreme mental or emotional disturbance'.

¹² For a helpful discussion, see Simester and Sullivan, *Criminal Law: Theory and Doctrine* (2nd edition 2003) pp 344 to 348.

¹³ Oliver Quick and Celia Wells, in "Getting Tough with Defences" [2006] *Criminal Law Review* 514, 522, claim in relation to our proposals that, "The CP retains the notion of loss of self-control, and its association with male temper killings...". We do not believe there is a basis for this claim in anything that we have proposed or recommended. We respectfully refer them to our criticisms of the loss of self-control requirement in *Partial Defences to Murder* (2004) Law Com No 290, paras 3.28 to 3.30, and 3.135 to 3.137, criticisms that we continue to believe are valid.

¹⁴ See Appendix C.

¹⁵ Above, paras C.7 to C.8

- 5.22 In our report on provocation in 2004, we followed the views of a majority of judges and academics in taking the view that the phrase ‘extreme mental or emotional disturbance’ was unduly vague and indiscriminate.¹⁶ Further, the introduction of a new phrase of this kind at the heart of the defence would lead to intense legal scrutiny and, no doubt, to a number of cases in the appeal courts to determine its meaning and scope. Whether the law would be improved as a result of this is open to question. However, we recognise that the phrase has formed the basis for a provocation defence in at least some American state jurisdictions,¹⁷ and cannot therefore be dismissed as unworkable (see paragraph 5.32 below).
- 5.23 We do accept that excluding cases in which there was a ‘considered desire for revenge’ ((3) in paragraph 5.11 above) may by itself be insufficient to exclude from the trial every unmeritorious case. However, we believe that juries can simply be trusted to reject such claims when they slip through the net and into the trial itself. It is worth exploring this issue in more detail because to do so will show how difficult it is to provide a clearly superior alternative.
- 5.24 The exclusion in (3) in paragraph 5.11 above was phrased so as to allow some cases in which there had been an element of premeditation to fall in principle within the scope of the defence. Examples are cases in which a battered woman has killed her violent partner.¹⁸ Such cases clearly call for the jury’s consideration of a partial excuse, despite the element of premeditation. The premeditation will typically reflect no more than D’s reasonable fear that an immediate and direct confrontation with the abusive partner will lead to violence being inflicted on her.¹⁹ It would not be appropriate to describe D’s premeditation in such cases as constituting a ‘considered desire for revenge’.
- 5.25 Setting such cases on one side, it has been put to us that there are other cases that, whilst not involving cold-blooded revenge, should nonetheless be ruled out as potential provocation pleas. Examples are so-called ‘honour’ killings, in which D may say that he (and it will normally be a ‘he’) planned the killing of the victim to uphold the honour of the family rather than to take revenge on the victim for something said or done. We believe that there is likely to be a strong motive of revenge in such cases. The offender is seeking to make an example of the victim because she (and it normally will be a ‘she’) has defied tradition, custom or parental wishes in her choice of boyfriend, spouse or life-style.²⁰
- 5.26 It may be that such cases – or others like them - involve mixed motives (other than those contemplated in (4) in paragraph 5.11 above). An example might be *Baillie*,²¹ in which D’s motive could be said to have been both the taking of revenge on a drug dealer and the prevention of further crime by that drug dealer. Such cases may or may not be ruled out under (3) in paragraph 5.11 above.

¹⁶ Partial Defences to Murder (2004) Law Com No 290, paras 3.47 to 3.59.

¹⁷ Above, Appendix F.

¹⁸ Above, paras 3.28, and 3.104 to 3.107.

¹⁹ See eg, *Thornton* [1992] 1 All ER 306; *Ahluwalia* [1992] 4 All ER 889.

²⁰ See eg, Salma Choudry, “Pakistani Women’s Experience of Domestic Violence in Great Britain”, Home Office Research Findings No 43 (1996).

²¹ [1995] *Criminal Law Review* 739.

- 5.27 In drawing up our recommendations, we were not engaged in statutory drafting and so our use of phrases such as ‘considered desire for revenge’ was only suggestive of an approach. It seems likely that in many mixed motive cases the judge might take the view that, even if there is no ‘considered desire for revenge’, it is nonetheless a case where no reasonable jury would find that the defence applies. It would thus be ruled out under (5) in paragraph 5.11 above. We regard it as significant that of the provocation cases studied by Professor Mitchell and Dr Cunningham, in the two involving honour killing both the accused were convicted of murder.²² We are confident that the result would be no different under our recommendations.
- 5.28 Nonetheless, the question arises whether such cases should, or should not, be ruled out through a restriction of the kind set out in (3) in paragraph 5.11 above and, if so, how.
- 5.29 It was clear to us that when a battered woman uses excessive force against her abusive partner only because she fears for her safety in any direct confrontation, it would be wrong to rule out her plea simply because there was no evidence of a loss of self-control. Such cases are discussed further from paragraph 5.47 onwards.
- 5.30 A different approach could be adopted for cases falling *solely* within 1(a)(i) in paragraph 5.11 above, those that do not involve the excessive use of force motivated by a fear of serious violence (1(a)(ii) in paragraph 5.11 above). It would be possible to insist on satisfaction of an extra requirement of ‘immediacy’ (as in Scottish law²³), or of, say, ‘a spontaneous display of anger’²⁴ in cases falling exclusively within this limb (1(a)(i) in paragraph 5.11 above) without relying on the notion of ‘loss of self-control’. Satisfaction of such an extra requirement would not be necessary under 1(a)(ii) or 1(a)(iii) in paragraph 5.11 above (where only (3) and (5) in paragraph 5.11 would have to be satisfied).
- 5.31 It must be said that such a ‘positive’ requirement, added to 1(a)(i) in paragraph 5.11 above, would complicate the law, not least in cases where the question whether the case falls into 1(a)(i) alone is disputed. It might be simpler to rely on the judge’s power to withdraw unmeritorious cases, under (5) in paragraph 5.11 above, to weed out cases in which someone has committed a premeditated honour killing or has taken the law into his or her own hands by acting as self-appointed judge, jury and executioner, as in *Baillie*.²⁵
- 5.32 This is a difficult issue, and there are no perfect solutions. If the answers provided by the present law are inadequate, then the following alternatives may be something to be considered further in the next stage of the review. We recommended alternative (1) below in 2004, for the reasons given above, but alternatives (2) and (3) below will also have supporters:

²² Appendix C.

²³ *Thomson v HMA* (1986) SLT 281. It would not, however, be desirable to follow the rule in Scotland that the cumulative effect of provocation other than that immediately preceding the final provocation cannot be considered.

²⁴ As the older English cases required.

²⁵ [1995] *Criminal Law Review* 739.

(1) A negative requirement, that D must not have acted out of considered desire for revenge, whether in response to gross provocation or in response to a fear of serious violence, or both together (our conclusion in 2004: see para 5.11 above).

(2) In addition to (1), a positive requirement, that D must have acted in a state of extreme emotional disturbance whether in response to gross provocation or in response to a fear of serious violence, or both together (rejected by us in 2004: see para 5.22 above).

(3) In addition to (1), a positive requirement that D must have acted immediately following gross provocation, this additional requirement being inapplicable both in the case of a response to a fear of serious violence alone and in the case of a response to both gross provocation and a fear of serious violence together.

Uncertainty over the 'reasonable person' requirement

5.33 At present a provocation plea cannot succeed unless the jury decide that a reasonable person might have responded to the provocation in question by doing as D did, namely losing self-control and killing. We set out above, in paragraph 5.11, 1(b) and 2, our recommendation for the way in which this 'reasonable person requirement' should be understood. We believe the law needs clarification on this point for the following reasons.

5.34 In a series of cases in recent years, the Court of Appeal, the House of Lords, and the Privy Council, have disagreed over how broadly or narrowly to construe the reasonable person requirement. The result has been uncertainty over its scope and nature, although in no case has the justification for having the restriction in some form been doubted. In the Privy Council case of *Attorney-General for Jersey v Holley*,²⁶ departing from an approach to the reasonable person requirement adopted by the House of Lords only four years previously,²⁷ Lord Nicholls said:

In expressing their conclusion...their Lordships are not to be taken as accepting that the present state of the law is satisfactory. It is not. The widely held view is that the law relating to provocation is flawed to an extent beyond reform by the courts...Their Lordships share this view. But the law on provocation cannot be reformulated in isolation from a review of the law of homicide as a whole.²⁸

5.35 Disagreement in the courts has focused on the extent to which D's own characteristics, or other factors, can, or must, be taken into account in judging how the reasonable person might have responded to the provocation.

5.36 One key question in making that judgement is 'how gravely provocative really was the provocation'? It is obvious that D's own characteristics must be relevant to this question. To give a simple example, D's own height would be relevant in

²⁶ [1995] UKPC 23, [2005] 2 AC 580.

²⁷ *Smith (Morgan)* [2001] AC 146.

²⁸ [2005] 2 AC 580, 594 to 595.

assessing the gravity of the provocation constituted by an accusation that he or she was 'a midget'.²⁹ The courts have not encountered significant difficulties in recent years in deciding how such characteristics or factors affecting the gravity of provocation should be dealt with in law.³⁰ The jury is obliged to take such characteristics into account.³¹

- 5.37 More controversial has been the question whether the jury should be required, or permitted, to take into account individual characteristics of D (or other factors) liable to affect the level of self-control that he or she can be expected to show in the face of *any* provocation. It may be, for example, that a drunken D, an immature D or a mentally deficient D, is unable to exercise the same level of self-control, in the face of provocation generally, as a sober adult with normal mental capacities. The courts have disagreed over whether the jury should be required or permitted to take such factors into account.
- 5.38 We will not retrace the history of the courts' attempts to introduce clarity to the law on this question.³² In our view, the function of the reasonable person requirement is to test D's own reaction against the standards of someone of his or her age possessed of an ordinary temperament: someone who is neither intolerant nor lacking in a reasonable measure of self-restraint when facing provocation. Unless the jury concludes that D's reaction might have been that of such a person, the defence ought to fail, even if D only killed as a result of a provoked and momentary loss of temper.
- 5.39 We are reluctant to speculate on how the courts would interpret the provisions in 1(b) and (2) in paragraph 5.11 above. Still less would we wish to insist that they interpret them in a given way. None the less, the following examples may provide some guidance on the kinds of distinctions we think that it would be helpful to draw.
- 5.40 Our provisions impose a duty on the judge to instruct the jury to ignore factors that affect D's general capacity to exercise self-control. Alcoholism, for example, or another mental deficiency or disorder that is liable to affect temper and tolerance are obvious examples.³³ A person who has killed because his or her capacity for self-control was reduced by such a characteristic must look to the defence of diminished responsibility for a partial defence, because such

²⁹ Such a provocation is, of course, very minor and could not in itself be regarded as sufficient to reduce the offence to second degree murder. Under our recommendations, we would expect such a provocation (unsupported by other provocation of a substantial kind) to fail at the first hurdle, namely at the stage when the judge decides whether or not to put it to the jury.

³⁰ See *Camplin* [1978] AC 705; *Morhall* [1996] AC 90.

³¹ It is not the function of the reasonable person requirement to lay down, as a matter of law, what kinds of provocation can and cannot be treated as "gross" or as giving rise to a "justifiable sense of having been seriously wronged", to use our definition of provocation from 1(a) in para 5.11 above. The jury should be trusted to evaluate the relative grossness of provocation, in whatever form it comes, according to their own sense of justice in an individual case.

³² See *Partial Defences to Murder* (2004) Law Com No 290, paras 3.109 to 3.134

³³ Save only in the rare case when they are relevant to the gravity of the provocation because D has been taunted about them. See *A-G for Jersey v Holley* [2005] UKPC 23, [2005] 2 AC 580.

characteristics constitute an abnormality of mental functioning, unlike, for example, D's age.

- 5.41 Abnormal states of mind, such as intoxication or irritability, should also be left out, as should other factors that affect a general capacity to exercise adequate self-control, like a claim that D is 'more jealous or obsessive than most'.³⁴ This approach to the general capacity to exercise adequate self-control will produce some hard cases. Examples might be ones in which, at the time of the provoked killing, D's general capacity for self-control was temporarily impaired by the effect of taking prescribed medicine, by having suffered a stroke, by involuntary intoxication, by an allergic reaction of some kind or by a bang on the head.
- 5.42 In such cases, the individual might well be accurately described in general terms as someone with adequate powers of self-restraint. It is just that their reaction could (albeit for good reason) not be expected to be the reaction of such a person in the particular circumstances. We believe that if their reaction was not one that might have been the reaction of a person exercising ordinary powers of self-restraint in the particular circumstances, that very fact means the provocation defence must fail. The fact that the individual in question could, putting on one side their reaction in the circumstances, be described as someone with adequate powers of self-restraint is quite irrelevant to the provocation plea. They must instead look to diminished responsibility for a defence.³⁵ As Professor Gardner expresses the point:

[T]he question, for excusatory purposes, is obviously not whether the person claiming the excuse lived up to expectations in the predictive sense of being true to form ... The question is whether that person lived up to expectations in a *normative* sense ... In the face of ... taunts, did this person exhibit as much self-restraint as we have a right to demand of someone in her situation? The character standards which are relevant to these and other excuses are not the standards of our own characters, nor even the standards of most people's characters, but rather the standards to which our characters should, minimally, conform ... those standards cannot be capped according to the capacities (be they past, present or even future) of the person to whom the excuse is supposed to apply. For, such incapacity, far from militating against unfitness [for playing the role of someone with adequate powers of self-control], is a mode of unfitness in its own right.³⁶

- 5.43 By way of contrast, a low IQ could be taken into account as part of the circumstances of D (see 1(b) in paragraph 5.11 above) if it meant, for example, that D misinterpreted a provocation, thinking it to be more grave than a person of

³⁴ *Weller* [2004] 1 Cr App R 1. The decision itself does not sit well with our recommendations.

³⁵ That may be easier for them to do, under our recommendations, than it would be under the existing law because we are replacing the requirement that an abnormality of mind (mental functioning) stem from specified causes with a requirement instead that it stem from a 'recognised medical condition': see para 5.112 below.

³⁶ John Gardner, "The Gist of Excuses" (1998) 1 *Buffalo Criminal Law Review* 575, 579 to 587 (Gardner's emphasis).

higher intelligence might have done.³⁷ To give a different example, the fact that D was dumb and thus unable to respond verbally, is a factor that might legitimately be taken into account when considering D's reaction to a particular provocation given on a particular occasion. In each example, the characteristic is not being used as evidence that the D lacked a general capacity to exercise adequate self-control.

- 5.44 By way of contrast, some of the evidence given by a psychiatrist in *Roberts*³⁸ would not be relevant to the provocation plea, under our recommendations. This was evidence that 'irrational violence was to be expected from some immature prelingually deaf persons when emotionally disturbed'. This is evidence relevant to a plea of diminished responsibility, rather than to a plea of provocation, because it is evidence of an impaired general capacity for self-control.
- 5.45 In many instances, the circumstances liable quite properly to influence the jury in D's favour will bear on how 'gross' the provocation was, or on how justifiable it was for D to feel seriously wronged (see 1(a)(i) in paragraph 5.11 above). An example is the cumulative effect of repeated provocations given, quite possibly over many years, in circumstances where it may also have been impossible for D to escape the provocation's effects. There is usually no theoretical difficulty about taking such background factors into account because they do not necessarily suggest that D is someone with a reduced general capacity to exercise self-control. A classic example would be the intimidated spouse who has been subject to abuse, the cumulative effect of which has become intolerable over the years.³⁹
- 5.46 This area of law will always remain difficult. As we indicated in the CP, however, a trial judge is under a duty to explain to the jury the full context in which a provoked killing has taken place, and the form of his or her direction ought to be discussed in advance with prosecution and defence advocates.⁴⁰ These safeguards should go some way towards minimising the chance of misdirections, and hence appeals.

A NEW BASIS FOR THE DEFENCE: FEAR OF SERIOUS VIOLENCE

- 5.47 The problems dealt with in the preceding section are in some respects problems generated by the terminology of the existing law ('loss of self-control'; 'reasonable man'). The provision in 1(a)(ii) in paragraph 5.11 above, however, extends the defence of provocation in a novel way. We explain how in this section.

³⁷ For the Commission's view about cases of mistaken provocation more generally, see *Partial Defences to Murder* (2004) Law Com No 290, paras 3.153 to 3.160. Where D has lost self-control and reacted more or less spontaneously, there is a case for asking the jury to treat a mistaken provocation as if it were a true provocation, even if the mistake seems in hindsight unreasonable. The contrast is with duress cases, where there will typically have been more time to reflect on whether there has been a mistake about the nature of the duress: hence a requirement of reasonableness in relation to that mistake (see Part 6).

³⁸ [1990] *Criminal Law Review* 122.

³⁹ The discussion of such cases by Lord Nicholls in *A-G for Jersey v Holley* [2005] UKPC 23; [2005] 2 AC 580, 594, accords with the way in which we envisage our proposals operating in practice.

⁴⁰ See Judicial Studies Board, *Model Directions (Provocation)*; *Rowlands*, *The Times* 12 January 2004. See also the CP, para 6.135.

5.48 In 1(a)(ii) we recommend that:

the partial defence of provocation should be expanded to encompass cases in which the defendant over-reacted to a fear of serious violence.

5.49 Historically, the common law treated as provocation (sufficient to reduce murder to manslaughter) an overreaction to illegal conduct, such as violence towards or (threatened) false imprisonment of the accused.⁴¹ This line of cases lost its authority when the 'loss of self-control' and 'reasonable person' requirements became established. As we have said, the provocation defence is currently available only when there is evidence that D was provoked to lose his or her self-control. The defence is concerned with angry, spur-of-the-moment reactions to provocation. It is not concerned with reactions prompted by fear, unaccompanied by a loss of self-control, even if the fear in question was that the victim would have inflicted serious violence on D if the victim had not been killed.

5.50 There is a contrast here with Scottish law, which permits murder to be reduced to culpable homicide in a case where someone's fatal overreaction to physical violence was not disproportionate to the nature and degree of violence confronted.⁴² It should be made possible in English law to plead provocation when the killing was in response to a fear of serious violence, if someone of an ordinary temperament but otherwise acting in circumstances facing the accused, might have reacted in the same or in a similar way.⁴³ A rigid insistence on confining the provocation plea to angry reactions, as opposed to actions taken out of fear, has prevented this development occurring at common law (through a resurrection of the older cases). Here are two examples where the law is currently deficient:

Example 1: D and V live together, but their relationship is a violent one. V frequently hits D when he (V) comes home drunk. One night, when V comes home drunk and threatens to beat D yet again, she goes to the kitchen, fetches a knife, and stabs V in the chest while he is off his guard. V dies.

Example 2: D is an armed police officer called to a house where a neighbour has said there is a man (V) with what looked like a gun. When the officer enters the house, V appears to have something in his hand. D demands that V show him what is in his hand but V does not respond. D shoots V and V dies. It turns out that V had a small metal bar in his hand. V may not have heard what D said because he (V) suffered from deafness.

5.51 In both examples, assuming he or she cannot plead diminished responsibility, D has only two effective choices under the existing law if he or she admits having acted with the fault element for murder. D can plead self-defence, a justificatory

⁴¹ *Buckner* (1641) Style 467; *Hopkin Huggett* (1666) Kel 59; *Goffe* (1672) 1 Vent 216; *Mawgridge* (1707) Kel 119, 135 to 137 (by Holt CJ).

⁴² *Robertson v HMA* (1994) SCCR 589; *Gillon v HMA* [2006] HCJAC 61.

⁴³ This 'ordinary person' restriction does not apply to the relevant limb of the provocation defence in Scotland.

plea that, if successful, will end in complete acquittal. Alternatively, D can seek a manslaughter verdict by pleading provocation.

- 5.52 To succeed in a plea of self-defence, D must make a case that what he or she did was within the bounds of reasonableness, as a means of averting a threat posed by V.⁴⁴ In both examples it is possible, given the circumstances, that a jury will accept this. It is also quite possible, however, that the prosecution will persuade the jury in each case that acting with intent to kill or do serious harm was not within the bounds of reasonableness as a response to the threat posed by V.
- 5.53 Under the present law, if D's killing of V is regarded as an overreaction in self-defence, he or she must be convicted of murder unless he or she can succeed in a plea of provocation (with the result that the offence is reduced to manslaughter).⁴⁵ In example 1, D would be required to frame the partial defence in terms of the provocation constituted by V's threat, in the context of V's history of violence. In example 2, the provocation would have to be framed in terms of V's failure to respond to D's request, coupled with the fact that V is holding what D believes to be a gun. In both examples, that is an artificial way to analyse the basis for a partial defence. Further, D will in both examples have to show that the provocation caused him or her to lose self-control at the time of the killing. It is not enough that D was frightened, but still in control of himself or herself.
- 5.54 In some circumstances, cases on facts such as those in examples 1 and 2 should end in a first degree murder verdict. In our view, however, a rational approach to reaching the right verdict is currently hampered by arbitrariness and unfairness in the way that the provocation defence is structured. In particular, D should not be prejudiced because he or she over-reacted in fear or panic, instead of over-reacting due to an angry loss of self-control.
- 5.55 Consequently, we are recommending that the provocation defence should be available where D killed in response to a fear of serious violence.⁴⁶ D will be allowed to say that the effect of the fear of the threat, or of the fear of the threat coupled with the impact of the gross provocation received, was such that, in the circumstances, someone of D's age and of an ordinary temperament might have reacted in the same or in a similar way. The frequently close relationship between anger and fear in someone's reaction makes us confident that it is right to link these elements together in a single partial defence of provocation.
- 5.56 This reform would have the additional benefit of giving Ds (such as those in examples 1 and 2) more flexibility in how they choose to run their defence. If they are prepared to accept nothing less than total vindication of what they did, then they can plead nothing other than self-defence. In such a case, the outcome sought is complete acquittal, to which the alternative is conviction for first degree

⁴⁴ Criminal Law Act 1967, s 3.

⁴⁵ See *Clegg* [1995] 1 AC 482.

⁴⁶ By analogy with duress cases, the defence should not be available where the D had, without reasonable excuse, knowingly exposed him or herself in advance to the risk of being threatened with violence. Such cases should be excluded by the judge's use of his or her new power – see (5) in para 5.11 – to withdraw the issue from the jury when no reasonable jury, properly directed, could find that the defence succeeds.

murder.⁴⁷ If D is not so confident that the jury will find his or her actions to have been fully justified, he or she can plead provocation – in the form of a fear of serious violence – instead of or alongside a plea of self-defence.

- 5.57 Having the latter option reduces the chance that D will be harshly adjudged to have committed first degree murder because the jury finds that he or she overreacted. The jury can opt for the middle course: guilty of second degree murder on the grounds of provocation,⁴⁸ leaving the judge with discretion over sentence. As Lord Bingham has indicated:

The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged.⁴⁹

- 5.58 In making our recommendation, we have considered whether the law's understanding of "serious violence" should be extended, as it has in the state of Victoria.⁵⁰ In Victoria, "violence", in relation to a child, can include causing or allowing the child to see or hear physical, sexual or psychological abuse. Therefore, in Victoria, D can say that he or she was reacting to a fear of serious "violence", if he or she killed to protect a child from having to see or hear physical, sexual or psychological abuse. We have concluded that "violence" should not be given such an extended meaning.

- 5.59 It only seems necessary to give violence such an extended meaning if (as in Victoria) a partial defence plea cannot be framed in terms of a retaliatory response to gross provocation generally, and must be framed in terms of a defensive response specifically to violent conduct. Under our recommendations, 'gross provocation' is a basis for reducing first degree to second degree murder. Causing or allowing a child to see or hear physical, sexual or psychological abuse might well amount to gross provocation to another family member. That would be the basis for reducing the offence to second degree murder. Therefore, there would be no need to portray such conduct as a form of "violent" conduct from which the defendant was defending the child.⁵¹

- 5.60 Almost all consultees welcomed the extension of provocation to cover cases in which the killing was motivated by a fear of serious violence.

⁴⁷ Subject to any control that may be exercised by the judge over the options put to the jury: see now *Coutts* [2006] UKHL 39; [2006] 1 WLR 2154.

⁴⁸ This proposal has been discussed with the Police Federation, who indicated to us that they could see logic in both courses being available to a D such as D in Example 2, as we are suggesting.

⁴⁹ *Coutts* [2006] 1 WLR 2154, 2159.

⁵⁰ For a fuller discussion, see the CP, paras 6.128 to 6.140.

⁵¹ Although any additional, 'defensive' motivation would count in favour of the provocation plea, insofar as it was generated by a fear of serious violence.

HOW NARROW SHOULD THE PROVOCATION DEFENCE BE?

- 5.61 As we indicated in paragraph 5.13 above, some consultees would prefer the defence of 'provocation' to be *confined* to cases of excessive self-defence. They would like to see 1(a)(i) in paragraph 5.11 above (gross provocation such as led D to have a justifiable sense of having been seriously wronged) omitted from legislative reform. This would leave only 1(a)(ii): ('fear of serious violence'). Consultees who held this view did so for one main reason.
- 5.62 There are currently no restrictions on the kinds of provocation that may, in principle, be considered by the jury. So, provocation could in principle include, for example, a confession of adultery, the crying of a baby, or a simple refusal by one spouse to obey the other unconditionally. This state of the law is thought to be especially 'user-friendly' to men seeking to plead provocation, because they may be more likely than women to lose their temper and respond violently over such matters. When women kill, it tends to be in response to an extreme situation involving a fear of violence to themselves or their children.⁵² As Dr Quick and Professor Wells have stated:
- Male killing is about power and control. Women killing abusers is about avoiding power and control...Women do not often kill from anger, while anger is what fuels many male killings.⁵³
- 5.63 The argument from this perspective is that the existing law goes wrong twice. First, it makes no provision for fear of serious violence to reduce murder to manslaughter. It then compounds this error by permitting reduction in cases where the provoked murder may have been little more than a reflection of the continuing cultural acceptability of men's use of violence in anger. For example, in their response to our CP on partial defences to murder, Justice for Women cited cases in which provocation had been successfully used by a male D who had killed his partner because, 'she was having an affair', 'she was going to leave me', and 'the baby wouldn't stop crying'.⁵⁴
- 5.64 Our recommendation that the defence of provocation be extended to cases in which there was a fear of serious violence (1(a)(ii) in paragraph 5.11 above) meets the first of these criticisms of the existing law. We also believe that the way in which we have unambiguously restricted the scope to the first limb of the provocation defence (1(a)(i) in paragraph 5.11 above) does enough to meet the second criticism.
- 5.65 The belief that the criticism has been met is reinforced by adding to the picture the new power the trial judge will have to withdraw a provocation claim from the jury if he or she thinks no reasonable jury would accept it ((5) in paragraph 5.11 above). The requirement that provocation must be 'gross' in that it must be such as to give rise to a justifiable sense of having been *seriously* wronged (1(a)(i) in paragraph 5.11 above) is meant to ensure that the kinds of provocation pleas to whose success Justice for Women rightly objected (in paragraph 5.63 above) are

⁵² Susan S M Edwards, "Sex and Gender in the Legal Process" (1996), 394 to 395; Partial Defences to Murder (2004) Law Com No 290, para 3.28.

⁵³ Oliver Quick and Celia Wells, "Getting Tough with Defences" [2006] *Criminal Law Review* 514, 524.

⁵⁴ Partial Defences to Murder (2003) Law Com Consultation Paper No 173, para 6.15.

not successful.⁵⁵ Such pleas should fail either because they are ruled out by the judge right from the start, using the new power in (5) (paragraph 5.11 above), or because the jury accepts that they cannot satisfy the test in 1(a)(i) in paragraph 5.11 above.

5.66 We recognise, however, that this is a controversial recommendation, even though it received widespread support. It may be a matter to be taken further in the next stage of the review of the law.

5.67 We believe that restricting ‘provocation’ cases to instances in which someone overreacted to a fear of serious violence would probably not introduce greater certainty or justice. Trying to exclude some kinds of provocation from the jury’s consideration, whilst permitting the jury to consider other kinds, is unlikely to prove any more successful a strategy now than it was 300 years ago, for the following reasons.

5.68 First, a recommendation to introduce this severe restriction on the provocation defence plea would make the courts’ interpretation of the term ‘violence’ especially significant. Inevitably, even if a statutory definition – be it partial or complete – is provided as it is in New Zealand and Victoria, the courts would come under pressure to extend it, especially in cases on the borderline between ‘violent’ conduct and ‘abusive’ conduct more generally.⁵⁶

5.69 Secondly, there might also be uncertainty over when and whether other kinds of provocation become relevant to a plea, once the “fear of serious violence” threshold has been crossed. This raises the possibility of Ds making a claim of “fear of serious violence”, simply in order to ensure that evidence of other kinds of gross provocation is then placed before the jury. Once before the jury, such evidence – if it involves gross provocation – is likely to persuade a jury to reduce the crime to second degree murder, whether or not they are also satisfied that there was a genuine fear of serious violence. So, the ‘serious violence’ restriction could come to be evaded. It may be, of course, that such evasion could be prevented by implementation of the judge’s power to withdraw the issue from the jury, when no reasonable jury could find that there was a fear of serious violence (see (5) in paragraph 5.11 above).

5.70 Thirdly, it should be kept in mind that the restriction of the formal provocation defence to cases where there is evidence of a fear of serious violence will not put an end to the relevance and admissibility of evidence of other kinds of provocation in murder cases. The restriction could, in fact, very easily be avoided in many cases.

5.71 This could happen if the defence, as part of their case, were to use evidence of provoking conduct (other than threats of violence) to support a denial of the fault element for first degree murder. The defence will say: “The deceased’s

⁵⁵ Assuming that they are ‘stand alone’ provocations and not simply the ‘last straw’ in a long history of provocation that, seen as whole, could reasonably amount to gross provocation of a kind that satisfies our suggested test in para 5.11 above.

⁵⁶ For example, a question arises under the Housing Act 1996 s 198(2A) of what it would be for someone to be exposed to ‘violence’ if housed in a particular area. Does that include, say, harassment under the Protection from Harassment Act 1997, offences concerned with making threats, public order offences, or ‘psychic’ assaults?

outrageously provocative conduct caused D to completely lose his temper, with the result that he cannot be proved to have intended to kill, or to do serious injury aware of a serious risk of causing death". There could be no restrictions on the use of evidence of provocation to this perfectly legitimate end, as a means of securing a verdict of second degree murder.⁵⁷

5.72 If evidence of provocation were used in this way (and it would have to be, to be relevant at all), none of the safeguards built in to the formal provocation defence – such as the role of the judge in withdrawing the defence, and the “ordinary person” restriction – would apply. Juries could, of course, be trusted to reject specious claims of this nature. Nonetheless, we believe that it is important to highlight what will be the continuing importance of evidence of all kinds of provocation to murder cases, whether or not the formal defence of provocation is itself more severely restricted than we are already suggesting that it should be.

5.73 Finally, we believe that it is just to permit the formal defence of provocation to apply beyond cases in which D was responding to a threat of serious violence. It is important to remember the reason for having the first limb of the defence (1(a)(i) in paragraph 5.11 above). It is there to leave the door ajar for cases where real injustice would be done if a reduction from first degree murder to second degree murder cannot be achieved under the second limb, because D did not fear serious violence. In paragraph 5.7 we mentioned, as an illustrative example, the case of *Camplin*,⁵⁸ where a 15-year-old boy lost his self-control and killed after having been, as he claimed, raped and then laughed at in consequence by the victim.

5.74 This is perhaps the most important argument because it is supported by the survey of public opinion that we commissioned by Professor Barry Mitchell for our previous Report on partial defences to murder.⁵⁹ Here is an example from that survey:

Example 3: An Asian woman returned home to find two white men attempting to rape her 15-year-old daughter. She got a knife from the kitchen. The men shouted racist abuse at her and started to run away. She chased after them and stabbed one of them several times in the back, killing him.

5.75 Example 3 was the subject of analysis in our survey of public opinion in 2004.⁶⁰ Our survey was conducted amongst people across a broad spectrum, with a variety of ethnic, religious and cultural backgrounds. A number of those taking part were the next-of-kin of victims of homicide.

5.76 70% of those taking part in the survey thought that D in example 3 should receive, at worst, a prison sentence of less than 5 years. Over 40% thought that

⁵⁷ See Criminal Justice Act 1967, s 8.

⁵⁸ *Camplin* [1978] AC 705.

⁵⁹ Partial Defences to Murder (2004) Law Com No 290, Appendix C.

⁶⁰ For analysis of such an example against an American law background, see Susan D Rozelle, 'Controlling Passion: Adultery and the Provocation Defence' (2005) 37 *Rutgers Law Journal* 197.

she should receive a non-custodial sentence or should not be prosecuted at all.⁶¹ If the partial defence of provocation is restricted to cases in which the killing reflects a fear of serious violence, D in example 3 must be convicted of first degree murder if, when she is chasing after the men, she no longer fears at that moment that they will do serious violence to her or to her daughter. On conviction for first degree murder, she will receive a life sentence, a result at odds with public opinion. No doubt other analogous examples could easily be imagined or drawn from the existing case law.

- 5.77 In conclusion we believe, along with a majority of our consultees, that the partial defence of provocation should extend beyond cases in which D reacted to a fear of serious violence. It should extend in principle to any case in which there was gross provocation such as caused D to have a justifiable sense of having been seriously wronged. It must be kept in mind that even if provocation satisfies this test, the defence can still fail. It should fail if the jury takes the view that a person of ordinary tolerance and temperament would not have acted in the way D did (the “ordinary person” restriction).

BARS TO THE DEFENCE

- 5.78 **We are recommending that:**

It should not be possible to plead provocation either if (a) the provocation was itself incited by the defendant for the purpose of providing an excuse to use violence; or if (b) the defendant acted in considered desire for revenge.

- 5.79 We have already considered (b) in paragraphs 5.17 onwards above. We regard (a) as unproblematic, although it requires a change in the law. At common law, “self-induced” provocation was not regarded as sufficient to found a provocation plea. However, the 1957 Act requires the judge to put the defence to the jury whenever there is evidence of a provoked loss of self-control. This requirement – criticised in paragraphs 5.15 to 5.16 above – may have removed the common law restriction relating to “self-induced” provocation. The law is uncertain. The common law position ought to be clearly affirmed by statute.
- 5.80 The recommended new basis for pleading provocation – where someone has overreacted to a fear of serious violence (1(a)(ii) in paragraph 5.11 above) - raises the question whether there should be a further bar to the plea. This is in circumstances where someone’s fear of serious violence stems from their own conduct, in exposing themselves to threats through engagement in criminal activity. A violent conflict between rival criminal gangs may, for example, give rise to a well-justified fear amongst members of the gangs that they will be targeted with serious violence. If someone, fearing that he or she faces a threat to his or her safety, kills a member of the rival gang as a pre-emptive strike, it is arguable that such a case should be specifically excluded from the scope of 1(a)(ii) in paragraph 5.11 above.

⁶¹ Partial Defences to Murder (2004) Law Com No 290, Appendix C, annex 3.

- 5.81 It should be noted that the law of justified self-defence does not raise an absolute bar to the use of the plea in cases of this kind.⁶² If there was an imminent threat, but the person using force to negate it was themselves to blame for the fact that they faced the threat, the law relies on the tribunal of fact to find that the use of force was not reasonable in all the circumstances. We expect a similar approach to be taken to such cases, in so far as they raise the partial defence in 1(a)(ii), in paragraph 5.11 above. Either the judge will rule that no reasonable jury could find that the defence succeeded, and will not permit the plea to be made; or the jury will themselves reject it on the grounds that a person of ordinary temperament and tolerance would not have responded in that way.
- 5.82 There are, of course, cases in which people may have more or less understandably exposed themselves to the risk of criminal violence, before the need to kill due to fear of serious violence arises. Examples might be members of a severely intimidated family who remain with the gang-boss patriarch, or the persecuted individual who, in desperation, accepts help from a criminal gang to flee the regime persecuting him.⁶³ In such cases, the judge and jury are more likely to find that a person of ordinary temperament and tolerance might have acted as the accused did.

THE EFFECT OF A DIMINISHED RESPONSIBILITY PLEA

- 5.83 **We recommend that:**

diminished responsibility should be a partial defence, with a successful plea having the effect of reducing first degree murder to second degree murder.

- 5.84 The defence does not play a central role in murder cases, being successful in fewer than 20 cases annually.⁶⁴ Nonetheless, a survey of public opinion in 2003 revealed broad public support for treating in a tolerant way those who kill because of serious mental abnormality, so long as there is adequate protection against dangerous offenders.⁶⁵ Under the existing law, upon conviction for manslaughter following a successful diminished responsibility plea, the judge has discretion over the sentence to be imposed on the offender.⁶⁶ Roughly half of

⁶² See the discussion in Smith and Hogan, *Criminal Law* (11th ed 2005) p 337.

⁶³ See, on this point, the speech of Baroness Hale, in *Z* [2005] UKHL 22; [2005] 2 AC 467.

⁶⁴ The number of successful pleas has dropped dramatically in recent years. In 1980 to 1986, there were 70 to 85 successful pleas per year: R D Mackay, *Mental Condition Defences in the Criminal Law* (1995) p 181.

⁶⁵ See *Partial Defences to Murder* (2004) Law Com No 290, Appendix C (research conducted by Professor Barry Mitchell).

⁶⁶ For the judicial approach to guidance on sentencing, see *Chambers* (1983) 5 Cr App R (S) 190. It is now possible to make a 'hospital and limitation direction', under the Crime (Sentences) Act 1997, s 45, if the offender is suffering from a psychopathic disorder. This means that a court can send an offender to prison, whilst also directing that he or she be admitted to hospital for treatment. The direction is very rarely used: see Home Office Statistical Bulletin 13/2002 (recording three cases in 2000 and in 2001).

those who plead diminished responsibility successfully are made the subject of hospital orders under the Mental Health Act 1983.⁶⁷

- 5.85 Almost all the hospital orders made are coupled with restriction orders that make conditions for release more stringent, under the Mental Health Act 1983 section 41. The vast majority of such orders are made without any limit on their duration. A restriction order is made when the court is satisfied that it is necessary to protect the public from serious harm. The effect of the imposition of a restriction order is to make release dependent on a judgement by either the Home Secretary or a Mental Health Review Tribunal that the offender's detention is no longer necessary to protect the public from serious harm.
- 5.86 On average, offenders subject to a restriction order spend 9 years in hospital before discharge.⁶⁸ Offenders successfully pleading diminished responsibility who are sent to prison (about 20% of the total) receive sentences of up to 10 years.⁶⁹ The sentencing range is thus not that dissimilar to the range found in successful provocation cases.
- 5.87 Our recommendation was supported by the majority of consultees, but produced a divergence of opinion. Several consultees thought that, whatever the effect of a provocation plea was on the verdict, diminished responsibility should reduce first degree murder to manslaughter (not just to second degree murder). We have already explained in Part 2 why we regard that solution as liable to produce injustice in many cases, through splitting juries as to the appropriate verdict. Pleas of provocation and diminished responsibility may be run in tandem, even though they are (in our view) rightly kept separate as defences. They involve a significant number of overlapping issues. For example, both pleas typically arise in the context of a rage, quarrel or fight.⁷⁰ As we indicated in Part 2, for this and other reasons it would not be acceptable for these pleas to have to end in different verdicts, forcing the jury to choose which one is successful.
- 5.88 Further, if diminished responsibility reduced first degree murder to manslaughter it would have to be a partial defence to second degree murder as well. Otherwise, those who have killed with the fault element only for second degree murder would irrationally be labelled more harshly (because they could not plead diminished responsibility) than those who killed with the fault element for first degree murder but successfully pleaded diminished responsibility. As we have already indicated in Part 2, however, to extend the number of crimes to which evidence of diminished responsibility bears on verdict, rather than on sentence, would be wrong. Amongst other things, it would fly in the face of the way in which medical experts, whose evidence is so crucial, perceive their role in presenting

⁶⁷ 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: see *Partial Defences to Murder* (2004) Law Com No 290, Appendix B (research conducted by Professor R Mackay). 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.

⁶⁸ See Andrew Ashworth, *Sentencing and Criminal Justice* (4th edition 2005) p 376.

⁶⁹ See Andrew Ashworth, *Principles of Criminal Law* (4th edition 2003) pp 284 to 285.

their evidence. They regard their evidence as primarily of relevance to the sentence and not to the verdict, because it can be presented in a nuanced way when relevant to the sentence, in a way it cannot be when it must relate to the verdict.

- 5.89 In their response to our CP, the Royal College of Psychiatrists made clear to us how important it was, from the point of view of medical experts in homicide cases, that psychiatric evidence was wherever possible made relevant to sentencing decisions, rather than to distinctions between offences and hence to verdicts.⁷¹ Their reasoning was as follows:

[W]here the law does not attempt to construct 'discrete' defined 'mental condition constructs', within an adversarial legal process, but allows for a 'graded' approach to justice within sentencing, there is far less mismatch between law and psychiatry. That is, abandonment of 'trials of mental responsibility', and substitution of judicial consideration of medical evidence expressed in its own terms, is likely not only to all but abolish the 'mismatch' but also to enhance justice, so far as it depends upon the application of medical evidence.

- 5.90 To make psychiatric evidence of diminished responsibility relevant to the verdict in second degree murder cases, and not just to the sentence, would be to ensure that the problem of mismatch that concerns the Royal College is retained – indeed extended⁷² – within a revised structure. We believe it is right to ensure that the mismatch is kept to a minimum. That means, putting aside insanity cases, ensuring that psychiatric evidence is made relevant to the verdict only when the mandatory sentence of life imprisonment is at issue, namely in first degree murder cases.

- 5.91 A minority of consultees thought that the defence should be abolished. The Criminal Cases Review Commission (CCRC) supported this suggestion. Their argument was that they came across a large number of cases in which the basis for an applicant's appeal against a conviction for murder was fresh evidence that he or she was suffering from diminished responsibility. The claim is either that the abnormality of mind was not spotted or accurately assessed before trial, or that (possibly more rarely) a new classification of abnormality of mind has been identified that explains their conduct, that was not known about at the time of the trial. In the view of the CCRC:

⁷⁰ See Partial Defences to Murder (2004) Law Com No 290, Appendix B (research conducted by Professor R Mackay).

⁷¹ Indeed, their opposition to the mandatory life sentence for murder is founded on their judgement that, "its retention greatly enhances the difficulty in usage of expert psychiatric evidence in homicide trials": (Response of the Royal College of Psychiatrists).

⁷² In so far as it would then bear on the question of whether killing through an intention to cause injury, or a fear or risk of injury, in the awareness of a serious risk of causing death should be second degree murder or manslaughter. To date, psychiatric evidence in such cases has been relevant only to the appropriate sentence, because these are manslaughter cases under the existing law.

In both types of cases, it is hard to assess where the interests of justice lie when considering whether, and if so how, the matter should be remedied at the appeal stage, when, usually, a jury is no longer able to assess the matter...In the CCRC's view, these faults do not lie in the old provision or in the Law Commission's proposed definition, but in the existence of the partial defence itself...If it is considered necessary to avoid mandatory life sentences for particular cases, it ought to be recognised that this is at the cost of considerable inconsistency, confusion, and possible resulting injustice in a number of other cases.

- 5.92 The CCRC's view about evidence of mental disorder is to some extent consistent with submissions about such evidence that we received from, for example, Justice for Women. They thought that prison psychiatrists might not always be best placed to identify before trial symptoms of post-traumatic stress disorder or borderline personality disorder in women who have killed violent partners.⁷³
- 5.93 We believe that many of the problems identified by the CCRC and Justice for Women would be addressed by improving assessment procedures prior to trial. Some of these were discussed in our CP.⁷⁴ The Criminal Bar Association was one of those consultees who thought that proper consideration of the issue at the plea and case management hearing was essential. The Royal College of Psychiatrists stressed the importance of experts on both sides conducting a full and independent examination of D, if possible, rather than relying on consideration of the other side's report.
- 5.94 Medical experts also commonly suggested that the partial defence should be abolished as a trial matter. Instead, they thought discretion should rest with the judge to determine the appropriate sentence post trial, if he or she found that D was suffering from diminished responsibility. This would (in very broad terms) accord with the way in which diminished responsibility is handled in France and Germany: as a sentencing matter only. It is a solution recently endorsed by the state of Victoria.⁷⁵
- 5.95 Whatever its merits may be, this solution could make significant inroads on the mandatory nature of the life sentence for murder. If they were entitled to do so, it seems likely that a significant proportion of Ds would indicate at a plea and case management hearing that, in the event that they were convicted of first degree murder by the jury, they would then like the judge to consider whether they had been suffering from diminished responsibility.⁷⁶ If a finding by the judge of diminished responsibility at that later stage freed him or her from the obligation to pass a life sentence, the mandatory nature of the life sentence for first degree murder would have become defeasible.
- 5.96 It may be said that this suggestion would make no more of an inroad on the mandatory life sentence than is currently produced by the fact that the

⁷³ For a case study, see the CP, Appendix F.

⁷⁴ Paras 6.105 to 6.106.

⁷⁵ Victorian Law Reform Commission, *Defences to Homicide* (2004), 241.

⁷⁶ Defendants might also more often plead guilty to first degree murder, to reach this stage.

prosecution now accepts a very high proportion (70-80%) of pleas of guilty to manslaughter by reason of diminished responsibility, when there is sound medical evidence to back those pleas.⁷⁷ It is, however, one thing to avoid a trial by accepting a plea, when there is medical evidence about the offender's state of mind that is decisive in that regard. In such cases, the evidence bears directly on trial considerations. It is quite another matter not to consider that evidence until the trial ends in a guilty verdict or a plea of guilty to murder is entered. In such cases, the direct bearing the evidence has is on sentencing considerations. The latter procedure involves a direct challenge to the mandatory nature of the sentence for murder (and is hence not a solution within our terms of reference) in a way that the former does not. Moreover, such a procedure may seem to undermine or bypass the jury's verdict.

- 5.97 In relation to any possible abolition of the defence of diminished responsibility, and its re-emergence as a sentencing matter post-trial, His Honour Judge Jeremy Roberts QC pointed out to us a way in which inroads on the mandatory nature of the sentence for murder could be kept to a minimum. This could be achieved if the only discretion the judge was given to depart from the mandatory sentence for murder was where the disordered offender was dangerous: where there was evidence of diminished responsibility of a kind justifying the passing of a hospital order coupled with a restriction order.
- 5.98 This solution is worthy of further consideration. It does, however, have an odd consequence. This concerns offenders whose disorder would have been severe enough to warrant a reduction of the offence from first degree murder, if the partial defence of diminished responsibility still existed, but who do *not* constitute a threat to the public at the time of sentencing. These offenders include perhaps the most deserving of lenient treatment, such as a battered woman or a mercy killer who had the full consent of the victim. These would then become the very offenders guaranteed to receive the mandatory life sentence for first degree murder, even if they were suffering from diminished responsibility.
- 5.99 More broadly, we believe that there is a case on 'labelling' grounds for reducing the offence from first degree murder, when there is evidence of diminished responsibility. The mitigating factor of an abnormality of mental functioning can be such that a killer acting under its influence does not deserve to be labelled a first degree murderer.
- 5.100 To illustrate this, we can employ three examples used in our CP:
- (1) A mentally sub-normal boy is cajoled into playing a minor role in a killing by the elder brother he idolises.
 - (2) A woman kills her husband having been physically and mentally abused by him over many years, to the point where she admits she has 'lost touch with reality'.

⁷⁷ See Partial Defences to Murder (2004) Law Com No 290, Appendix B (research conducted by Professor R Mackay).

- (3) A severely depressed husband is taken past breaking point by his wife's persistent demands that he 'put her out of her misery', during a terminal illness that has progressively worsened as he has cared for her over many years. At her request, he suffocates her with a pillow.

5.101 These cases may seem like cases that should fall into the lowest tier within a homicide structure but it must be recognised that, like provocation, diminished responsibility covers a wide range of cases. Many cases, although worthy of mitigation on the grounds of diminished responsibility, will not be so deserving as these cases. That is just one of the reasons, explored earlier (paragraphs 5.87 to 5.90), why we are not persuaded that a manslaughter verdict ought to be the outcome of a successful plea of diminished responsibility.

5.102 An analogous, alternative approach has been suggested to us. Given that the most popular sentence following a successful plea of diminished responsibility is a hospital order, there might be a case for treating 'killing under diminished responsibility' as a discrete – treatment orientated – *offence*. Amongst a minority of our consultees, this reform was supported by, for example, the Law Society. There are few instances world-wide of this way of dealing with diminished responsibility, so its likely success is not easy to assess. We have already indicated in Part 2 that one reason for rejecting this approach is that it is right to label as a 'murderer', albeit as a second degree murderer, someone who kills with the fault element for first degree murder, even if, leaving aside complete defences such as insanity, the extenuating circumstances warrant reduction of the offence.

5.103 There was very wide support for the view that, as a matter of principle, the effect of a successful plea of diminished responsibility should be to reduce first degree murder to the middle-tier offence, second degree murder. This view was supported by, for example, the Higher Courts' Homicide Working Party, the Association of Chief Police Officers, the Police Federation, Victims' Voice, the Public Affairs Council of the Church of England, several individual judges in the higher courts, several individual academics, the Crown Prosecution Service (and by the vast majority of individual prosecutors surveyed⁷⁸), Justice, Pro-Life, and the Royal College of Psychiatrists.

5.104 For those who disagree with our thinking on this point, there are other reasons for rejecting the alternative approach. One reason for rejecting this option has already been given, namely that the effect of a plea of provocation and a plea of diminished responsibility should be the same, because they may be pleaded together and involve important overlapping issues (paragraph 5.87 above). The jury should not be forced to choose between them as a matter of law.

5.105 An equally significant difficulty with the alternative approach is that the prosecution would come under the obligation to show beyond reasonable doubt that the offender was suffering from diminished responsibility. As D is not obliged to submit to an examination by the prosecution's medical experts, a contested case would become impossible to prosecute. Even if D initially supplied the prosecution with a favourable medical report, leading the prosecution to a charge of 'killing under diminished responsibility' rather than first degree murder, that

⁷⁸ See the CP, Appendix B.

would not prevent a later change of heart as to defence tactics. D may decide, further into the case, to deny the offence altogether. That, again, could unfairly put the prosecution in difficulty because the medical report may, on its own, be insufficient to support proof of diminished responsibility beyond a reasonable doubt in a contested hearing. The court might permit the prosecution to amend the indictment to include a charge of first degree murder in such circumstances, but we see no reason why the law should be permitted to become this complex.

- 5.106 Finally, in practice, this approach is not really necessary, even in the interests of the accused. The prosecution in England and Wales generally accepts a plea of guilty to manslaughter by reason of diminished responsibility, if it is backed by sound expert medical opinion, far more often than is usual in some other jurisdictions.⁷⁹ Therefore, it seems unlikely that more contested trials would be avoided by giving the prosecution the option of charging ‘homicide by reason of diminished responsibility’.

THE DEFINITION OF DIMINISHED RESPONSIBILITY

- 5.107 **We recommend that:**

The definition of ‘diminished responsibility’ should be modernised, so that it is both clearer and better able to accommodate developments in expert diagnostic practice.

- 5.108 Diminished responsibility is currently defined as follows:

[S]uch abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired [the defendant’s] mental responsibility for [his or her] acts or omissions in doing or being a party to the killing.⁸⁰

- 5.109 There has been consistent criticism of the way in which diminished responsibility was defined in the 1957 Homicide Act. Lord Justice Buxton has gone so far as to describe the wording of the Act as “disastrous” and “beyond redemption”.⁸¹ There are two principal problems.

- 5.110 First, the definition says nothing about what is involved in a “substantial impairment [of] mental responsibility”. The implication is that the effects of an abnormality of mind must significantly reduce the offender’s culpability. The Act neither makes this clear, nor says in what way the effects of an abnormality of mind can reduce culpability for an intentional killing, such that a manslaughter verdict is the right result.

⁷⁹ For example, Professor Mackay told us that, between 1990 and 1993, whereas some 70% of diminished responsibility cases went to trial and only 30% of Ds had pleas of diminished responsibility accepted in New South Wales, only 23% of such cases went to trial in England and Wales.

⁸⁰ Homicide Act 1957, s 2.

⁸¹ See *Partial Defences to Murder* (2004) Law Com No 290, para 5.43 n 40. The late Professor Griew said, “the wording is altogether a disgrace”: “Reducing Murder to Manslaughter: Whose Job?” (1986) 12 *Journal of Medical Ethics* 18. See, the CP, paras 6.36 to 6.41.

5.111 Secondly, the definition has not been drafted with the needs and practices of medical experts in mind, even though their evidence is crucial to the legal viability of any claim of diminished responsibility. ‘Abnormality of mind’ is not a psychiatric term, so its meaning has had to be developed by the courts from case to case. Further, diagnostic practice in diminished responsibility cases has long since developed beyond identification of the narrow range of permissible ‘causes’ of an abnormality of mind stipulated in the bracketed part of the definition. In any event, the stipulated permissible causes have never had an agreed psychiatric meaning. The outmoded stipulation of permissible causes has become as much a hindrance as a help. As Dr Madelyn Hicks put it to us:

[A]ttempting to specify the cause of mental disorders...is irrelevant [and] misleading, and in fact there are almost always multiple causes stemming from the interaction between genetic vulnerability and life events.⁸²

5.112 To address these problems, in our CP⁸³ we provisionally proposed a new definition of diminished responsibility, developed from a definition adopted in the state of New South Wales in 1997. That definition received very broad support when we first proposed a version of it in 2004. Once again, it has had the support of a majority of consultees, but we have also had some helpful suggestions for improvement. In response to comments and analysis that we have received, **we recommend adoption of the following definition:**

- (a) **a person who would otherwise be guilty of first degree murder is guilty of second degree murder if, at the time he or she played his or her part in the killing, his or her capacity to:**
- (i) **understand the nature of his or her conduct;⁸⁴ or**
 - (ii) **form a rational judgement;⁸⁵ or**
 - (iii) **control him or herself,**

⁸² The CP, para 6.40. Dr Hicks is a Consultant Psychiatrist and Honorary Lecturer, Institute of Psychiatry, King’s College London.

⁸³ Para 6.2.

⁸⁴ This wording replaces the wording of ‘understand events’, at the suggestion of the Criminal Cases Review Commission, and (independently) of Professor Mackay. The aim is to ensure that the accused’s lack of understanding of, say, global political events, is not relevant to his or her plea.

⁸⁵ This wording replaces “judge whether his or her actions were right or wrong”. The Royal College of Psychiatrists, whilst content for this phrase to appear, considered that “form a rational judgement” was apt to cover cases the original phrase was not. An example might be one in which a deluded D killed someone he believed to be the reincarnation of Napoleon. D might realise that it is morally and legally wrong to take the law into one’s own hands by killing, and yet be suffering from a substantially impaired capacity to form a rational judgement. Professor Mackay also cast doubt on the ‘right/wrong’ formula.

was substantially impaired by an abnormality of mental functioning arising from a recognised medical condition, developmental immaturity in a defendant under the age of eighteen,⁸⁶ or a combination of both; and

(b) the abnormality, the developmental immaturity, or the combination of both provides an explanation for the defendant's conduct in carrying out or taking part in the killing.

5.113 It is envisaged that this definition would improve the present law in the following ways.

5.114 First, the law will no longer be constrained by a fixed and out-of-date set of causes from which an abnormality of mental functioning ('mental functioning' is a term preferred by psychiatrists to 'mind') must stem. The issue will be whether the abnormality was brought about by a 'recognised medical condition'. The Royal College of Psychiatrists supported this change, saying:

The presence of such a restriction is, we believe, consistent with the general nature and purpose of 'diminished responsibility' as a defence and would ensure that any such defence was grounded in valid medical diagnosis. It would also encourage reference within expert evidence to diagnosis in terms of one or two of the accepted internationally classificatory systems of mental conditions (WHO ICD10 and AMA DSM) without explicitly writing those systems into the legislation...Such an approach would also avoid individual doctors offering idiosyncratic 'diagnoses' as the basis for a plea of diminished responsibility. Overall the effect would be to encourage better standards of expert evidence and improved understanding between the courts and experts.

5.115 In that regard, at the Royal College's suggestion, we must correct an impression that we gave about the nature of conditions capable of falling within the new definition. In the CP we made reference to 'serious' mental conditions, but that is potentially misleading. A condition could be serious in the sense that it is untreatable and liable to worsen, or serious in the sense that great stigma is attached to its sufferers, without meeting the conditions for reducing the offence from first degree murder under the new provisions.

5.116 In law it is sufficient that a condition is 'more than trivial'. What matters is that it has the effect of substantially impairing D's capacities.⁸⁷ It follows that, alongside the familiar psychotic disorders that fall within the scope of the provisions, neurotic disorders, for example, may also do so. An example of the latter would be a post traumatic stress disorder suffered by a woman due to violent abuse suffered over many years.

⁸⁶ This new part of the definition is discussed from para 5.125 onwards.

⁸⁷ *Lloyd* [1967] 1QB 175

5.117 Secondly, we believe the provisions make clearer the relationship between the role of the expert and the role of the jury. It is for the experts to offer an opinion on:

(1) whether D was suffering from an abnormality of mental functioning stemming from a recognised medical condition; and

(2) whether and in what way the abnormality had an impact on D's capacities, as these are explained in the new provisions.

5.118 It is then for the jury to say whether, in the light of that (and all the other relevant) evidence they regard the relevant capacities of D to have been 'substantially impaired'. On this point, the Royal College of Psychiatrists commented:

Although it is common for the courts to accept, or even encourage a psychiatric expert to comment upon whether the defendant should be seen as 'substantially impaired', the College believes that this should be resisted...Our belief is that this restriction should apply irrespective of the 'side' which is calling an expert. We believe that this can be achieved without in any way leaving the jury 'floundering' with materials and issues with which they are not in a position to cope...Hence, for example, an expert can inform the jury in a murder trial of the likely effects of the defendant's disorder in terms of the various mental capacities, yet still fall short of saying whether these 'amounted to' substantial impairment of mental responsibility.

5.119 The Royal College here affirms the view that an expert should not express an opinion on what lawyers call the 'ultimate issue', the question whether D did or did not meet all the criteria to warrant reducing first degree murder to second degree murder, on the grounds of diminished responsibility. In the Royal College's opinion, the recommended definition of diminished responsibility will not require medical experts to express a view on the ultimate issue and hence trespass on the jury's territory.

5.120 In that regard, Professor Nigel Eastman, a member of the Royal College and a medical expert with many years' experience of giving evidence in murder cases, pointed out that there is an additional reason to avoid a situation in which the medical expert gives an opinion on the ultimate issue. This is that such an opinion will inevitably be based, in part, on assumptions about the factual underpinning for the diminished responsibility claim when that background may itself be a contested matter between prosecution and defence. As he put it:

The reasons I believe that it is wrong for a doctor to give an opinion on the ultimate issue of 'diminished' is not merely that it is 'legally wrong' within the 'law of evidence'. It is that, to do so, usually means taking a view about matters of fact. And that seems an entirely wrong thing for an expert to do. It also opens up enormously the lines of cross examination, since then the doctor will be asked questions which arise directly out of his/her 'assumption' of a particular version of past and offence-related events, which the 'other side' may dispute.

5.121 Thirdly, the new provisions seek to make clear what impact on capacity the effects of an abnormality of mental functioning must have, if the abnormality is to be the basis for a successful plea of diminished responsibility. It might be helpful to illustrate this by example, although it is not our case that on the actual facts given below the defence should necessarily succeed.

(1) Substantially impaired capacity to ‘understand the nature of his or her conduct’:

(a) a boy aged 10 who has been left to play very violent video games for hours on end for much of his life, loses his temper and kills another child when the child attempts to take a game from him. When interviewed, he shows no real understanding that, when a person is killed they cannot simply be later revived, as happens in the games he has been continually playing.

(2) Substantially impaired capacity to ‘form a rational judgement’:

(a) a woman suffering from post traumatic stress disorder, consequent upon violent abuse suffered at her husband’s hands, comes to believe that only burning her husband to death will rid the world of his sins;

(b) a mentally sub-normal boy believes that he must follow his older brother’s instructions, even when they involve taking part in a killing. He says, ‘I wouldn’t dream of disobeying my brother and he would never tell me to do something if it was really wrong’;

(c) a depressed man who has been caring for many years for a terminally ill spouse, kills her, at her request. He says that he had found it progressively more difficult to stop her repeated requests dominating his thoughts to the exclusion of all else, so that ‘I felt I would never think straight again until I had given her what she wanted.’

(3) Substantially impaired capacity to ‘control him or herself’:

(a) a man says that sometimes the devil takes control of him and implants in him a desire to kill, a desire that must be acted on before the devil will go away.

5.122 Fourthly, it has never been entirely clear whether, under the existing law, the abnormality of mind must, in some sense, ‘cause’ D to kill. The law simply states that the abnormality of mind must substantially impair D’s mental responsibility for his acts in doing or being a party to the killing.

5.123 Leading experts on this area of law, such as Professor Mackay,⁸⁸ advised against the introduction of a strict causation requirement. The Royal College of Psychiatrists did not object to the requirement, as such, but cautioned against creating a situation in which experts might be called on to ‘demonstrate’

⁸⁸ Professor of Criminal Policy and Mental Health, De Montfort University, Leicester.

causation on a scientific basis, rather than indicating, from an assessment of the nature of the abnormality, what its likely impact would be on thinking, emotion, volition, and so forth.

- 5.124 The final choice of particular words is a matter for those drafting the legislation. However, we have framed the issue in these terms: the abnormality of mind, or developmental immaturity, or both, must be shown to be ‘an explanation’ for D’s conduct. This ensures that there is an appropriate connection (that is, one that grounds a case for mitigation of the offence) between the abnormality of mental functioning or developmental immaturity and the killing. It leaves open the possibility, however, that other causes or explanations (like provocation) may be admitted to have been at work, without prejudicing the case for mitigation.

DEVELOPMENTAL IMMATURITY

- 5.125 **We recommend that:**

It should be possible to bring in a verdict of diminished responsibility on the grounds of the developmental immaturity of an offender who was under 18 at the time he or she played his or her part in the killing.

- 5.126 This part of our recommendation for reform of the defence is so important that it warrants discussion under a separate heading.

- 5.127 The recommendation was supported by a large majority of our consultees. It had the support of, for example, the Royal College of Psychiatrists, the Judges of the Central Criminal Court, the Criminal sub-committee of the Council of Her Majesty’s Circuit Judges, the Criminal Bar Association, the NSPCC, the Youth Justice Board, Justice, and the Law Society.

- 5.128 A very important aspect of this recommendation is that evidence of developmental immaturity can be combined with evidence of an abnormality of mental functioning, to make a case for a verdict of second degree murder. As we explained in the CP, experts may find it impossible to distinguish between the impact on D’s mental functioning of developmental immaturity, and the impact on that functioning of a mental abnormality. To force experts – as the law currently does – to assess the impact of the latter, whilst disregarding the effect of the former, is wholly unrealistic and unfair.⁸⁹

- 5.129 We recognise that our recommendation may prove to be a controversial one, in spite of the level of support expressed for it. Some consultees considered that it was too generous to those who had killed with the fault element for first degree murder.⁹⁰ By way of contrast, some consultees expressed doubts about the

⁸⁹ It would, of course, be possible to meet this point simply by stipulating that evidence of developmental immaturity can only form part of a case for diminished responsibility if it augmented or accompanied the effects of an abnormality of mind.

⁹⁰ This objection may to some extent be met by lowering the age at which D ceases to be eligible to plead developmental immaturity as part of his or her case that he or she was suffering from diminished responsibility. We recommend 18 years of age (as against the Royal College of Psychiatrists’ recommendation of 21 years of age), but it would clearly be possible to lower the upper age limit to, say, 16 years of age.

proposal because it did not go far enough to shield child Ds from conviction for serious offences of homicide.

- 5.130 It is important to recognise the nature and limits of what we are suggesting. In England and Wales, criminal liability for murder can be imposed on an offender if he or she was at least 10 years of age at the time of the offence. We are not suggesting that imposing liability for murder on a child of this age is always unfair or inappropriate. Some 10-year-old killers may be sufficiently advanced in their judgement and understanding that such a conviction would be fair.⁹¹
- 5.131 What we are suggesting is that it is unrealistic and unfair to assume that *all* children aged 10 or over who kill must have had the kind of developed sense of judgement, control and understanding that makes a first degree murder conviction the right result (provided the fault element was satisfied). Instead, our recommendation is that it should be for the jury to decide in the individual case whether D had such a sense of judgement, control, or understanding. Moreover, it will be for the D to prove that his or her capacity for judgement, control and understanding was substantially impaired by developmental immaturity.
- 5.132 D may wish to prove substantial impairment by developmental immaturity through appeal either to biological factors, or to social and environmental influences, or to a combination of both. For example, D may wish to give evidence that his or her power of control over his or her actions was substantially impaired by a biological factor such as poor frontal lobe development. This is because, as the Royal College of Psychiatrists have put it:

Biological factors such as the functioning of the frontal lobes of the brain play an important role in the development of self-control and of other abilities. The frontal lobes are involved in an individual's ability to manage the large amount of information entering consciousness from many sources, in changing behaviour, in using acquired information, in planning actions and in controlling impulsivity. Generally the frontal lobes are felt to mature at approximately 14 years of age.⁹²

- 5.133 As this final sentence implies, however, in an individual case involving a child under 14 years of age, it would be open to the prosecution to seek to rebut evidence of poor frontal lobe development by arguing that this particular D had matured to a sufficient degree to be fairly convicted of first degree murder. The jury should be trusted to reject implausible claims, as they are with other defences based on expert evidence.

⁹¹ The Police Federation suggested that, "there needs to be recognition that children are more advanced in present day life than at any time previously in history and to ignore this fact would be an injustice to the families of the deceased." Theirs is, however, a controversial claim so far as moral development is concerned. The Royal College of Psychiatrists has suggested, by way of contrast, that, "Given the eagerness to please and suggestibility of learning-disabled children who may have learned legal or psychological phrases off by heart, the automatic recitation of such jargon should not be taken to indicate a good understanding of the process but, rather, an attempt to take some control over a new situation by attempting to sound competent or streetwise", Child Defendants (Occasional Paper OP56, March 2006).

⁹² Royal College of Psychiatrists, Child Defendants (Occasional Paper OP56, March 2006), 38.

- 5.134 So far as social and environmental influences on young killers are concerned, two studies have shown how these influences may, in extremely rare circumstances, lead children or young persons to kill.⁹³ One study has shown that seriously disturbed children who murder have home backgrounds in which there was commonly paternal psychopathy, alcohol abuse, absence from the home, and a history of violent behaviour by fathers. Another study has shown depressive illnesses in the mothers of juvenile murderers, and histories of serious sexual and physical abuse of juvenile murderers.
- 5.135 Such evidence might be employed by D to suggest that he or she was developmentally immature to the extent of having substantially impaired judgement, control, or understanding. It would be open to the prosecution to seek to rebut such evidence, on the facts of an individual case. Again, the jury should be trusted to reject implausible claims. In that regard, we are very grateful to Professor Sue Bailey,⁹⁴ who has given us a template providing a guide to the ways in which the nature and degree of developmental immaturity can be assessed by experts in the field (Appendix F). There should be no shortage of experts sufficiently well-versed in the subject to provide expert opinions of the kind that would be needed by both sides, were diminished responsibility to be reformed as we recommend.
- 5.136 Offenders under the age of 18 commit a very small proportion of the 850 or so homicides that occur each year (around 4%). We find it hard to imagine that more than a low proportion of the even smaller number from this group finding themselves charged with first degree murder will be in a strong position to claim that they were suffering diminished responsibility, in virtue of developmental immaturity alone. Even those who do succeed in persuading the jury of the merits of their claim – and they are likely to be the younger age group, who commit the fewest homicides – will still be convicted of second degree murder, and can be sentenced to anything up to and including life imprisonment.
- 5.137 Our recommendation is, therefore, likely to affect only a very few cases, and only by reducing the crime from top-tier homicide to middle-tier homicide. However, for the few cases that do meet the criteria, we believe our recommendation meets requirements of justice recognised as fundamental in civilised legal systems across the world.

DIMINISHED RESPONSIBILITY AND INSANITY

- 5.138 Our recommendations do not affect the availability of the defence of insanity as a complete defence to murder. Professor Mackay quite properly asked us how we saw the recommended change to the definition of diminished responsibility

⁹³ Royal College of Psychiatrists, 'Child Defendants' (Occasional Paper OP56, March 2006), 41, citing studies by S Bailey, "Adolescents who murder" (1996) 19 *Journal of Adolescence*, 19 to 39; G Boswell, "Young and Dangerous: The Background and Careers of Section 53 Offenders" (1996).

⁹⁴ Lancashire School of Health and Postgraduate Medicine, University of Central Lancashire.

affecting the relationship between diminished responsibility and insanity.⁹⁵ It could be argued that our recommendation is a more restrictive version of the existing law, meaning that to prove diminished responsibility D would have to show that he or she was 'borderline insane'. That would mean not only a narrower range of Ds who could use evidence of mental disorder as a defence to murder in some form, but also a very fine line between the conditions for the partial defence (diminished responsibility), and the conditions for a complete acquittal (insanity).

- 5.139 It is possible that our recommendations will actually broaden the scope of the diminished responsibility plea. For the first time, the definition makes provision in general terms for 'recognised medical conditions' to form the basis for a plea. The nature and scope of such conditions will evolve with changing diagnostic practice, and this may enlarge somewhat the range of mentally disordered Ds who might make a successful plea. It must be kept in mind, however, that just as some new medical conditions giving rise to abnormalities of mental functioning may come to be recognised (potentially broadening the reach of defence), so other medical conditions hitherto accepted may be shown to have been unsoundly based (narrowing the reach of the defence).
- 5.140 It is also important to recognise how legal change may affect changes in prosecution policy, generating an impact in practice on the scope of the defence, whatever its limits in theory. As we have already indicated (paragraph 5.106 above), there is currently a high rate of acceptance by the prosecution of a plea of guilty to manslaughter by reason of diminished responsibility, when the plea is based on sound medical evidence. If our recommended definition is accepted, it may subsequently be judged right for the prosecution to look more sceptically at some diminished responsibility claims than others, and be more willing to test some rather than others at trial.
- 5.141 It is possible to imagine, for example, a sceptical view being more commonly taken of claims by jealous husbands, who have killed their wives or children, that their capacity to form a rational judgement was substantially impaired by clinically recognised depression. Prosecutors may well think it right to show a much greater readiness to test claims of this kind before the jury⁹⁶ than they might show in a case where, for example, a child assessed before trial as severely subnormal has become involved in a killing at the urging of his domineering father. We take no stance on this issue ourselves.
- 5.142 Finally, there is the legal relationship between diminished responsibility and insanity. In theory, the definition of insanity means that whether a defect of reason (stemming from a disease of the mind) amounts to insanity in law is an 'all or nothing' matter. Either D shows that the defect of reason led him or her not to know the nature or quality of his or her act, or that the act was wrong, or the

⁹⁵ See *M'Naghten's Case* (1843) 10 Cl & Fin 200, 210, "the jurors ought to be told in all cases that...to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."

⁹⁶ And/or to use information obtained, when possible, through the disclosure provisions brought in by the Criminal Justice Act 2003, s 35.

defect of reason did not have that effect.⁹⁷ By way of contrast, the definition of diminished responsibility has always meant that whether an abnormality of mind (stemming from one of the required causes) amounts to diminished responsibility in law is a matter of judgement and degree. 'Substantial' impairment of mental responsibility is what is required, and that by its nature is a matter of degree. So, under our recommendations, there will remain an important theoretical distinction between the insanity plea (involving an all-or-nothing question) and the plea of diminished responsibility (involving a judgement of degree as to whether there was a substantial impairment by an abnormality of mental functioning).⁹⁸

⁹⁷ We say, 'at least in theory', because it is not our case that, in practice, the defence of insanity is inflexibly understood as an all-or-nothing matter in all cases in which it is pleaded. For more detailed discussion, see R D Mackay, *Mental Condition Defences in the Criminal Law* (1995) pp 100 to 108.

⁹⁸ This explanation broadly follows the way in which insanity and what English lawyers call diminished responsibility are distinguished in French law where, whilst insanity is a complete defence (as in England), diminished responsibility is a matter for sentencing.

PART 6

DURESS

INTRODUCTION

- 6.1 Consultees were more divided on duress as a defence to murder and attempted murder than on any other aspect of our review. There was a general consensus that duress should be, in some form, capable of being a defence to first degree murder, second degree murder and attempted murder. Accordingly, we do not intend to rehearse the reasons set out in the CP¹ for and against extending the defence to those offences.
- 6.2 Opinion was divided as to whether duress should be a full or a partial defence to first degree murder, second degree murder and attempted murder. We are very grateful to consultees for the quality of their arguments. Reasonable arguments have been deployed in support of each position.
- 6.3 We believe that there are five main options.
- (1) Duress should be a full defence to first degree murder, second degree murder and attempted murder.
 - (2) Duress should be a partial defence to first degree murder resulting in a conviction for second degree murder and a full defence to second degree murder and attempted murder.
 - (3) Duress should be a partial defence to first degree murder resulting in a conviction for second degree murder and a partial defence to second degree murder resulting in a conviction for manslaughter.
 - (4) Duress should be a partial defence to first degree murder and second degree murder, in each case resulting in a conviction for manslaughter.
 - (5) Duress should be a partial defence to first degree murder but not a defence to second degree murder or attempted murder.

We are recommending option (1).

- 6.4 We are conscious that in recommending option (1), we are departing from our provisional proposal, namely that duress should be only a partial defence to first degree murder. We will be advancing our reasons for doing so but we begin by providing a brief outline of the current law relating to the defence of duress. We do so in order to emphasise the stringent requirements of the defence at common law. Having done so, we will explain why we are not attracted to options (2) to (5) above. We will then focus on our reasons for recommending option (1).

¹ Paras 7.18 to 7.19.

THE CURRENT LAW

- 6.5 Duress, if raised by admissible evidence and not disproved by the prosecution, is a full defence to all crimes except murder,² attempted murder,³ possibly some forms of treason and, possibly, conspiracy.⁴ The prevailing judicial view is that duress operates as an excuse rather than a justification.⁵
- 6.6 There are two forms of duress: duress by threats and duress of circumstances.⁶ The issue of whether duress should be a defence to murder has been discussed primarily in relation to duress by threats.⁷ Duress by threats is where a person is told “commit a criminal offence or else you (or someone else) will be killed or seriously injured”. The threat emanates from another person.
- 6.7 By contrast, duress of circumstances is where a person commits an offence in response to a threat of death or serious harm that is not the result of being told “commit it or else”.⁸ An example is provided by the famous case of *Dudley and Stephens*.⁹ Two shipwrecked sailors, threatened with death by starvation, killed and fed on a cabin boy who was shipwrecked with them.
- 6.8 The general principles that govern duress by threats were set out by the Court of Appeal in *Graham*¹⁰ and subsequently approved by the House of Lords in *Howe*.¹¹ In *Graham*, Lord Chief Justice Lane said that in law a person acts under duress by threats if the answers to the two following questions are “yes” and “no” respectively:

² *Howe* [1987] AC 417.

³ *Gotts* [1992] 2 AC 412.

⁴ In *Abdul-Hussain* [1999] *Criminal Law Review* 570, the Court of Appeal questioned whether duress is a defence to conspiracy. However, if duress can be a defence to doing something, it is difficult to see why it cannot also be a defence to agreeing to do something.

⁵ *Z* [2005] UKHL 22, [2005] 2 AC 467 at [18] by Lord Bingham.

⁶ The courts have not always accurately reflected the distinction – *Martin (Colin)* [1989] 1 All ER 652.

⁷ Both Smith and Hogan, *Criminal Law* (11th ed 2005) pp 311 to 313 and Simester and Sullivan, *Criminal Law Theory and Doctrine* (2nd ed 2003) pp 594 to 595 discuss whether duress can be a defence to murder before considering duress of circumstances.

⁸ In cases of duress of circumstances, the threat may, but need not, emanate from another person. In *Willer* (1986) 83 Cr App R 225 D pleaded duress of circumstances to a charge of reckless driving. The manner of his driving resulted from his being confronted by what he believed would be a violent attack by a gang of youths. The defence would have been equally available had he driven in the manner he did in order to escape a herd of charging bulls.

⁹ (1884) 14 QBD 273. It is true that the judgment of Lord Chief Justice Coleridge refers to “necessity” rather than duress of circumstances. Nevertheless, the case, properly analysed, is one of duress of circumstances.

¹⁰ [1982] 1 WLR 294.

¹¹ [1987] AC 417.

- (1) Was [D], or may [D] have been, impelled to act as he did because, as a result of what he reasonably believed [X] had said or done, he had good cause to fear that if he did not so act [X] would kill him or (if this is to be added)¹² cause him serious physical injury?
- (2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed [X] said or did by taking part in the killing?¹³ (“the objective limb of the defence”)

The general principles that govern duress of circumstances are substantially the same.

6.9 A feature of the defence, reinforced by the recent decision of the House of Lords in *Z*,¹⁴ is its very stringent qualifying conditions,¹⁵ namely:

- (1) the threat must be one of death or serious physical harm;¹⁶
- (2) the threat must be extraneous to the defendant;¹⁷
- (3) the threat must be directed at the defendant, a member of his or her immediate family or someone for whose safety the defendant reasonably regards him or herself as responsible;¹⁸
- (4) although there does not have to be a threat *in fact*,¹⁹ the defendant must believe in the existence of a threat and his or her belief must be reasonable. Further, the defendant must reasonably believe that the threat will be implemented;²⁰

¹² Lord Lane had doubts as to whether a threat of serious harm should suffice. On this issue, see paras 6.73 to 6.76 below.

¹³ [1982] 1 WLR 294, 300. The reason why Lord Lane referred to “killing” is that the prosecution conceded that duress was capable of being a defence to murder. The House of Lords in *Howe* [1987] AC 417 has since made it clear that duress is not a defence to murder.

¹⁴ [2005] UKHL 22, [2005] 2 AC 467.

¹⁵ For the avoidance of doubt, by ‘qualifying conditions’ we mean all the elements of the defence other than the requirement that a sober person of reasonable firmness might have responded in the way that that D did.

¹⁶ In *Baker and Wilkins* [1997] *Criminal Law Review* 497 it was held that the defence was not available where the threat related to psychological injury.

¹⁷ *Rodger and Rose* [1998] 1 Cr App R 143; *Brown* [2003] EWCA Crim 2637.

¹⁸ In *Shayler* [2001] EWCA Crim 1977, [2001] 1 WLR 2206 the Court of Appeal referred to “persons for whom the situation makes him responsible”.

¹⁹ *Safi* [2003] EWCA Crim 1809, [2004] 1 Cr App R 14.

²⁰ In *Safi* [2003] EWCA 1809, [2004] 1 Cr App R 14 the Court of Appeal, without having to decide the point, seemed to favour dispensing with the requirement that the belief must be reasonably as well as honestly held. However, in *Z* [2005] UKHL 22, [2005] 2 AC 467 at [23] Lord Bingham was unequivocal, “But there is no warrant for relaxing the requirement that the belief must be reasonable as well as genuine”.

- (5) although the threat need not be the sole motive for the defendant committing the principal offence, the defence is not available if the prosecution can prove that the defendant would have committed the offence even if the threat had not been made;
 - (6) there must be no evasive action that the defendant can reasonably be expected to take (generally the defendant must reasonably believe the threat to be immediate or almost immediate); and²¹
 - (7) the defendant must not have voluntarily laid him or herself open to the duress. In particular, if the defendant voluntarily associates with those engaged in criminal activity where he is aware or ought to be aware²² that he or she may be subject to *any* compulsion by threats of serious violence, the defendant cannot rely on duress as a defence to any act which he or she is thereafter compelled to do.
- 6.10 In addition to these qualifying conditions the defence involves an evaluative condition (the objective limb of the defence) that must also be satisfied. The defence is not available if no reasonable person, sharing the defendant's ("D's") characteristics, would have responded to the threat by committing the principal offence. In *Bowen*,²³ the Court of Appeal said that relevant characteristics include age, (possibly) sex, pregnancy, serious physical disability and "recognised mental illness or psychiatric condition". Characteristics due to self-induced abuse, whether through alcohol or drugs, are not relevant characteristics and neither is being unusually pliant or timid.²⁴
- 6.11 In *Z*,²⁵ Lord Bingham expressed the prevailing judicial attitude to the defence:
- ... I find it unsurprising that the law in this and other jurisdictions should have been developed so as to confine the defence of duress within narrowly defined limits.²⁶

Our provisional proposals and questions

- 6.12 In the CP, we provisionally proposed that duress should be a partial defence to first degree murder, reducing the offence to second degree murder.²⁷

²¹ In *Abdul-Hussain* [1999] *Criminal Law Review* 570 the Court of Appeal suggested the threat had to be "imminent" but not "immediate". However, in *Z* [2005] UKHL 22, [2005] 2 AC 467, at [28] Lord Bingham referred to the threat having to be one that D reasonably expects to follow "immediately or almost immediately".

²² In *Z* [2005] UKHL 22, [2005] 2 AC 467 at [38] Lord Bingham, in passing, said that the defence is not available if D ought to have been aware of the risk of being subjected to any compulsion by threats of violence. On this view, it is irrelevant that D was not aware of the risk.

²³ [1996] 2 Cr App R 157.

²⁴ Specifically, the Court held that a low IQ short of mental impairment is not a relevant characteristic.

²⁵ [2005] UKHL 22, [2005] 2 AC 467.

²⁶ Above, at [21].

²⁷ Para 7.32.

- 6.13 We asked whether duress should be a defence to second degree murder and attempted murder and, if so, whether it should be a full or partial defence.
- 6.14 We provisionally proposed that for a plea of duress to succeed as a partial defence to first degree murder (and to second degree murder and attempted murder were the defence to apply to those offences), the threat must have been one of death or life-threatening harm.²⁸
- 6.15 In respect of children and young people, we invited views as to whether duress, if successfully pleaded as a defence to first degree murder, should give rise to more lenient treatment than in the case of adults.²⁹
- 6.16 In addition, we made the following firm proposals:
- (1) In deciding whether a person of reasonable firmness might have acted as D did, the jury should be able to take into account all the circumstances of D, including his or her age, other than those that bear upon his or her capacity to withstand duress.
 - (2) D's belief as to the existence of the threat and its being implemented must be not only honestly but also reasonably held.³⁰

Responses to the provisional proposals and questions

- 6.17 A very substantial majority of those who addressed the issue thought that duress should be a defence to first degree murder. However, opinion was divided as to whether it should be a full or partial defence. A considerable, but not overwhelming, majority thought that it should be a partial defence. Of that majority, most felt that it should result in a conviction for second degree murder rather than manslaughter.
- 6.18 A very substantial majority of those who addressed the issue thought that duress should be a defence to second degree murder and attempted murder. However, again, opinion was divided as to whether it should be a full defence. A slight majority thought that it should be a full defence.
- 6.19 A large majority of those who addressed the issue thought that for duress to be a defence to first degree murder, the threat must be one of death or life-threatening harm.
- 6.20 A large majority of those who addressed the issue agreed that duress if successfully pleaded by a child or young person as a defence to first degree murder should result in more lenient treatment than it would for adults.

²⁸ Paras 7.3 and 7.44.

²⁹ Para 7.73.

³⁰ Para 7.50.

OUR RECOMMENDATIONS

6.21 We recommend that:

- (1) duress should be a full defence to first degree murder, second degree murder and attempted murder.**
- (2) For duress to be a defence to first degree murder, second degree murder and attempted murder, the threat must be one of death or life-threatening harm.**
- (3) The defendant should bear the legal burden of proving the qualifying conditions of the defence on a balance of probabilities.**

OPTIONS THAT WE REJECT

Option (2): duress should be a partial defence to first degree murder resulting in a conviction for second degree murder but a full defence to second degree murder and attempted murder

- 6.22 This option reflects the view of the majority of consultees who addressed the issue. It avoids the 'all or nothing' outcome that results from duress being a full defence to first degree murder. Accordingly, it addresses the concerns of those who believe that a stark choice between conviction for first degree murder, on the one hand, and an acquittal, on the other hand, will be prone to produce the 'wrong result'. On this view, a mandatory life sentence would be too harsh for a parent who played a minor role as a secondary party in a killing when faced with a threat to the life of his or her child. Conversely, an acquittal would be too generous in the case of D who, in order to preserve his or her own life, intentionally kills an innocent person.
- 6.23 In addition, it might be thought that an advantage of the option, at least in relation to first degree murder, is that it accords with our recommendations for provocation and diminished responsibility, namely that they reduce first degree murder to second degree murder.
- 6.24 We recognise the attraction of the option in the way that it seeks to accommodate the very broad range of circumstances in which duress can operate in cases of intentional killing. However, if the option were to be adopted, there would be a vast difference in the outcome depending on whether or not it was established that D had the requisite fault element for first degree murder. If it were proved that D had the mental element for first degree murder, a successful plea of duress would result in a conviction for second degree murder. By contrast, if the prosecution were unable to prove that D had that mental element, a successful plea of duress would result in exoneration. Accordingly, we envisage that, were the option to be adopted, in many cases it would be submitted that D did not intend to kill but merely intended to do no more than was necessary in order to ensure he or she or another would not be killed. This would be to confuse intention and motive and, no doubt, the trial judge would direct a jury to distinguish the two. However, there would be a real danger that a sympathetic jury would confuse the two and conclude that the purpose of D doing what he or

she did was to save rather than take life.³¹

6.25 In addition, the indulgence of trying to persuade the jury to substitute motive for intention, while available to the principal offender, would be denied to some secondary parties. It would not be available to secondary parties who were charged with first degree murder not on the basis that they intended to kill but on the basis that they had foreseen the risk of the principal offender committing first degree murder.³² For example, D1 and D2 are threatened with death unless they assist a gang of burglars to commit a burglary. D1 and D2 both anticipate that their role will be confined to driving members of the gang to the house where the burglary will be committed and keep watch. D1, but not D2, anticipates that, should the householder disturb the gang, the gang will intentionally kill the householder. On arriving at the house, D1 is ordered to stay in the car and keep watch. D2 is told to accompany the gang into the house. The householder does disturb the gang one of whom tells D2 to stab the householder several times in the chest. D2 does so believing that he will be shot unless he does so. Whereas D2 may seek to persuade a jury that he did not intend to kill, D1 will not be able to deny the fault element that makes him guilty of first degree murder as a secondary party, namely that he foresaw that the householder might be intentionally killed.

6.26 Were this option to be adopted, it could also be argued that an anomalous position with regard to attempted murder would be created:

D, under duress, shoots both V1 and V2 with intent to kill, killing V1 but not V2.

6.27 In relation to the killing of both V1 and V2, under the current law D has no defence of duress. Under our recommendation, D would be able to plead duress as a complete defence to both the murder of V1 and the attempted murder of V2. By way of contrast, under option (2) D would have a partial defence of duress in relation to the killing of V1 but a full defence in relation to the attempted killing of V2. The element of chance in whether the full defence is or is not available, depending on whether D is successful in carrying out his instructions, makes this option an unattractive one.

6.28 These considerations militate against recommending this option. In addition, for the reasons that we set out below,³³ we believe as a matter of principle that duress ought to be a complete rather than a partial defence not only to second degree murder but also to first degree murder.

³¹ It is true that an alternative basis for convicting D of first degree murder would be that he or she foresaw that it was virtually certain that V would die. However, it has to be remembered that a finding by the jury that D foresaw death as a virtual certainty entitles but does not compel the jury to find that D intentionally killed.

³² Under our recommendations, D would be liable to be convicted of first degree murder if he or she was a party to a joint venture and foresaw that another party to the joint venture might commit first degree murder – see Part 4.

³³ See paras 6.36 to 6.65.

Option (3): duress should be a partial defence to first degree murder resulting in a conviction for second degree murder and a partial defence to second degree murder resulting in a conviction for manslaughter

- 6.29 This option has the same advantages as option (2) as far as duress being a partial defence to first degree murder is concerned. Further, by making duress a partial but not a full defence to second degree murder, it dilutes, without wholly removing, the disadvantages that we have highlighted in connection with option (2).
- 6.30 However, the option is inconsistent with the overall structural approach that we are recommending. In Part 2 above, we explained why we believe that provocation and diminished responsibility should be partial defences to first degree murder but not to second degree murder. If we were to recommend that duress should be a partial defence to second degree murder, the question would arise: why not do the same with provocation and diminished responsibility? In truth, if we believed that duress should be a partial defence to both first degree murder and second degree murder, then it would be difficult to justify a position under which provocation and diminished responsibility are not partial defences to second degree murder. However, as we explain below, we believe that there are valid reasons why duress, on the one hand, should be a complete defence to first degree murder and provocation and diminished responsibility, on the other hand, should be partial defences.
- 6.31 A further difficulty with this option is that it provides no principled basis on which to decide whether duress should or should not be a defence to attempted murder.

Option (4): duress should be a partial defence to both first degree murder and second degree murder, in each case resulting in a conviction for manslaughter

- 6.32 Similar, if not identical, considerations apply as in option (3) above.

Option (5): duress should be a partial defence to first degree murder but not a defence to second degree murder or attempted murder

- 6.33 Some consultees, while of the view that duress should be a partial defence to first degree murder, argued that duress should not be a defence to second degree murder or attempted murder. This was because there would be sufficient flexibility in the discretionary life sentence for second degree murder to accurately reflect any mitigation arising from duress.³⁴

This option would be consistent with our recommendations in relation to the partial defences of provocation and diminished responsibility. However, the option has to be evaluated in the light of the fact that duress operates as a full defence to all offences to which under the present law it is capable of being a defence.

³⁴ Treacy J, Crown Prosecution Service, the Police Federation, and the Association of Chief Police Officers.

- 6.34 As under option (2), it is arguable that an anomaly arises with the treatment of attempted murder.³⁵ It becomes a matter of chance whether D has a partial defence or no defence at all.
- 6.35 Here is another example illustrating how option (5) would operate less than satisfactorily. D, under duress, attacks three people V1, V2 and V3. D intends to kill V1 and does so. D intends to cause serious harm to V2 and V3. V2 dies but V3 survives. D would be guilty of second degree murder in relation to V1. D is also guilty of second degree murder in relation to V2. D is acquitted of causing grievous bodily harm with intent to V3.³⁶ We do not consider this to be a satisfactory outcome.

THE OPTION THAT WE ARE RECOMMENDING

Option (1): duress should be a full defence to first degree murder, second degree murder and attempted murder

A full defence to first degree murder

- 6.36 We acknowledge that the majority of consultees who favoured duress being a defence to first degree murder agreed with our provisional proposal that it should be a partial rather than a full defence to first degree murder. At the same time, a significant minority³⁷ thought that it should be a full defence and, on balance, we are now persuaded that it should be.
- 6.37 Previously, the Commission has recommended that duress should be a full rather than a partial defence to murder:
- ... where the duress is so compelling that the defendant could not reasonably have been expected to resist it, perhaps being a threat not to the defendant himself but to an innocent hostage dear to him, it would be ... unjust that the defendant should suffer the stigma of a conviction even for manslaughter. We do not think that any social purpose is served by requiring the law to prescribe such standards of determination and heroism.³⁸
- 6.38 In the CP, we provisionally proposed a different approach in relation to first degree murder. There were two main reasons:

- (1) we thought it important that there should be consistency with the partial defences of provocation and diminished responsibility, both of which we were proposing should reduce first degree murder to second degree murder;

³⁵ Paras 6.26 to 6.27 above.

³⁶ Contrary to Offences Against the Person Act 1861, s 18.

³⁷ Including Elias J, the Criminal Bar Association, the Law Society, the London Criminal Courts Solicitors' Association and Liberty. Professor David Ormerod thought that "[t]he argument that it ought to operate as a full defence has not been adequately rebutted."

³⁸ Report on Defences of General Application (1977) Law Com No 83, para 2.43 cited with approval by the Commission in Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, para 30.17.

- (2) it would not be right for a person who had intentionally killed to be completely exonerated.

REASONS FOR QUESTIONING OUR PROVISIONAL PROPOSAL THAT DURESS SHOULD BE A PARTIAL DEFENCE TO FIRST DEGREE MURDER

- 6.39 We now believe that, in this context, we exaggerated the importance of treating duress in a manner that was consistent with the way provocation and diminished responsibility fitted into our proposed structure.³⁹ Professor Ormerod commented:

... I am not convinced that duress has been shown to be sufficiently similar to provocation and diminished responsibility to warrant like treatment. An argument could be made that it ought to be treated like self defence, and therefore ought to afford a complete defence. In truth, the defence is distinct from all of the others. It has a strong objective element which allies it with provocation, and it focuses on external pressures triggering a response, but it is a defence in which D has made a more calculated choice. Similarly, with diminished responsibility, the defences might be regarded as excuses (whatever that may mean), but duress is very different from the quasi-medicalised defence (unless we are treating them both as some form of diminished capacity defence).

- 6.40 We also acknowledge that we exaggerated the strength of the case for duress being a partial defence to first degree murder merely because, under our proposals, there would be more categories of murder. We now accept that, while having more categories of murder may make it easier to effect a compromise between competing views, the mere fact that there are more categories of murder does not assist in deciding whether or not as a matter of principle duress should be a full defence to first degree murder.
- 6.41 In the CP, we stressed that if D intentionally kills he or she deserves to be stigmatised despite killing under duress. However, we now believe that we paid insufficient attention to the fact that, for the defence to succeed, D must satisfy the very stringent requirements of the defence including satisfying a jury that a reasonable person, sharing his or her characteristics, might have acted in the way that D did.
- 6.42 Further, during the consultation process it became clear that significant anomalies might arise were duress to be a partial defence to some homicide offences but a full defence (or no defence) to others. It is hard, for example, to see why duress should be a full defence (or no defence) to attempted murder but a partial defence to first degree murder, given that only chance may distinguish whether the one offence or the other has been committed. While it might not be impossible to find a justification in relation to each individual offence, the overall structure threatens to become incoherent.

³⁹ Paras 6.59 to 6.65 below.

REASONS FOR CONCLUDING THAT DURESS SHOULD BE A FULL DEFENCE TO FIRST DEGREE MURDER

- 6.43 The argument that duress should be a full defence to first degree murder has a moral basis. It is that the law should not stigmatise a person who, on the basis of a genuine and reasonably held belief, intentionally killed in fear of death or life-threatening injury in circumstances where a jury is satisfied that an ordinary person of reasonable fortitude might have acted in the same way. If a reasonable person might have acted as D did, then the argument for withholding a complete defence is undermined. In the words of Professor Ormerod, "if the jury find that the defendant has, within the terms of the defence, acted reasonably, it seems unfair to treat him as a second degree murderer or even a manslaughterer".
- 6.44 Further, the option also accords with the way that duress operates as a complete defence in relation to other offences and it is, therefore, conducive to coherence and consistency as we pointed out above.
- 6.45 One respondent who favoured duress being a partial defence to first degree murder did so because he thought that this was the best way of accommodating each side in the moral debate. We see the force of this argument. However, we believe that if the arguments of principle and morality point decidedly in one direction, our recommendation should reflect what we believe to be a principled approach rather than one based on a desire to accommodate the different viewpoints.
- 6.46 An important counter-argument is that the law rightly attaches special sanctity to innocent human life and that this should preclude duress ever being a full defence to first degree murder.⁴⁰ We now depart from this view, in so far as we believe that the 'sanctity of life' argument was not meant to deal with examples such as ten year olds or peripheral secondary parties becoming involved in killing under duress. The 'sanctity of life' argument may be more confusing than illuminating in this context.
- 6.47 Those who are opposed to duress being a full defence to first degree murder argue that cases of intentional killing under duress can never be completely deserving of excuse, but some are more deserving of excuse than others. For that reason, so the argument runs, duress should result in a conviction of second degree murder where the sentence can reflect the circumstances of each case.
- 6.48 Of course, views may differ as to what makes a case more or less deserving of excuse. For example, some, but not all, will think that a person is more deserving of excuse if he or she commits first degree murder under duress in order to secure a net gain of life.⁴¹ Alternatively, some will believe that those who commit

⁴⁰ Some who subscribe to this view would go further and maintain that it should never be even a partial defence to first degree murder.

⁴¹ *Dudley and Stephens* (1884) 14 QBD 273 is an example.

first degree murder under duress in order to save the life of an innocent third party are more deserving of excuse than those who do so to save themselves, particularly if the killing also secures a net gain of life. Others will point to the case of a secondary party such as a taxi driver who is threatened with death unless he or she drives a gang to a location where he or she knows they are intending to kill a householder.

- 6.49 By contrast, others will point to the case of a drug addict who, threatened by his or her supplier to whom he or she is in debt, commits a murder to placate his or her supplier to whom he or she owes money.
- 6.50 Although, amongst those who would prefer duress to be a partial defence to first degree murder, there may not be unanimity as to what makes a case more (or less) deserving, they are as one in stressing the range of circumstances in which duress may be pleaded. In their view, what is required is a flexible sentencing regime which, while recognising that a person who intentionally kills under duress ought always to be stigmatised, allows the trial judge to pass a suitably severe or lenient sentence depending on the circumstances.
- 6.51 We see the attraction of this view. However, we believe that there is more force in the views expressed by consultees who believe that duress should be a complete defence to first degree murder. For example, the Criminal Bar Association argued that, if duress were not a complete defence to first degree murder, it would give the impression that, in law, “it is better to prevent the death of a stranger than to prevent the death of one’s children.” Similarly, Mr Justice Elias said that withholding duress as a complete defence implies that the criminal law should support the view that “people ought to act in an exceptionally moral and courageous way. They are being punished for giving way to what will often be enormous fear and wholly understandable human frailty.”
- 6.52 We also think it important to bear in mind the stringent qualifying conditions that attach to the defence. In particular, the majority of the House of Lords in *Z*⁴² were firmly of the view that the defence ought not to be available to D if he or she saw or ought to have foreseen the risk of being subjected to any compulsion by threats of violence. We believe that this will serve to exclude the most unmeritorious cases where the defence should simply not be available. It is true that it will not in itself exclude all undeserving cases but we believe that juries should be trusted not to accept the defence in undeserving cases.
- 6.53 Above all, we believe that it is essential to recognise and accord proper weight to the fact that for the defence to succeed, a jury must form a judgement that a reasonable person in D’s position might have committed first degree murder. If a jury forms that judgement, we believe that D should be completely exonerated despite having intentionally killed.

⁴² [2005] UKHL 22, [2005] 2 AC 467.

Distinguishing cases according to whether or not the defendant acted in response to a threat against his or her own person

- 6.54 We have considered whether it would be appropriate to distinguish cases of duress according to whether D has intentionally killed in order to save the life of an innocent third party as opposed to his or her own life. Some believe that there is a clear moral difference between acting on a threat directed at another and acting on a threat directed at oneself. However, we believe that it would be unsatisfactory to recommend reform based on such a distinction.
- 6.55 Consider these examples. A child is threatened with life-threatening harm by his or her psychopathic father unless he or she helps him to perpetrate a murder. A pregnant woman is threatened with death unless she kills V. She yields to the threat in order to safeguard the life of her unborn baby who, while in the womb, has no legal recognition for the purposes of the criminal law, apart from the offences of child destruction⁴³, attempting to procure a miscarriage⁴⁴ and offences under the Abortion Act 1967. An uncle threatened with death commits murder in order to preserve his own life so that he can donate a kidney to his desperately ill nephew. In our view, it would be wrong to deny such persons a complete defence merely because they acted in order to preserve their own lives.

Distinguishing between principal offenders and secondary parties

- 6.56 We have also considered whether it would be appropriate to distinguish cases depending on whether D was a principal offender or a secondary party. At one stage, we were inclined to do so. However, for two reasons, we believe that it would be undesirable.
- 6.57 First, it assumes, wrongly, that a secondary party acting under duress is necessarily less culpable than a principal offender acting under duress. For example, a husband and his wife are told that their child will be killed unless they kill V who is the husband's brother. They agree that the wife will perpetrate the killing and the husband will keep watch. It would be wrong to afford the husband but not the wife a complete defence. Likewise, a psychopathic father threatens his child with serious physical harm unless the child commits a murder while the father keeps watch. We believe that, unhesitatingly, most people would brand the father as the more culpable. The jury should be trusted to employ the objective test to distinguish deserving from undeserving cases, without this added legal complication.

⁴³ Contrary to Infant Life (Preservation) Act 1929, s 1.

⁴⁴ Contrary to Offences Against the Person Act 1861, s 58.

- 6.58 Further, it would put a premium on determining whether someone was a principal offender or a secondary party. For example, a husband and wife are threatened that their child will be killed unless they kill V. They decide to kill V by poisoning. Before V joins them for lunch, together they measure out a fatal dose of strychnine which the wife sprinkles over V's soup. V drinks the soup and dies. On one view, the wife is the principal offender because she is the most direct and immediate cause of V's death. Her husband is a secondary party. Suppose, however, that, in order to introduce the fatal dose into V's soup, the husband lifts V's soup bowl across the dining table and then, after the wife ladles out the soup, replaces the bowl. Alternatively, the husband's sole contribution is to pass a spoon to V.⁴⁵ We believe that to make the liability of the husband and wife dependent on whether or not one was a principal offender and the other a secondary party would result in liability being dependent on fine distinctions that would reflect poorly on the law, particularly where the issue is whether one or other, or both, is guilty of first degree murder.

Consistency with provocation and diminished responsibility

- 6.59 It might be thought that our recommendation is inconsistent with our recommendations that provocation and diminished responsibility should operate as no more than partial defences to first degree murder.
- 6.60 On the assumption that provocation, diminished responsibility and duress are all defences that operate by way of excusing D, the way that the current law treats these defences is illogical. Provocation and diminished responsibility each has a weaker moral claim to excusatory status in the law of murder than duress. It is true that provocation is grounded on the view that D has lost his or her self-control whereas in cases of duress D has made a conscious, albeit an unwilling, choice. It is also true that in cases of diminished responsibility, D is partially excused because it is recognised that his or her responsibility for intentionally killing is lessened. However, in cases of provocation and diminished responsibility, D has not killed in order to preserve innocent life and yet he or she has a partial excuse. By contrast, a person who pleads duress is one who has sought to avoid the death of or serious physical harm⁴⁶ to an innocent person (not necessarily him or herself) by doing no more than is required to avert that harm. Yet, provocation and diminished responsibility excuse murder while duress does not.

⁴⁵ The scenarios are taken from Professor K J M Smith, *A Modern Treatise of the Law of Criminal Complicity* (1991) p 80.

⁴⁶ Under our recommendations, death or *life-threatening* harm.

- 6.61 More importantly, it is inappropriate to characterise duress as an excusatory defence in the same way that provocation and diminished responsibility are excusatory. Although it cannot be said of all cases, some instances of duress come close to being a justification for killing rather than an excuse. To give an example of duress of circumstances, the roped climber who cuts the rope after his or her companion has accidentally slipped and is dragging them both to oblivion is a case in point. The same claim cannot be made in respect of either provocation or diminished responsibility. No act of killing comes close to being justified if committed solely in response to provocation or as a result of diminished responsibility. Viewed in this light, the case for distinguishing duress from provocation and diminished responsibility becomes more compelling.⁴⁷
- 6.62 The fact that we are recommending a reformulated partial defence of provocation does not detract from the above. It would be wrong to conclude that the reformulation, by removing the loss of self-control requirement and at the same time requiring that D must have a “justifiable sense of having been seriously wronged”, places the defence on a justificatory basis. The first limb of the reformulation is seeking to do two things. First, it avoids the well known problems caused by the loss of self-control requirement.⁴⁸ Secondly, it is emphasising that the provocation must be of such gravity that if a person responds to it by intentionally killing, he or she merits being partially excused despite his or her conduct lacking any justification.
- 6.63 The second limb of the reformulated partial defence of provocation focuses on an intentional killing in response to a fear of serious violence. At first blush, it might be thought that this places the defence on a more justificatory footing. However, it is important to emphasise that the defence comes into play only if the justificatory defence of self-defence is unavailable or unsuccessful. If self-defence is unavailable or unsuccessful it will be because D used an unreasonable amount of force in the circumstances. In such cases the D’ conduct cannot be characterised as justified.
- 6.64 In conclusion, we believe that the following extract from one of our earlier reports bears repetition. After setting out the arguments against a defence of duress to murder, we said:

⁴⁷ Under our recommendations, D would commit first degree murder not only if he or she intended to kill but also if D intended to cause serious harm aware that there was a serious risk of causing death. On one view, if D, under threat of death to others for whom he or she is responsible, does an act intended to cause serious harm but in the realisation that it carries a serious risk of causing death, his or her conduct can be characterised as justified. This is because D has acted in order to save innocent lives without intending to take life.

⁴⁸ See our earlier report *Partial Defences to Murder* (2004) Law Com No 290 paras 3.28 to 3.30

... the law should not insist upon condemning a person who acts under compulsion which he is unable to resist; that in doing so it would be making excessive demands on human nature and imposing penalties in circumstances where they are unjustified as retribution and irrelevant as a deterrent. The law must recognise that the instinct and perhaps the duty of self-preservation is powerful and natural, and that it would be 'censorious and inhumane if it did not recognise the appalling plight of a person who suddenly finds his life in jeopardy unless he submits and obeys'.⁴⁹ This argument is most cogently advanced by the majority in *Lynch's* case and convinces us that it would be quite unjust that a person who has committed an offence only because of threats which he could not withstand (subject to qualifications as to the nature of the threats) should face trial and conviction with the obloquy inherent therein.⁵⁰

- 6.65 **We recommend that duress, if successfully pleaded, should be a full defence to first degree murder.**

A possible refinement of our recommendation

- 6.66 Under our recommendation, duress would be a full defence to first degree murder if D satisfies the qualifying conditions⁵¹ on a balance of probabilities *and* the jury concludes that a sober person of reasonable fortitude in the circumstances of D might have committed first degree murder.
- 6.67 However, we envisage that in some cases, while D may be able to satisfy the qualifying conditions, the jury will conclude that no sober person of reasonable fortitude in the circumstances of D would have committed first degree murder. We believe that such cases are much more likely to arise if D is a principal offender as opposed to a secondary party.
- 6.68 It would be possible to adopt an 'all or nothing' approach by virtue of which D would either be convicted of first degree murder or completely exonerated depending on whether or not he or she satisfies all the elements of the defence. However, that might be thought to be too severe on those who had proved that they genuinely and reasonably believed that they, or a person for whom they reasonably felt responsible, would be killed or very seriously harmed unless they committed first degree murder.
- 6.69 In such cases, a conviction for second degree murder would recognise the perilous circumstances in which, without any fault on their part, they had (or reasonably thought they had) been placed while acknowledging that they ought to be convicted of a very serious offence because no reasonable person would have acted as they did.

⁴⁹ *DPP for Northern Ireland v Lynch* [1975] AC 653, 671, by Lord Morris.

⁵⁰ Report on Defences of General Application (1977) Law Com No 83, para 2.16.

⁵¹ See n 15 above.

A full defence to second degree murder and attempted murder

- 6.70 Since we are recommending that duress should be a full defence to first degree murder, it would be anomalous were we to recommend otherwise in relation to second degree murder and attempted murder.
- 6.71 **We recommend that duress, if successfully pleaded, should be a full defence to second degree murder and attempted murder.**
- 6.72 We believe that our recommendations that duress should be a full defence to first degree murder, second degree murder and attempted murder are conducive to achieving clarity and coherence. However, we have rejected other options not merely because we think that they are intellectually untidy. Ultimately, the function of the criminal law is not to produce intellectual tidiness for its own sake but, rather, to do practical justice as it would be seen by ordinary members of the public. We do not believe that the options that we have rejected would achieve that result. We believe that the recommendations we are making would do so.

ADDITIONAL RECOMMENDATIONS

Fear of death or life-threatening harm

- 6.73 A large majority of consultees were in favour of the proposal that for duress to be a defence to murder or attempted murder, then the threat must be one of death or life-threatening harm.
- 6.74 It is true that, under the current law, the defence can succeed if the threat was one of death or serious harm, whether or not life-threatening harm. However, we believe that the special harm involved or intended in cases of first degree murder, second degree murder and attempted murder justifies a higher threshold.
- 6.75 We are conscious that some consultees have reservations about the threat having to be one of life-threatening harm. Some believe that it would exclude deserving cases such as a parent witnessing his or her child being tortured.⁵² Others believe that the concept 'life-threatening' is too vague and ambiguous.⁵³ However, it is important to recognise that the threat does not have to be objectively life-threatening. It is the reasonableness of D's perception of the threat that is critical. D would have to prove that he or she honestly and reasonably believed that the nature of the threat was such that, if implemented, would involve a risk to life. The jury would be entitled to take into account the age and vulnerability of the person being threatened with harm. Thus, a jury might well conclude that D reasonably believed that a threat of torture to his or her five-year-old child involved a risk of life-threatening harm while taking a different view if the threat of torture was directed at the D's spouse.
- 6.76 **We recommend that for duress to be a full defence to first degree murder, second degree murder and attempted murder, the threat must be one of death or life-threatening harm.**

⁵² Ms Lumsdon, Mr Samuels and Mr Taylor.

⁵³ The Criminal Bar Association and Graham Virgo.

Reasonably held belief

- 6.77 We did not pose a direct question to consultees as to whether D's belief that a threat of death or life-threatening harm had been made and would be implemented had to be reasonably held. A few consultees questioned the need for the belief to be reasonably held. It was suggested that the requirement was unnecessary because a jury would be unlikely to conclude that an unreasonable belief was an honestly held belief.⁵⁴ One consultee thought that a reasonableness requirement would make it more difficult for children and the mentally vulnerable to make out the defence.⁵⁵
- 6.78 Previously the Law Commission has expressed support for the proposition that D's belief should only have to be honestly held.⁵⁶ Further, neither provocation nor self-defence import a test of reasonableness.⁵⁷ However, in this respect, there are important differences between duress, on the one hand, and provocation and self-defence, on the other hand. The defence of duress revolves around a threat of death or serious-harm that will materialise at some point in the future should D not do what he or she has been told to do. Typically, D will have time to reflect on and assess the nature and strength of the threat. As Professor Ormerod commented, "D has made a more calculated choice".
- 6.79 By contrast, in cases of provocation and self-defence, typically there is a more immediate temporal or physical nexus between the actions of the victim ("V") and the action of D that is precipitated by the actions of V. In relation to self-defence, the law recognises this even in relation to that aspect of the defence – the degree of force used by D – where there is a reasonableness requirement. Thus, Lord Morris observed:
- If there has been an attack so that defence is reasonably necessary it will be recognised that a person cannot weigh to a nicety the exact measure of his necessary defensive action.⁵⁸
- 6.80 It is clear that at common law, D's belief in the existence of the threat and that it will be implemented must be reasonably held.⁵⁹ It would be anomalous that if D is pleading duress as a defence to theft his or her belief in the existence of the threat must be reasonably held but not if D is pleading duress as a defence to first degree murder, second degree murder or attempted murder.

⁵⁴ Nicola Padfield.

⁵⁵ Justice.

⁵⁶ A Criminal Code for England and Wales (1989) Law Com No 177, vol 2 Commentary on Draft Criminal Code Bill para 12.15; Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, paras 29.9 to 29.10.

⁵⁷ It is true that for a plea of self-defence to succeed, the *degree* of force employed by D must have been reasonable in the circumstances as he or she believed them to be. However, D's belief in the need to resort to self-defence need only be an honest belief – *Williams (Gladstone)* [1987] 3 All ER 411.

⁵⁸ *Palmer v R* [1971] AC 814, 832.

⁵⁹ *Graham* [1982] 1 WLR 294; *Howe* [1987] AC 417; *Z* [2005] UKHL 22, [2005] 2 AC 467.

- 6.81 At the same time, we see no reason why the particular circumstances of D should not be capable of being taken into account in determining whether or not his or her belief was reasonably held. This would enable account to be taken of the age and vulnerability of D. It would also accord with the decision in *Martin (David Paul)*.⁶⁰ The Court of Appeal held that expert testimony that D was suffering from a recognised psychiatric condition which made him more likely than others to regard things said or done as threatening and to believe that they would be carried out was admissible evidence. We do not believe that Z⁶¹ casts doubt on that decision.
- 6.82 Contrary to the view that we have previously expressed, we now believe that for duress to be a full defence to first degree murder, second degree murder and attempted murder, the defendant's belief as to the existence of the threat and to its being implemented must be not only honestly held but also reasonably held.

The defendant's characteristics for the purpose of the objective limb of the defence⁶²

- 6.83 Two consultees, Professor Ronnie Mackay and Nicola Padfield, disagreed with our proposal that the relevant characteristics should not include those which bear on D's capacity to withstand duress. Professor Mackay argued that to alter the common law rule in *Bowen*,⁶³ in which it was held that relevant characteristics include psychiatric syndromes and mental illnesses, would be unfair and is driven by a suggested need for consistency with provocation. Professor Mackay argues that the two pleas are very different in nature. Professor Mackay further argues that it is speculative to suggest that the decision in *Attorney General for Jersey v Holley*⁶⁴ will mean that *Bowen* will no longer be followed.
- 6.84 Despite Professor Mackay and Nicola Padfield's objections, we believe that in deciding whether a person of reasonable firmness would have acted as D did in a case of first degree murder, second degree murder and attempted murder, the jury should be able to take into account all of the circumstances of D, including his or her age, other than those which bear upon his or her capacity to withstand duress. This recommendation is consistent with our recommended reformulation of the partial defence of provocation.⁶⁵ We believe that it would be anomalous if there were to be a significant distinction between the characteristics that are relevant to provocation and duress.

⁶⁰ [2000] 2 Cr App R 42.

⁶¹ [2005] UKHL 22, [2005] 2 AC 467.

⁶² See para 6.8(2) above.

⁶³ [1996] 2 Cr App R 157.

⁶⁴ [2005] UKPC 23, [2005] 2 AC 580.

⁶⁵ It is also consistent with the decision on relevant characteristics in relation to provocation in *A-G for Jersey v Holley* [2005] UKPC 23, [2005] 2 AC 580.

- 6.85 We appreciate that our recommendation, if implemented, would result in a narrower test for first degree murder, second degree murder and attempted murder than the *Bowen* test which would apply to all other offences. However, we consider that this is justified for two reasons. First, given the seriousness of the harm caused (or intended) in cases of first degree murder, second degree murder and attempted murder, it is important that a strict objective standard is maintained to limit the scope of the defence. Secondly, unlike other offences, the partial defence of diminished responsibility would be available to mentally disordered persons charged with first degree murder. We acknowledge that, under our recommendations, diminished responsibility would not be available to those charged with second degree murder or attempted murder. However, since both these offences attract a discretionary life sentence, any mental disorder can be taken into account in sentencing.
- 6.86 We believe that, in deciding whether a person of reasonable firmness might have acted as the defendant did, the jury should be able to take into account all the circumstances of the defendant, including his or her age but not any other characteristics which bear upon his or her capacity to withstand duress.

A reverse burden of proof

A further consultation

- 6.87 Once it became clear that some consultees thought that duress should be a full defence to first degree, second degree and attempted murder, we considered the question of whether the burden of proof should be on D when pleading duress as a defence to first degree murder, second degree murder and attempted murder. As this was not a matter on which we had originally consulted, we conducted a further consultation amongst consultees who had indicated that they supported duress being either a full or a partial defence to first degree murder.

THE FURTHER QUESTIONS THAT WE ASKED

- 6.88 In relation to first degree murder, we asked whether consultees would prefer duress to be:
- (1) a full defence with the burden on the prosecution to disprove;
 - (2) a full defence with the persuasive burden on D;
 - (3) a partial defence with the burden on the prosecution to disprove; or
 - (4) a partial defence with the persuasive burden on D.
- 6.89 In relation to second degree murder we asked whether consultees would prefer duress to be:
- (1) a full defence;
 - (2) a partial defence resulting in a conviction for manslaughter; or
 - (3) no defence.

- 6.90 We also asked whether the burden of proof should be the same for second degree murder as for first degree murder or different.
- 6.91 In relation to Article 6(2) of the European Convention Human Rights (ECHR) we asked whether:
- (1) introducing a defence, but subject to a reverse burden, would interfere with the presumption of innocence;
 - (2) if the answer to question one was “yes”, imposing a reverse burden would pursue a legitimate aim; and
 - (3) if the answer to question two was “yes”, imposing a reverse legal burden would be a proportionate means of pursuing the aim.

THE RESPONSES

- 6.92 Only two consultees favoured duress being a full defence to first degree murder with the burden on the prosecution to disprove. Five consultees favoured it being a full defence to first degree murder with the persuasive burden on D. Six consultees favoured it being a partial defence to first degree murder with the burden on the prosecution to disprove. Three consultees favoured it being a partial defence to first degree murder with the persuasive burden on D.
- 6.93 Five consultees favoured duress being a full defence to second degree murder with the burden on the prosecution to disprove. Three consultees favoured it being a full defence to second degree murder with the persuasive burden on D. Two consultees thought that it should be a partial defence to second degree murder with the burden on the prosecution to disprove. Four consultees thought that it should not be a defence to second degree murder.
- 6.94 All the members of the judiciary who responded thought that, if the persuasive burden were placed on D in circumstances where duress was pleaded as a defence to first and second degree murder, it would not offend against article 6(2). By contrast, some academic consultees thought that a reverse burden would engage Article 6(2) and that, even if a reverse burden was pursuing a legitimate aim, it was not a proportionate means of pursuing that aim. One consultee was of the opinion that there were no compelling arguments for distinguishing murder from other offences in this regard.

The objective limb of the defence

- 6.95 In *Graham*,⁶⁶ Lord Lane said that the burden was on the prosecution to prove that a sober person of reasonable firmness would not have responded to the threat of death or serious harm by committing the offence with which D was charged. It might be thought that reversing the burden of proof would involve D having to prove that a sober person of reasonable firmness might have responded to the threat by committing first degree murder.

⁶⁶ [1982] 1 WLR 294.

6.96 However, unlike Lord Lane, we do not believe that it is helpful to speak in terms of a burden of proof in relation to the objective limb. This is because, in our view, the objective limb involves the jury undertaking “an exercise in judgment or evaluation, not the application of a burden of proof”.⁶⁷ In determining the objective limb of the defence, the jury is making an assessment which is dependent upon judgement.⁶⁸ Accordingly, any recommendation that we make in relation to the burden of proof will be in relation to the qualifying conditions of the defence of duress and not in relation to the objective limb of the defence.

Burden of proof and defences

6.97 A principle of the common law is that the prosecution must prove the guilt of D.⁶⁹ At the very least, this means that the prosecution must prove beyond reasonable doubt that D satisfies all the definitional elements of the offence. In the context of murder, this means that the prosecution must prove that:

- (1) D did an act which caused the death of V; and
- (2) in doing the act, D intended to kill or cause or serious bodily harm to V.

6.98 However, the law recognises that to convict a person of murder in every case where he or she intended to kill or cause serious harm would give rise to injustice. An example is where D kills V in circumstances where D was doing no more than responding to a potentially lethal attack on D by V. If so, D is entitled to plead a defence, namely that he or she was acting in self-defence.

6.99 In cases where D alleges that he or she killed out of self-defence, the common law says that, provided that D discharges an evidential burden, the prosecution must prove beyond reasonable doubt that D, in killing V, was not acting in self-defence. D discharges the evidential burden if there is admissible evidence suggesting the possibility that D was acting in self-defence when he or she killed V.⁷⁰ In the way that it requires the prosecution to disprove self-defence as a defence to murder, the common law treats murder in exactly the same way as it does any other offence.

⁶⁷ *R (O) v Crown Court at Harrow* [2006] UKHL 42, [2006] 3 WLR 195 at [11].

⁶⁸ See *S* [2006] EWCA Crim 756, [2006] 2 Cr App R 23 where the Court of Appeal held that the decision whether or not to stay proceedings on the grounds of abuse of process involved an exercise of judicial assessment dependent upon judgement. The Court said that it was potentially misleading to apply to the exercise of that discretion the language of burden and standard of proof.

⁶⁹ *Woolmington v DPP* [1935] AC 462.

⁷⁰ The evidential burden can be discharged by prosecution evidence. Eg, the prosecution adduce evidence of what D said when interviewed by the police. In the course of the interview, D says that he or she committed the offence as a result of being confronted by potentially lethal violence.

6.100 Further, in the way that it requires the prosecution to disprove self-defence, the common law treats self-defence in the same way that it treats provocation and duress. The underlying principle, namely that the burden of proof is on the prosecution to disprove the defence, applies equally to all three defences. It might be thought, therefore, that were duress to be a full defence to first degree murder, second degree murder and attempted murder, D ought to have to discharge only an evidential burden.

Reasons for departing from the common law principle

THE PROBLEM OF DISPROVING DURESS

6.101 We do not believe that the legal burden of proof should be on the prosecution to disprove duress as a defence to murder, with D only having to discharge an evidential burden, merely because that is the position when provocation and self-defence are raised as partial and full defences to murder respectively.

6.102 There is an important difference between provocation and self-defence, on the one hand, and duress, on the other hand. Lord Bingham reflected this difference when he observed in *Z* that the defence of duress is “peculiarly difficult for the prosecution to investigate and disprove beyond reasonable doubt.”⁷¹ In doing so, Lord Bingham was echoing what we had said in an earlier report.⁷²

No analogy with provocation and self-defence

6.103 As we pointed out in 1993, in many cases of provocation and self-defence:

... the evidence of circumstances founding the defence is part and parcel of the incident during which the offence is committed; and it is therefore reasonable to expect the prosecution who have to prove the offence, also to disprove the existence of circumstances on which the defence might be founded.⁷³

6.104 By contrast, in many cases of duress the offence is committed during a sequence of events that is likely to be separate from those in which the threat was made. This is so even though the law requires the threat made to be in terms that, if the threat is to be averted, a criminal act must be done more or less immediately. By contrast, a provoked reaction or the need to act in self-defence is likely to immediately materialise in response to the conduct of V him or herself. Further, in cases of duress, the person making the threat, D and V are almost always different people. In cases of duress, V may well not be present or even nearby when the threat is made. The separation of the two events in duress cases (the making of the threat and the carrying out of the criminal act) is liable to create extra difficulty for the prosecution to discharge its burden. This is a difficulty over and above the problem – common to both provocation and duress – that D may be the sole source of the evidence that provides the foundation for the defence.

⁷¹ [2005] UKHL 22, [2005] 2 AC 467 at [20].

⁷² Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, para 33.6.

⁷³ Above.

- 6.105 Where the criminal act is part of the same sequence of events which give rise to the evidence founding the defence, as in most cases of provocation and self-defence, there may be independent evidence as to how the offence was committed that can assist the prosecution. For example, there may be evidence that the offence was committed in a highly deliberate or ruthless fashion that undermines a claim that it occurred during a loss of temper or in response to an immediate need to take evasive action. Such evidence cannot in itself undermine a claim of duress because it could be that D was only acting, as he or she claims, in exactly the same way that the person making the threat demanded that he or she should act.
- 6.106 Further, as we now explain, in cases of duress, even if the relevant facts may be verified by sources other than D, those sources may be difficult to access in a way that is not realistically true in cases of provocation and self-defence.

Duress emanating from or relating to acts outside the jurisdiction

- 6.107 The dual problems of difficulty in disproving the defence and the relative ease with which it can be concocted are particularly acute in two contexts (which may overlap). First there are cases where D claims that the duress emanated from outside the jurisdiction. In fact, such cases reveal a wider problem. At common law, duress developed at a time when it was quite exceptional for the duress to emanate from abroad. That being so, it was entirely reasonable that D could not successfully plead the defence if he or she could have invoked the assistance of the state's agents to effectively protect him or her from the threat of death or serious harm. However, this means of controlling the operation of the defence starts to break down if the source of the duress is a foreign state or the agents of that state. It also comes under strain if the threat, although coming from within the jurisdiction, consists of, for example, a threat to kill D's wife and children who are resident overseas in a country in which the government is powerless to protect them. As a result, the potential scope of the duress defence is widened and it is widened in circumstances that make it very difficult for the prosecution to adduce evidence to disprove false claims.
- 6.108 It is right to acknowledge, however, that in such cases D may encounter similar difficulties in obtaining evidence to support what is an authentic claim of duress. However, in the context of an evidential gap, there are two factors that might make it easier for D to discharge the burden of proof compared to the prosecution. First, if a legal burden were to be imposed on D, he or she would only be required to prove duress on the balance of probabilities. In contrast, the prosecution is required to disprove duress beyond reasonable doubt. Secondly, D is in a position to provide his or her own testimony as evidence. In contrast, the prosecution cannot compel D to provide evidence, subject to D first discharging the evidential burden required to raise duress. It would not always be necessary for D to testify in order to discharge the evidential burden, so long as the matter had been raised at interview.

Collaboration between criminals

- 6.109 The second context in which the prosecution may encounter particular difficulties in disproving duress, and where there are likely to be false claims of duress, are cases where both the person making the threat and the perpetrator of the crime are themselves loosely associated through criminal activity. In an earlier report we said that, "... members of a criminal gang might well be capable, not only individually, but in collusion, of concocting a false defence of duress."⁷⁴ The current law, of course, denies the defence of duress to gang members who make threats against one another.⁷⁵ Nevertheless, there remains a risk that D could succeed in a false claim of duress in many cases where the prosecution will be unable to prove D's voluntary membership of or association with a criminal organisation. An example would be where a former prisoner is paid by former fellow inmates to agree that he will say that he threatened them into perpetrating criminal acts.

DISTINGUISHING MURDER AND ATTEMPTED MURDER FROM OTHER OFFENCES

- 6.110 It is not within our remit to consider whether D should bear the burden of disproving duress as a defence to offences other than first degree murder, second degree murder and attempted murder. We are conscious that recommending that D should bear the burden of proving duress as a defence to first degree murder, second degree murder and attempted murder, will result in different burdens depending on the offence to which duress was being pleaded as a defence.
- 6.111 We acknowledge that the fact that first degree murder, second degree murder and attempted murder involve a uniquely serious actual or intended harm does not, in itself, justify a reverse burden of proof. We are, after all, not recommending that D should bear the burden of proving provocation. Rather, we believe that a combination of factors justifies the imposition of a reverse burden of proof. These are the difficulty of disproving duress, the relative ease with which the defence can be concocted, the uniquely serious nature of murder and attempted murder and the duties imposed by Article 2 of the European Convention on Human Rights and Fundamental Freedoms ("the ECHR").

Article 2 of the ECHR

- 6.112 It is important to stress that that our recommendation is that duress should be a full and not a partial defence to first degree murder, second degree murder and attempted murder. Article 2 of the ECHR provides that no one shall be deprived of his or her life intentionally save in the execution of a sentence of a court following conviction of a crime for which the penalty of loss of life is provided by

⁷⁴ Above, at para 33.12.

⁷⁵ Z [2005] UKHL 22, [2005] 2 AC 467.

law. Article 2 requires not only that the state must refrain from taking life intentionally but also that appropriate steps are taken by the state to safeguard life. Where a defence, such as provocation, only has the effect of reducing murder to a lesser homicide offence, it may be argued that the state has taken appropriate steps to safeguard the life of V because D can be convicted of that lesser offence. Where a defence leads to a complete acquittal, it is the conditions in which the defence can be pleaded successfully that may have to be structured so as to satisfy the 'appropriate steps' requirement.

6.113 Under our recommendations, in cases where D pleads duress as a defence to first degree murder, it would be admitted that he or she had unjustifiably killed an innocent person and that he or she had done so with the requisite fault element. The requisite fault element includes an intention to kill. If the burden were to be placed on the prosecution to disprove a claim that the killing took place excusably under duress, that explicitly countenances situations in which D must be acquitted in the following instance:

- (1) D admits unjustifiably and intentionally killing;
- (2) D is lying about the alleged duress;
- (3) the jury suspects that D is lying;
- (4) but the jury cannot be sure that D is lying.

The obligation under Article 2 is to provide effective measures to ensure that the substance of Article 2 is secured.⁷⁶ If those charged with murder on the basis of having unjustifiably and intentionally killed can plead duress secure in the knowledge that the prosecution are unlikely to be able to disprove the defence, then it becomes questionable whether the state is effectively discharging its obligation under Article 2.⁷⁷

6.114 What is more, appropriate steps must be taken to safeguard life in relation to the permitted scope of all homicide offences that involve a high degree of threat to life. This means that the situation described in paragraph 6.113 must be avoided as much in cases of second degree murder and attempted murder as in cases of first degree murder.

⁷⁶ *Z v UK* (2002) 34 EHRR 3 at [73].

⁷⁷ It is also true that D may kill intentionally when acting in self-defence and yet he or she bears only an evidential burden in relation to that defence, in spite of the fact that a successful plea also leads to a complete acquittal. However, cases of self-defence are different, even though there may be just as much of a risk that D is lying. The right to kill in self defence is itself protected by Article 2(2). That explains our reference to the need for an intentional killing to be *unjustified* if it is to raise the Article 2 point.

CONCLUSION

- 6.115 Accordingly, subject to it being compatible with Article 6(2) of the ECHR, we recommend that a person charged with first degree murder, second degree murder and attempted murder should bear the legal burden of proving the qualifying conditions of the defence on a balance of probabilities. In doing so, we are confirming the recommendation that the Commission made in 1993.⁷⁸

Compatibility with Article 6(2) of the ECHR⁷⁹

- 6.116 Both the European Court of Human Rights in Strasbourg (“the Strasbourg Court”) and the House of Lords have considered the question of the compatibility of reverse burdens of proof with article 6(2) ECHR. The approach of the Strasbourg Court is to consider whether the individual applicant, on the particular facts, has been the victim of a breach of article 6(2). In contrast, the House of Lords asks whether a particular legislative provision is incompatible with article 6(2). However, general principles relevant to the interpretation of article 6(2) may be drawn from the jurisprudence of both courts.

THE STRASBOURG JURISPRUDENCE

- 6.117 The leading case on article 6(2) is *Salabiaku v France*.⁸⁰ According to Lord Bingham,⁸¹ the general principles which may be drawn from the Strasbourg jurisprudence are as follows:

- (1) It is open to states to define the constituent elements of a criminal offence.
- (2) The ECHR does not prohibit the operation of presumptions of fact or law as a matter of general principle.
- (3) However, article 6(2) does not regard presumptions of fact or law with indifference. Rather, “[i]t requires states to confine them within reasonable limits which take account of the importance of what is at stake and maintain the rights of the defence.”⁸²
- (4) The substance and effect of any presumption adverse to a defendant must be examined and found to be reasonable.

⁷⁸ Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, at para 33.16.

⁷⁹ Article 6(2) ECHR reads:
Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

⁸⁰ (1991) 13 EHRR 379.

⁸¹ *Sheldrake* [2004] UKHL 43, [2005] 1 AC 264 at [12] and [21].

⁸² *Salabiaku v France* (1991) 13 EHRR 379 at [28].

THE HOUSE OF LORDS' CASES

6.118 The leading House of Lords cases are *R v DPP, ex parte Kebilene*,⁸³ *Lambert*,⁸⁴ *Johnstone*⁸⁵ and *DPP v Sheldrake; Attorney-General's Reference (No 4 of 2002)* ("*Sheldrake*").⁸⁶ When considering whether a reverse legal burden is compatible with article 6(2), their Lordships have found that, in concert with the principles laid down in the Strasbourg Court, the presumption of innocence may be qualified provided that two conditions have been fulfilled. The first condition is that the reverse burden must be imposed in pursuance of a legitimate aim. The second is that it must be proportionate to the achievement of that aim.⁸⁷ Therefore, in deciding whether the reverse burden is compatible with article 6(2), the following three stage test should be applied:

- (1) Is there an interference with the right contained in article 6(2)?
- (2) Does the interference have a legitimate aim?
- (3) Is the effect of the provision proportionate to the legitimate aim?

6.119 The domestic courts have rejected adopting a blanket rule as to how these criteria apply to reverse onuses. Instead the validity of a reverse onus is to be determined on an examination of all the facts and circumstances of the case.⁸⁸ If the reverse legal burden is found to be incompatible with article 6(2), the House of Lords will enquire whether it can 'read down' the burden to an evidential one, in accordance with section 3 of the Human Rights Act 1998.⁸⁹

IS THERE AN INTERFERENCE?

6.120 On one view, there can be no interference with the presumption of innocence provided the reverse burden of proof applies only to a defence as distinct from the constituent elements of the offence itself. If nothing in the definition of the offence infringes article 6(2), then a defence that serves only to improve D's situation cannot be regarded as a violation of article 6(2). This was the position adopted by the minority in *Sheldrake*.⁹⁰

⁸³ [2000] 2 AC 326.

⁸⁴ [2001] UKHL 37, [2002] 2 AC 545.

⁸⁵ [2003] UKHL 28, [2003] 1 WLR 1736.

⁸⁶ [2004] UKHL 43, [2005] 1 AC 264.

⁸⁷ I Dennis, "Reverse Onuses and the Presumption of Innocence: in Search of Principle" (2005) *Criminal Law Review* 901, 902.

⁸⁸ *Lambert* [2001] UKHL 37, [2002] 2 AC 545 at [34]; *Sheldrake* [2004] UKHL 43, [2005] 1 AC 264 at [21].

⁸⁹ The Human Rights Act 1998, s 3, reads:

- (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

⁹⁰ Lord Rodger and Lord Carswell.

6.121 However, the majority in *Sheldrake* rejected the above reasoning, finding that there could be an interference with the presumption of innocence in these circumstances. The same view had been taken by the majority of their Lordships in the earlier cases of *Lambert* and *Johnstone*. In *Johnstone*, Lord Nicholls stated:

... if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused....⁹¹

6.122 In light of the above authorities, a court examining a reverse burden of proof for duress in cases of first degree murder, second degree murder and attempted murder cases may well conclude that there was an interference with the presumption of innocence. However, we do not regard this as a foregone conclusion. In our view, the presumption of innocence is much more plausibly found to exist in relation to a fully justificatory defence than in relation to an excusatory defence. Although in some cases of duress the circumstances come close to being justifications for killing, they cannot justify intentionally killing in the way that, for example, acting necessarily and proportionately in self-defence does.

IS THERE A LEGITIMATE AIM?

6.123 It is likely that the House of Lords would accept that avoiding the dangers of false claims of duress in relation to the murder or attempted murder of an innocent person was a legitimate legislative aim. Such claims may be difficult to disprove. There would be a clear public interest in ensuring that those who commit first degree murder, second degree murder and attempted murder should not go unpunished. Further, there is a legitimate aim in ensuring that the state complies with its obligations under Article 2 of the ECHR.⁹²

IS THE INTERFERENCE PROPORTIONATE?

6.124 Proportionality is the issue on which the reverse burden of proof cases have turned. In applying the proportionality test, the question is always one of balance between the magnitude of the problem and the magnitude of the interference. In *Johnstone*,⁹³ Lord Nicholls said:

⁹¹ [2003] UKHL 28, [2003] 1 WLR 1736, 1750 by Lord Nicholls.

⁹² See paras 6.112 to 6.115 above.

⁹³ [2003] UKHL 28, [2003] 1 WLR 1736.

The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.⁹⁴

We now consider the relevant factors that Lord Nicholls referred to.

The seriousness of the offence and the severity of the penalty

- 6.125 Undoubtedly, the courts have placed a considerable emphasis on the seriousness of the offence and the severity of the penalty. The more serious the offence for which D stands to be convicted, the more important it is that the burden of proof falls on the prosecution.
- 6.126 However, the way in which the courts have approached the partial defences to murder of diminished responsibility and killing pursuant to a suicide pact demonstrates that a reverse burden of proof can be compatible with Article 6(2) of the ECHR, even though the offence in question is the most serious of all criminal offences. When it enacted the Homicide Act 1957, Parliament created two new partial defences to murder, namely diminished responsibility and killing pursuant to a suicide pact. In each case, Parliament chose to place the burden of proving the defence on D.⁹⁵ The Court of Appeal, despite the unique stigma attached to a conviction for murder and the mandatory sentence of life imprisonment, has upheld the reverse burden of proof in relation to both partial defences.⁹⁶ For suicide pacts the Court of Appeal stated that:

... Parliament was only prepared to reduce the offence of murder to manslaughter if the survivor proved the existence of such a pact. In doing so, no doubt it had in mind the fact that in many cases the only evidence of such a pact would emanate from the survivor. As Douglas Brown J pointed out in his ruling, not only will the facts necessary to establish the defence lie within the defendant's knowledge but also the reverse legal burden provides protection for society from murder disguised as a suicide pact killing.⁹⁷

⁹⁴ Above, at [50].

⁹⁵ Homicide Act 1957, s 2(2) in relation to diminished responsibility and s 4(2) in relation to killing pursuant to a suicide pact.

⁹⁶ *Lambert* [2002] QB 1112; *Attorney-General's Reference (No 1 of 2004)* [2004] EWCA Crim 1025, [2004] 1 WLR 2111.

⁹⁷ [2004] EWCA Crim 1025, [2004] 1 WLR 2111 at [130] to [132]. The Court of Appeal's judgment was subject to some adverse comment by Lord Bingham in *Sheldrake* [2004] UKHL 43, [2005] 1 AC 264 at [29] to [32]. However, Lord Bingham did not explicitly overrule the Court of Appeal on the issue of suicide pacts as it did not arise on the facts of *Sheldrake*.

6.127 On one view, diminished responsibility is a special case because the defence is dependent upon the provision of expert psychiatric evidence. Such evidence cannot be obtained without the consent of D. If the prosecution had the burden of proving the defence, there would be insuperable problems if D refused to be medically examined.

6.128 However, the same cannot be said of the other partial defence where the burden of proof is on D, namely killing pursuant to suicide pact. We believe that it is more helpful to consider what it is that unites diminished responsibility and killing pursuant to a suicide pact. In doing so, we consider the next factor highlighted by Lord Nicholls in *Johnstone*.

The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution

6.129 The feature that diminished responsibility and killing pursuant to a suicide pact share is that they are defences that come into play only if the prosecution have proved the definitional elements of murder. More importantly, if the definitional elements themselves are satisfied, they reveal conduct on the part of D that amounts to the commission of the most serious of all wrongs. It will have been proved that D *intended* to kill or cause serious harm. This is in stark contrast to the conduct that was made criminal by section 11(1) of the Terrorism Act 2000 which was considered by the House of Lords in *Sheldrake*.⁹⁸ As Lord Bingham pointed out, a person who was innocent of any blameworthy conduct could fall within the terms of section 11(1).

6.130 In this respect, if duress was a defence to first degree murder, second degree murder and attempted murder, it would be no different than diminished responsibility and killing pursuant to a suicide pact. The definitional elements of the offence would have been proved and, like the partial defences, duress would not negate the definitional elements of these offences.

The extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him or her as matters within his or her own knowledge or to which he or she has ready access

6.131 If the burden of proof were on D, D would have to prove the qualifying conditions of the defence. The qualifying conditions are all matters that are within his or her own knowledge. Importantly, they are very different from the matters that D has to prove if charged with an offence under section 11(1) of the Terrorism Act 2000. Section 11(2) provides that it is a defence for D to prove that:

- (1) the organisation was not proscribed on the last (or only) occasion on which he or she became a member or began to profess to be a member; and
- (2) he or she had not taken any part in the activities of the organisation at any time while it was proscribed.

⁹⁸ Subject to the defence contained in s 11(2), s 11(1) makes it an offence to belong or profess to belong to a proscribed organisation.

6.132 In *Sheldrake*, Lord Bingham said that it might be impossible for D to prove that he or she had not taken part in any activities of the organisation while it was proscribed:

Terrorist organisations do not generate minutes, records or documents on which [the defendant] could rely. Other members would for obvious reasons be unlikely to come forward and testify on his behalf. If the defendant's involvement had been abroad, any evidence might also be abroad and hard to adduce. While the defendant himself could assert that he had been inactive, his evidence might well be discounted as unreliable.⁹⁹

6.133 However, Lord Bingham's observations have to be seen in context. The offence in question criminalised conduct that was not necessarily blameworthy. Further, if the legal burden of proof was on D, it would have involved D proving two negatives. By contrast, establishing duress would not be entirely dependent on D proving a series of negatives.

6.134 In *Makuwa*¹⁰⁰ the Court of Appeal recently considered whether the statutory defence granted by section 31 of the Immigration and Asylum Act 1999 placed a legal burden on D of proving the matters to which it referred and further, whether the resulting infringement of article 6(2) was justifiable as a proportionate way of achieving the legitimate objective of maintaining proper immigration controls by restricting the use of forged passports. It was held, relying on *Embaye*¹⁰¹ (a case concerning section 2 of the Asylum and Immigration Act 2004) that a legal burden was proportionate as D alone is likely to have all of the relevant information:

In almost all cases it would be very difficult, if not impossible, for the Crown to prove that the defendant's life or freedom had not been threatened in the country from which he had come; in most cases it would be difficult, if not impossible, for the Crown to prove that he had not presented himself to the authorities in the United Kingdom without delay; in many cases it would be difficult to show that he had not shown good cause for his illegal entry or presence or that he had not made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom. If the burden of the defendant were no more than to adduce sufficient evidence to raise an issue in relation to matters of that kind, the statutory provisions to which s.31 relates would be rendered largely ineffective in the case of all those who came to this country claiming a right to asylum here.¹⁰²

6.135 Some would argue that it is no easier for D who has acted in consequence of duress committed abroad to bear the burden than it is for the prosecution to do so. In connection with this point, the Court of Appeal have recently stated:

⁹⁹ [2004] UKHL 43, [2005] 1 AC 264 at [51].

¹⁰⁰ [2006] EWCA Crim 175, [2006] 2 Cr App R 11.

¹⁰¹ [2005] EWCA Crim 2865.

¹⁰² *Makuwa* [2006] EWCA Crim 175, [2006] 2 Cr App R 11 at [36] by Moore-Bick LJ.

[W]e recognise that a defendant may be traumatised and unable to produce documents or witnesses to support his factual claims, but the jury can be trusted to make allowances for those difficulties.”¹⁰³

The question is whether the possibility that individual cases may arise in which it is as difficult for D as for the prosecution to provide evidence about duress, should affect the choice of a general rule. We have concluded that it should not. As we have already pointed out, it must be kept in mind that if the prosecution bears the burden of proof, they must disprove duress beyond reasonable doubt, whereas if D bears the burden of proving duress, it is only on the balance of probabilities.

CONCLUSION

- 6.136 We believe that imposing a legal burden on D to prove duress on a balance of probabilities would be compatible with Article 6(2) of the ECHR. As one of our consultees, a leading QC at the criminal bar, observed:

If however a statute were enacted which placed a burden of proof on the defendant to establish on the balance of probabilities that he acted under duress, I would not expect the courts to hold that such a provision was incompatible with article 6(2) of the ECHR. It could not be described as an intrinsic part of the offence (as is indeed exemplified by the fact that it does not currently constitute a defence at all) and it is a matter on which the defendant is well placed to provide evidence.

- 6.137 The American Supreme Court by a seven to two majority has recently held that the burden of proof may be placed on the accused in duress cases.¹⁰⁴ Justice Kennedy said:

The claim of duress in most instances depends upon conduct that takes place before the criminal act; and, as the person who allegedly coerced the defendant is often unwilling to come forward and testify, the prosecution may be without practical means of disproving the defendant’s allegations. There is good reason, then to maintain the usual rule of placing the burden of production [ie evidential burden] and persuasion together on the party raising the issue.¹⁰⁵

- 6.138 Even though he dissented, Justice Breyer conceded that “there is a practical argument that favours the Government’s position here, namely that defendants should bear the burden of persuasion here because defendants often have superior access to the relevant proof.”¹⁰⁶

¹⁰³ *Embaye* [2005] EWCA Crim 2865 at [29].

¹⁰⁴ *Dixon v US* (2005) 413F 3rd 520.

¹⁰⁵ Above, 2 to 3.

¹⁰⁶ Above, 4. Justice Breyer goes on to contrast (as we have contrasted) the position in duress cases with the position in provocation cases. In provocation cases he says that proving an absence of passion in murder, “imposes no unique hardship on the prosecution”, citing *Mullaney v Wilbur* 421 US 702.

6.139 We note that in French law the burden of proving any general defence, including duress, is traditionally regarded as falling on the defendant.¹⁰⁷

Burden of proof to be consistent between first degree murder and second degree murder

6.140 As we stated at paragraph 6.90, in the further consultation that we undertook, we asked whether the burden of proof should be the same for first degree murder and second degree murder. All consultees were of the view that the burden of proof should be the same for first degree murder and second degree murder.

6.141 **We recommend that on a charge of first degree murder, second degree murder and attempted murder, the defendant should bear the legal burden of proving the qualifying conditions of the defence of duress on a balance of probabilities.**

Children and young persons

6.142 There was not a great deal of support among consultees for a special defence or an alternative verdict to be available to children and young persons pleading duress (such as a full defence to murder). However, a number of consultees noted that youth would be a relevant factor when determining how a reasonable person might have responded to the threats.¹⁰⁸ Further, youth could be taken into account in sentencing.¹⁰⁹ One consultee also noted that the exercise of discretion on the part of the prosecuting authorities could ensure that in appropriate cases, children and young persons were not prosecuted.¹¹⁰

6.143 On balance, we do not consider that children and young persons who plead duress should have a special defence or verdict. We agree that any leniency that should be shown to children or young persons due to their greater vulnerability to pressure can be accounted for by the test for duress itself (which includes age as a relevant characteristic) and in sentencing.

Complicity

6.144 Our specific recommendations on the application of the defence of duress to secondary parties to murder are contained in Part 4.¹¹¹

¹⁰⁷ Jean Pradel, *Manuel de procédure pénale*, (10th ed, 2000), §380

¹⁰⁸ The Criminal Bar Association, the Law Society, Mr Graham Virgo and Justice.

¹⁰⁹ Wilkie J, the Crown Prosecution Service, the Society of Labour Lawyers, Mr Samuels and Nicola Padfield.

¹¹⁰ Society of Labour Lawyers.

¹¹¹ See paras 4.37 to 4.41.

PART 7

'MERCY' AND CONSENSUAL KILLINGS

INTRODUCTION

- 7.1 In Part 1, we said that the issue of 'mercy' killing falls within the scope of our terms of reference only in so far as it relates to the grounds for reducing a more serious to a less serious homicide offence. We have considered it carefully in that context both in the CP and during the consultation process.
- 7.2 However, we have decided that a recommendation for a specific partial defence of 'mercy' killing should await a further and more detailed consultation exercise specifically concentrating on the issue. We quite simply did not have the time that we would have needed to conduct a full consultation on such an important issue. However, the issue is of such importance and topical interest that we thought that we should devote a Part of our report to it. Further, we are recommending that there should be a full consultation on the issue.
- 7.3 'Mercy' killings pose a particular problem. Although they are intentional killings, and thus in principle fall in the top tier of the law of homicide, they commonly share a distinctive quality. A 'mercy' killing involves an intention to prevent the continuation of one kind of harm (extreme pain and suffering) to a person by doing another kind of harm (killing) to the very same person. One consultee observed that, "The mental element is deeply ambiguous, and not wholly aligned with the act performed – a highly anomalous situation for the law to take account of". Lord Justice Buxton commented that:

The difficult paradox thus arises that a category of killing marked off in analytical terms as the most serious, and attracting the most serious penalty, will be... inhabited by killers who in moral terms attract the most sympathy.

All 'mercy' killings are unlawful homicides

- 7.4 The law of England and Wales does not recognise either a tailor-made offence of 'mercy' killing or a tailor-made defence, full or partial, of 'mercy' killing. Unless able to avail him or herself of either the partial defence of diminished responsibility or the partial defence of killing pursuant to a suicide pact, if the defendant ("D") intentionally kills the victim ("V") in the genuine belief that it is in V's best interests to die, D is guilty of murder.¹ This is so even if V wished to die and consented to being killed.
- 7.5 D is entitled to be convicted of manslaughter rather than murder if D proves that:

¹ If D *assists or encourages* V to commit suicide, D commits the offence of aiding, abetting, counselling or procuring suicide contrary to the Suicide Act 1961, s 2. The offence is punishable by a maximum term of imprisonment of 14 years.

- (1) he or she was suffering from diminished responsibility at the time of killing V;²
- (2) he or she was a party to an agreement with V which had as its object the death of both of them, irrespective of whether each was to take their own life, and it was D's intention, when entering into the agreement, to die pursuant to the agreement.³

7.6 The current law does not recognise the 'best interests of the victim' as a justification or excuse for killing. What it does, instead, is to acknowledge, to a very limited extent, that the consent of V can be relevant in the context of suicide pacts. However, the consent of V does not operate to *justify* the actions of the survivor of the suicide pact. Rather, combined with the fact that the survivor intended to kill him or herself as part of a pact, V's consent partially excuses the actions of the survivor.

7.7 Under the current law, the compassionate motives of the 'mercy' killer are in themselves never capable of providing a basis for a partial excuse. Some would say that this is unfortunate. On this view, the law affords more recognition to other less, or at least no more, understandable emotions such as anger (provocation) and fear (self-defence). Others would say that recognising a partial excuse of acting out of compassion would be dangerous. Just as a defence of necessity "can very easily become simply a mask for anarchy",⁴ so the concept of 'compassion' - vague in itself - could very easily become a cover for selfish or ignoble reasons for killing, not least because people often act out of mixed motives.

A mitigating factor for the purposes of fixing the minimum term of the life sentence for murder

7.8 The penalty for murder is a mandatory sentence of life imprisonment. The sentence comprises three components, the first of which is the 'minimum term' that the convicted person must serve before he or she can be considered for release on licence. Once the trial judge has identified the starting point of the minimum term, he or she must adjust it upwards or downwards to reflect the aggravating and mitigating features of the murder. In order to assist judges, Parliament has specified a number of factors that may aggravate or mitigate a particular murder.⁵ One of the mitigating factors is a belief by D that the murder was an act of mercy.⁶ Whether D did believe that the murder was an act of mercy is a matter for the trial judge, not the jury, to determine.

² Homicide Act 1957, s 2. D must prove that at the time of the killing, he or she was suffering from an abnormality of mind such as to substantially impair his or her mental responsibility for the killing. Whether or not V consented to being killed is irrelevant as is whether it was in the best interests of V to be killed. The focus is on D not V.

³ Homicide Act 1957, s 4.

⁴ *Southwark London Borough v Williams* [1971] Ch 734, 746, by Lord Justice Edmund Davies.

⁵ Criminal Justice Act 2003, s 269 and sch 21.

⁶ Criminal Justice Act 2003, sch 21, para 11(f).

PREVIOUS RECOMMENDATIONS FOR REFORM

The Criminal Law Revision Committee

7.9 In 1976, the Criminal Law Revision Committee (“the CLRC”) put forward for consideration a new offence of ‘mercy’ killing.⁷ The offence would have been punishable by a maximum term of imprisonment of two years. It would have required that D believed V to be:

- (1) permanently subject to great bodily pain or suffering;
- (2) permanently helpless from bodily or mental incapacity; or
- (3) subject to rapid and incurable bodily or mental degeneration.

A further requirement would have been that D killed ‘from compassion’. The offence, therefore, combined a ‘quality of life’ justification with an excusatory factor (acting out of compassion). However, the offence made no reference to V’s state of mind and, in particular, there was no requirement that V had to have consented to being killed or, at least, had not expressed dissent.

7.10 Following critical comment, the CLRC in its final report declined to recommend the creation of such an offence:

It was said that our suggestion would not prevent suffering but would cause suffering, since the weak and the handicapped would receive less effective protection from the law than the fit and well because the basis of the suggested new offence would rest upon the defendant’s evaluation of the condition of the victim. That evaluation might be made in ignorance of what medicine could do for the sufferer. We were reminded, too, of the difficulties of definition.⁸

It is clear that the CLRC was influenced by the criticism that its suggested offence of ‘mercy’ killing took no account of whether V wished to be killed.

The Select Committee of the House of Lords

7.11 In 1989 the Select Committee of the House of Lords (“the Nathan Committee”) published a report in which it considered the issue of ‘mercy’ killing.⁹ The Nathan Committee thought that abolition of the mandatory life sentence would adequately cater for such cases.¹⁰ Implicitly, the Nathan Committee may have been saying that it is right to label cases of ‘mercy’ killing as murder.

⁷ Working Paper on Offences against the Person (1976) paras 79 to 87.

⁸ Offences Against the Person (1980) Report 14, para 115.

⁹ Select Committee of the House of Lords, Report of the Select Committee on Murder and Life Imprisonment: vol 1 (1989).

¹⁰ Above, para 100.

PUBLIC ATTITUDES TO 'MERCY' KILLINGS

Research by Professor Barry Mitchell¹¹

The 2003 survey

- 7.12 In recent years Professor Barry Mitchell has conducted a number of surveys of public opinion in relation to unlawful homicides. In 2003 Professor Mitchell was commissioned to undertake research in connection with the Law Commission's project on Partial Defences to Murder.¹² He conducted a total of 62 interviews with members of the public in which he invited them to comment on 10 scenarios. Specifically, he asked interviewees to grade the scenarios in terms of their seriousness. One of the scenarios was entitled 'The Mercy Killing' in which a man had nursed his terminally-ill wife for several years. Eventually, he gives in to her regular requests that he should 'put her out of it' and he smothers her with a pillow.¹³
- 7.13 Interviewees generally regarded this scenario as the least serious. 58 of the 62 interviewees placed it in the three least serious scenarios, with 47 interviewees treating it as the least serious. 35 interviewees thought that the husband should not be prosecuted. Only 14 interviewees favoured a sentence of imprisonment and, of those, 11 thought that the term should be measured in single figures.
- 7.14 No less than 41 interviewees identified the wife's request to die as an important factor and, of those, 26 thought that there should be no prosecution. On the other hand, nine of the 35 interviewees who advocated no prosecution did not treat the request to die as significant and their views would have been the same even if the wife had not requested to be killed. 24 interviewees mentioned the husband's good motive as a significant consideration and 13 referred to the wife's poor quality of life. Three interviewees were concerned that the law would be open to abuse if there was to be no prosecution in the case of a 'mercy' killing.
- 7.15 Interviewees also said that they would be even more sympathetic to the husband if he had become mentally ill, for example clinically depressed.

The 2005 survey

- 7.16 In 2005 Professor Mitchell conducted a further survey.¹⁴ The survey was conducted by convening five groups of people with each group meeting on two separate occasions separated by a period of one week. In total, 56 people attended both meetings. The first meetings concentrated on discussing different kinds of homicides with a view to identifying variations in the seriousness of homicides. Discussions in the second meetings focused on the sentencing of convicted killers.

¹¹ Professor of Criminal Law and Criminal Justice, Coventry University.

¹² Professor Mitchell's conclusions were published as Appendix C (Brief Empirical Survey of Public Opinion relating to Partial Defences to Murder) to our report Partial Defences to Murder (2004) Law Com No 290.

¹³ See Appendix C paras 53 to 58.

¹⁴ The results of this survey comprise Appendix A (Report on Public Survey of Murder and Mandatory Sentencing in Criminal Homicides) to our consultation paper A New Homicide Act for England and Wales? (2005) Consultation Paper No 177.

7.17 In his report, Professor Mitchell devoted a section to what he termed “the perennial problem of mercy killing”. He said this:

It was invariably accepted that provided there is clear evidence of the victim’s wish to die, such cases are amongst the least serious of homicides. Where there is no such evidence, opinions were less clear, and that meant that where the victim is unable to indicate a desire to die participants found it more difficult to express a view on the gravity of the killing, even assuming the killer was motivated solely by compassion. In general, they thought that the homicide would be more serious, though not necessarily amongst the most serious. Participants said it would obviously be vital to know whether the case was a “genuine mercy killing” – had the victim truly and freely wanted to die, and was the killer’s motive a “good” one? It was this that concentrated participants’ minds most of all. Virtually all suggested that there ought to be some form of official inquiry into what had happened, and that a formal prosecution or police investigation might serve this purpose. Where the case was one of “genuine mercy killing”, the most punitive suggestion was for a short period of imprisonment, and many participants felt that a community-based disposal, with the emphasis on counselling for the killer, would be appropriate.¹⁵

OUR TERMS OF REFERENCE AND THE SCOPE OF OUR CONSULTATION

7.18 Our terms of reference said that:

The review will only consider the areas of euthanasia and suicide inasmuch as they form part of the law of murder, not the more fundamental issues involved which would need separate debate.¹⁶

In the CP, we said that we would not be addressing issues which were “too close to one falling outside the scope of the review”.¹⁷ We added that we would not be considering justifications for killing.¹⁸ In the CP, we stated:

In theory, consideration of whether the simple fact that a killing was consensual, or was a ‘mercy’ killing, or both, should reduce what would otherwise be murder to a lesser offence is within our terms of reference. However, that has not persuaded us to address these issues in that simple form. Largely the same extensive range of issues that crop up in any attempt to address the question whether killing with consent or ‘mercy’ killing should be legalised, also crops up when the question is whether these factors should by themselves reduce “first degree murder” to a lesser offence.¹⁹

¹⁵ Appendix A, para A.13.

¹⁶ See para 1.1(3) above.

¹⁷ Para 1.2.

¹⁸ Para 1.3.

¹⁹ Para 8.4.

Accordingly, in the CP, we did not ask consultees whether they thought there should be either a specific offence of 'mercy' killing or a partial defence of 'mercy' killing.

THE WIDER CONTEXT

7.19 Concurrently with our review of the law of homicide, there has been an on-going debate in Parliament as to whether a doctor should in certain circumstances be allowed to prescribe medication which a patient could take to end his or her own life. The Bill that engendered this debate was Lord Joffe's Assisted Dying for the Terminally Ill Bill.²⁰ The Bill was originally introduced in November 2004 and was re-introduced in November 2005. The Bill, if enacted, would allow a doctor to lawfully assist²¹ V to commit suicide provided V:

- (1) was at least 18 years of age;
- (2) was intellectually capable;
- (3) was terminally ill in the sense of having less than six months to live;
- (4) was suffering unbearably; and
- (5) provided a signed request to his or her doctor.

Although the Bill received its second reading, an amendment was passed in the House of Lords in May 2006 to delay the Bill by six months.²²

OUR PROVISIONAL PROPOSALS

7.20 Taking account of empirical research, in the CP we suggested that the cases most deserving of mitigation are killings in which long-term family carers have become progressively more depressed and mentally ill, usually because of the increasing burden of care as they become older. In addition, we pointed out that suicide pacts and consensual killings usually involve male carers killing their spouses and that this raised important gender issues.²³

²⁰ The Bill did not seek to legalise voluntary euthanasia in the sense of making it lawful for a physician to kill a consenting patient. Rather, it would in certain circumstances prevent doctors being prosecuted for aiding, abetting counselling or procuring suicide contrary to the Suicide Act 1961, s 2.

²¹ Under the Bill, it would remain murder if the doctor administers the medication. Further, under the Bill relatives and friends of V acquire no protection.

²² Lord Joffe has pledged to re-introduce the Bill. In addition, on 29 June 2006, 65% of doctors at the annual conference of the British Medical Association voted against making it lawful to assist the terminally ill to die.

²³ See paras 8.68 to 8.83.

- 7.21 Accordingly, we provisionally proposed that the definition of diminished responsibility should be expanded, partly to accommodate more easily than it does at present cases of severely depressed carers who kill. D would have to prove that an abnormality of mental functioning (arising from an underlying condition) played a significant part in the killing by interfering with the D's capacity for rational judgement. By limiting the defence in this way, we were anxious that the defence should not benefit men whose killing of their spouses or partners with the consent of the latter was really nothing more than a reflection of their violent and controlling, but not clinically abnormal, personalities. A successful plea of diminished responsibility would result in a conviction of second degree murder.
- 7.22 In the CP we also provisionally proposed that section 4 of the Homicide Act 1957 (killing pursuant to a suicide pact) should be repealed. We did so because we thought that it is an unsatisfactory partial defence in that it is incapable of affording a partial defence in some deserving cases and capable of providing a defence in some undeserving cases.
- 7.23 In addition, we invited views as to whether it ought to be possible on a charge of murder or manslaughter for a jury to convict D of complicity in suicide if D kills V as part and parcel of a course of conduct that was designed to end in the deaths of both D and V.

RESPONSES TO OUR PROVISIONAL PROPOSALS

- 7.24 A number of consultees believe that we have been far too cautious in not proposing either a tailor-made offence of 'mercy' killing or a tailor-made partial defence of 'mercy' killing.²⁴ In making this criticism, some of these consultees have linked it with a further criticism, namely that our reformulated partial defence of diminished responsibility would not capture all worthy cases of 'mercy' killing.
- 7.25 The criticism levelled at our reformulated definition of diminished responsibility was two-fold. First, it would not cater for rational 'mercy' killers, including professional or semi-professional carers. Secondly, it would not capture many cases of depressed carers.

CONCLUSIONS

A partial defence of 'mercy' killing

- 7.26 Despite criticism from some consultees, we remain of the view that 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 euthanasia should be legalised.
- 7.27 Some consultees who have criticised us for not putting forward a tailor-made offence or partial defence appear to have overlooked the fact that in the CP we said that we would not be considering justifications for killing. Each proposal that we have received setting out a tailor-made offence or partial defence is based wholly or partly on justifications for 'mercy' killing.

²⁴ We received different suggestions both as to what form a partial defence of 'mercy' killing should take and what should be its effect.

- 7.28 Consequently, we do not agree with the criticism that, by declining to consider a tailor made offence or partial defence of ‘mercy’ killing, we have conflated issues relevant to a complete justificatory defence of euthanasia, with in some sense separate issues relevant to a partial defence of ‘mercy’ killing. The fact is that any tailor-made offence or defence that focuses on the plight of V (‘quality of life’ justification) and V’s consent (‘autonomy justification’) raises issues of justification that were beyond the scope of our review to address adequately with the time and resources available to us.
- 7.29 There remains the possibility of a tailor-made offence or partial defence which is centred on the concept of ‘acting out of compassion’. However, we continue to believe that there would need to be a much wider debate before concluding that the concept of ‘compassion’, as a motive, is in itself a sufficiently secure foundation for a ‘mercy’ killing offence or partial defence.
- 7.30 In the CP we did not ask a question whether ‘mercy’ killing should be a partial defence. Although those consultees who thought we were wrong not to do so have expressed their views on the issue, others have not. It is highly likely that the latter would have expressed a view had we raised the question in that form. It is too important and socially significant a subject for us to make a recommendation without explicitly consulting on the question.
- 7.31 In addition, were we to recommend a partial defence of ‘mercy’ killing, there would be very difficult questions regarding its scope. For example, to what extent should the defence be open to secondary parties? Should it be limited to those who have a close personal relationship with V or should it also be available to professional and semi-professional carers? In relation to this second question, Dr Jonathan Rogers has suggested that the solution lies in distinguishing between, on the one hand, professional carers who kill, and on the other hand, family members who kill.²⁵ The idea is that the latter should have a partial excuse when the former would not.
- 7.32 We recognise the force of this argument, but there are problems with it. Justificatory considerations are liable to feature in the motivations of both groups. Moreover, some might argue that it is actually less excusable to rely on a purely personal judgement that another’s life is not worth living than it is to rely on a professional judgement to that effect (for which one is responsible to others as a professional). We offer no view on that argument but it shows the difficulty that must be faced in coming to conclusions that will be acceptable to a large majority of people.
- 7.33 While recognising that some consultees have properly raised the issue of whether there should be an offence or partial defence of ‘mercy’ killing, our conclusion is that it would not be right to make any recommendations on the issue in this report. It is a discrete issue which can only be properly addressed by a subsequent and specific review of this particular aspect of the law of homicide. As we stated above, we did not have the time to conduct the extensive consultation that is essential on such an important topic.

²⁵ Jonathan Rogers, “The Law Commission’s Proposed Restructuring of the Law of Homicide” [2006] *Journal of Criminal Law* 223.

Reformulating the defence of diminished responsibility

7.34 We recognise the force of some of the criticism that consultees have made of our proposed reformulation of the defence of diminished responsibility as set out in the CP (see Part 5 of this Report). In particular, Lord Justice Buxton suggested that the reformulation would do little or nothing to assist even severely depressed ‘mercy’ killers. He questioned whether the reformulation that we put forward in the CP would be capable of catering for most cases of ‘mercy’ killing because most of those who committed a ‘mercy’ killing would be unable to satisfy the criteria that we were proposing for the defence.

7.35 Having considered the response of the Royal College of Psychiatrists to our provisional proposals, we have now changed the criteria for diminished responsibility in an attempt (amongst other goals) to meet this point. Like the Royal College of Psychiatrists, we are confident that this change will not open a ‘barn door’ through which any killer suffering from depression can walk through to claim mitigation. Overall, the criteria that must be met for a successful plea of diminished responsibility will remain stringent.

7.36 We are now recommending that the substantial impairment of D’s capacity must relate to:

- (1) understanding the nature of his or her conduct;
- (2) forming a rational judgement; or
- (3) controlling him or herself

and that the abnormality must arise from a medical condition and that the abnormality must provide an explanation for D’s conduct.²⁶

7.37 We recognise that our proposed reformulation will not assist rational ‘mercy’ killers and those who understand the nature of what they are doing even if they kill V with the latter’s consent. This will disappoint some consultees but the defence of diminished responsibility should not be stretched so far that it becomes a backdoor route to partial excuse for caring but rational ‘mercy’ killers.

Repeal of section 4 of the Homicide Act 1957

7.38 Our provisional proposal was that section 4 of the Homicide Act 1957 should be repealed. A majority of our consultees agreed that it should be repealed and that our reformulated definition of diminished responsibility would cater adequately for deserving cases that currently fall within section 4 of the Homicide Act 1957. However, a minority of consultees disagreed because they believed that it would leave those who rationally entered into and survived a suicide pact facing a conviction for first degree murder.

²⁶ See Part 5, para 5.112.

7.39 Despite the support that we received for our proposal, we have concluded that it would be inappropriate to recommend the repeal of section 4 in the absence of any wider review of ‘mercy’ and consensual killings. We are not aware that in practice, the current law is proving problematic. Further, we recognise the concerns expressed by those who opposed the section’s repeal, namely that a rational and deserving person who is currently able to plead section 4 would be unable to successfully plead diminished responsibility.²⁷ It appears that for those who successfully plead section 4, custodial sentences of two to three years represent the upper limit. We do not believe that a mandatory sentence of life imprisonment with a very low minimum term followed by a life long period on licence would be appropriate.

Diminished responsibility combined with the victim’s consent

7.40 In the CP,²⁸ we invited views as to whether, in cases where the D’s diminished responsibility was a significant cause of his or her conduct in killing V and V consented to being killed, the presence of both diminished responsibility and V’s consent should reduce the offence to manslaughter.

7.41 A large majority of consultees thought that it would be wrong to allow the presence of V’s consent to result in a conviction for manslaughter rather than second degree murder. We agree.

Joint suicide and complicity in suicide

7.42 Section 4 of the Homicide Act 1957 enables D to be convicted of manslaughter rather than murder if D kills V pursuant to a suicide pact. Section 2(1) of the Suicide Act 1961 provides that a person who “aids, abets, counsels or procures“ V to commit suicide is guilty of an offence (‘complicity in suicide’) punishable with a term of imprisonment not exceeding 14 years. Section 2(2) provides that a person may be convicted of the section 2(1) offence on a charge of murder or manslaughter.

7.43 In some suicide pacts where the intention of D and V is that each should die together, D kills V by setting in train a series of events that results in V’s death. In such cases a verdict of manslaughter under section 4 is available but a verdict of complicity in suicide under section 2(1) is not.

7.44 In the CP,²⁹ we queried whether this was fair given that in ‘die together’ suicide pacts there may well have been mutual assistance and support in the acts leading up to the attempt to commit suicide together. The verdict of complicity in suicide is not available because, perhaps by chance, the survivor was the one who performed what is taken to be the key conduct which caused V’s death.

²⁷ Unless the defence of diminished responsibility was benignly and loosely interpreted to cater for deserving cases. We do not believe that would improve the law.

²⁸ Para 8.94.

²⁹ Para 8.100.

- 7.45 We invited views on whether on an indictment for murder or manslaughter, it ought to be possible for D to be convicted of complicity in suicide if the conduct that killed V was meant by D and V to end both their lives. The views of consultees were fairly evenly divided. In the absence of strong support for such a change, we are not minded to recommend it.

FINAL THOUGHTS AND RECOMMENDATIONS

- 7.46 Although we are not making any recommendations for an offence or partial defence of ‘mercy’ killing, we make the following observations.

- 7.47 First, Professor Mitchell’s surveys suggest that public opinion is generally not unsympathetic to those who believe that they are killing as an act of mercy, particularly if V has expressed a wish to be killed. The surveys reveal very little support for the imposition of a mandatory sentence of life imprisonment in genuine cases of ‘mercy’ killing. In addition, there is no clear evidence of a majority favouring no kind of prosecution in such cases.

- 7.48 Secondly, Parliament has already afforded statutory recognition to killings committed as acts of mercy. It has identified killing out of mercy as a potentially mitigating factor in fixing the length of the minimum term following a conviction for murder. There are three reasons why it is arguable that it would be more satisfactory if, in cases of rational ‘mercy’ killing, Parliament were to make ‘mercy’ killing a partial defence rather than purely a matter going to mitigation of the minimum term. First, for a genuine ‘mercy’ killer, a life long licence seems neither necessary nor appropriate. Secondly, if there is a dispute of fact as to D’s motive for killing V, it might be thought better that the jury, rather than the trial judge, should decide the issue. Thirdly, a partial defence would avoid the need for the practice, which concerns some of our consultees, of dressing up rational ‘mercy’ killing cases as ones of diminished responsibility by means of a sympathetic report from a pliant psychiatrist which the court and prosecution are content not to challenge.³⁰

- 7.49 **We recommend that the Government should undertake a public consultation on whether and, if so, to what extent the law should recognise either an offence of ‘mercy’ killing or a partial defence of ‘mercy’ killing.**

- 7.50 **We recommend that, pending the outcome of any public consultation, section 4 of the Homicide Act 1957 should be retained.**

³⁰ We stress that we are saying that these are *arguable* reasons.

PART 8

INFANTICIDE

INTRODUCTION

- 8.1 In the CP,¹ we set out the medico-legal debate surrounding the offence/defence of infanticide. As recognised when the Infanticide Bill was considered by the House of Lords in 1938, its subject matter “belongs to the territory where law and medicine meet, and to some extent carries with it difficulties which attach to both.”²
- 8.2 During our consultation, we sought the views of a range of medical and legal experts on the topic of infanticide. Almost half of the written responses to the CP considered the issue. Further, we commissioned research on infanticide cases, which we have included as an appendix to this report³.
- 8.3 Based on the response to our consultation, we believe that although the Infanticide Act 1938 has been subject to criticism, it is a practicable legal solution to a particular set of circumstances. Therefore, we will be recommending that the offence/defence of infanticide should be retained without amendment.⁴
- 8.4 Further, we will be recommending the adoption of an expedited appeal procedure for cases involving mothers convicted of murdering their infants who, as a result of suffering from a psychiatric disorder, may have been unable to admit to the killing at trial and so have not pleaded infanticide.
- 8.5 In this Part, we set out the current law of the offence/defence of infanticide and consider its distinguishing features. We then briefly outline its history and previous reform proposals. This is followed by a survey of consultation responses and recent research. Finally, we set out our recommendations and reasons, first on the substantive law of the offence/defence of infanticide and, secondly, on the procedural dilemma presented by the case of *Kai-Whitewind*.⁵

¹ Part 9.

² Hansard (HL), vol 108, col 292 (22 March 1938).

³ Appendix D: Professor R D Mackay, *Infanticide and Related Diminished Responsibility Manslaughters – An Empirical Study* (2006)

⁴ Subject to the reference to ‘murder’ being replaced with ‘first degree murder or second degree murder’.

⁵ [2005] EWCA Crim 1092, [2005] 2 Cr App R 31.

CURRENT LAW

- 8.6 Infanticide is an offence in its own right. The Infanticide Act 1938 provides that when a mother kills her child, when the child is under 12 months old, and at the time the balance of the mother's mind was disturbed as a result of her not having fully recovered from the effect of giving birth or due to the effect of lactation, then the mother will be guilty of infanticide rather than murder.⁶ A mother charged with murder in these circumstances may also raise infanticide as a defence.⁷ Punishment for infanticide is the equivalent of that for manslaughter, namely a maximum life sentence. In most cases an infanticide conviction results in a non-custodial sentence (albeit often subject to a treatment or hospital order).⁸
- 8.7 The offence/defence of infanticide has a number of notable features that distinguish it from other offences and defences, in particular, from the defence of diminished responsibility.
- 8.8 First, as indicated above, unlike the partial defences of diminished responsibility and provocation, infanticide operates not only as a defence to a charge of murder, but is also a separate offence.
- 8.9 Secondly, even when raised as a defence, the burden of proof is on the prosecution to disprove a claim of infanticide beyond reasonable doubt. In contrast, section 2 of the Homicide Act 1957, which provides for the defence of diminished responsibility, explicitly shifts the burden of proof to the defendant to discharge on the balance of probabilities.⁹

⁶ Infanticide Act 1938, s 1(1) provides:

Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of her act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

⁷ Infanticide Act 1938, s 1(2) provides:

Where upon the trial of a woman for the murder of her child, being child under the age of twelve months, the jury are of the opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

⁸ See Appendix D: R D Mackay, *Infanticide and Related Diminished Responsibility Manslaughters – An Empirical Study* (2006) para 21.

⁹ Homicide Act 1957, s 2(2). *Lambert, Ali and Jordan* [2002] QB 1112. Similarly, the other mental impairment defence of insanity also places the burden of proof on the defendant.

- 8.10 Thirdly, the offence/defence of infanticide does not require that the act or omission of killing be causally linked to the disturbance of the mother's mind. There need only be a temporal connection. In contrast, diminished responsibility requires that the defendant's "abnormality of mind ... substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing."¹⁰
- 8.11 Fourthly, apart from the verdict of a coroner's jury returning a verdict of suicide, the phrase "the balance of her mind was disturbed" is unique to infanticide. At the time the phrase was introduced, Parliament decided not to use an existing legal term of art.¹¹ It is different to both the test for insanity and the test for diminished responsibility ("abnormality of mind"). It is notable that none of these tests accord with medical terminology.
- 8.12 Finally, the offence/defence of infanticide is unique in that it is only available to a particular group of defendants (biological mothers) who kill a particular victim (their own baby who must be less than 12 months old).

HISTORY AND PREVIOUS REFORM PROPOSALS

- 8.13 The historical background to the offence/defence of infanticide is set out in the CP.¹² The Infanticide Act in its current form was created in 1938. It replaced an earlier Act passed in 1922. At the time the original Infanticide Act was passed in 1922, and again in 1938, Parliament recognised and debated its potential flaws and considered alternative options.¹³ For example, the phrase "the balance of her mind was disturbed" was challenged and the problems inherent in introducing medical evidence were acknowledged. Similarly, the link between the disturbance of the mind and birth was questioned and a broader basis of disturbance induced by poverty and despair was proposed. The need to ensure unmeritorious cases did not fall within the offence/defence of infanticide was stressed. Problems associated with setting an age limit were also acknowledged – it was recognised that any time limit was ultimately arbitrary to some extent. However, despite these concerns, Parliament decided on the current form of the offence/defence of infanticide as the best means of avoiding the "black cap farce"¹⁴ whereby judges

¹⁰ Homicide Act 1957, s 2(1).

¹¹ The then Lord Chancellor (Viscount Birkenhead) who introduced the amendment to include this phrase in the Bill stated that "they are new words. They are not terms of art." These new words were designed to avoid misunderstanding and "to give effect to the intention" of the framers of the Bill. Hansard (HL), vol 50, cols 761 to 762 (25 May 1922).

¹² Paras 9.5 to 9.7.

¹³ Hansard (HL), vol 50, cols 436-41 (16 May 1922), vol 50, cols 756 to 68 (25 May 1922) vol 50, cols 1096 to 99 (22 June 1922), vol 108, cols 292 to 309 (22 March 1938).

¹⁴ As dubbed by the press at the time: Lord Arnold, Hansard (HL), vol 108, col 303 (22 March 1938). When pronouncing a sentence of death, judges donned a Black Cap.

were required to pass a mandatory sentence of death (“with all its dreadful paraphernalia”)¹⁵ on mothers who were convicted of murdering their babies, only for the death penalty to be commuted to a lesser sentence.¹⁶

- 8.14 Since 1938, various law reform bodies have revisited many of the concerns debated at the time the Infanticide Acts were introduced.¹⁷ There has been no consensus arising from the deliberations of these bodies as to whether the offence/defence of infanticide should be retained, and, if so, in what form.

CONSULTATION AND RECENT RESEARCH

Provisional proposal

- 8.15 In the CP we set out a number of options for reform, ranging from the abolition of infanticide to a radical overhaul of the existing offence/defence.¹⁸ We provisionally proposed that the offence/defence of infanticide be retained and minimally reformed as follows:

- (1) removing the reference to lactation (on the basis that the link between psychiatric disorder and lactation is unfounded); and
- (2) raising the age limit of the victim to two years (this would capture almost all instances of child-killing connected to postpartum psychiatric disorder).¹⁹

Consultation responses

- 8.16 Forty-five of the written responses to our consultation considered the issue of infanticide, some exclusively.²⁰ The majority considered that a separate offence/defence of infanticide should be retained.²¹ There were, however, a number of consultees who thought that, in the light of current medical knowledge and the existence of the defence of diminished responsibility, the separate offence/defence of infanticide was obsolete.

¹⁵ The then Lord Chancellor (Viscount Birkenhead) Hansard (HL), vol 108, col 759 (25 May 1922).

¹⁶ In 1908 to 1909, when a Bill similar to the Infanticide Bill 1922 was introduced in the House of Lords, the then Lord Chancellor stated that a verdict of murder had not been followed by an execution in cases of this kind for the past 60 years: Hansard (HL), vol 108, col 437 (16 May 1922).

¹⁷ For a summary of the main reform proposals in the UK, including previous Law Commission recommendations, see the CP, paras 9.48 to 9.67.

¹⁸ Paras 9.72 to 9.95.

¹⁹ Paras 9.75 to 9.78.

²⁰ Consultation responses on the procedural issue raised by the case of *Kai-Whitewind*²⁰ are discussed in paras 8.50 to 8.51 below.

²¹ A range of professionals and organisations supported the retention of the offence/defence of infanticide, including judges, lawyers, academics, police, medical professionals, interested organisations and members of the public.

- 8.17 The majority of consultees who considered our proposals supported our provisional proposal to minimally reform the offence/defence of infanticide. Of those who did not support the minimal reform model, there was a range of views as to how infanticide should be reformed. Suggestions included raising, lowering or removing the age limit; requiring a causal connection between the killing and the disturbance of the mind; extending the offence/defence to other carers; and abolishing it altogether.
- 8.18 The majority of consultees believed that if the separate offence/defence of infanticide were to be abolished, infanticide cases should be subsumed within the defence of diminished responsibility. However, these responses were split between those whose preference was to retain the separate offence/defence of infanticide (and so only supported merger with diminished responsibility if the offence/defence of infanticide were abolished) and those who believed it should be abolished and merged with diminished responsibility. Of those consultees who did not favour merger with diminished responsibility, many did so on the basis that the separate offence/defence of infanticide should not be abolished.
- 8.19 Apart from the written responses, we held a meeting on infanticide attended by a range of medical and legal professionals. Although a variety of views were expressed, many of those who attended believed that the separate offence/defence of infanticide should be retained unless the defence of diminished responsibility could be reformed to ensure that the perceived benefits of the offence/defence of infanticide²² were protected.

Recent research

- 8.20 In the CP we noted that “[r]ecent research into the significant features or characteristics of particular cases [of infanticide] dealt with either by the courts or the prosecuting authorities is limited.”²³ As part of our review, we commissioned research in this area by Professor R D Mackay.²⁴ The results of Professor Mackay’s research are included in Appendix D of this report. Professor Mackay studied a sample of Crown Prosecution Service files for the period 1990 to 2003. The cases studied fell into two groups. First, a sample of cases resulting in infanticide convictions (49 cases). Secondly, a sample of cases of diminished responsibility manslaughter convictions of biological mothers who had killed their children aged three years and under (35 cases). The results of Professor Mackay’s research have informed our final recommendations.

²² Such as the ability to charge infanticide as an offence and placing the legal burden of proof on the prosecution to disprove infanticide when it is raised as a defence.

²³ Para 9.3.

²⁴ Professor of Criminal Policy and Mental Health, Department of Law, De Montfort University, Leicester.

- 8.21 In response to our consultation, Professor Ian Brockington,²⁵ who attended our meeting on infanticide, provided two tables. These tables are included in Appendix E. The first table sets out mental disorders that may occur during parturition (childbirth) and the post-partum period. The second table provides a classification of different types of infanticide. These tables are particularly relevant to the issue of the psychiatric foundation of the offence/defence of infanticide.
- 8.22 Finally, on the issue of lactation Dr Maureen N Marks,²⁶ who also attended our meeting on infanticide, referred us to recent research that she and her colleagues had conducted on the possible link between lactation and psychiatric disorder. This is discussed further in paragraph 8.26 below.

SUBSTANTIVE LAW: RECOMMENDATION AND REASONS

Recommendation

- 8.23 **Based on the responses to our consultation and recent research, we recommend that the offence/defence of infanticide be retained without amendment (subject to ‘murder’ being replaced with ‘first degree murder or second degree murder’).**

Psychiatric foundation

- 8.24 As discussed in the CP, there has been considerable debate about the psychiatric foundation of the offence/defence of infanticide.²⁷ This debate was evident in the consultation responses we received. For example, Professor Jenny McEwan stated that the provisions of the Infanticide Act “are no longer considered to have any basis in medical science”. Similarly, Professor Herschel Prins stated that recent research in ante-natal and post-natal care shows that the basis for current practice enshrined in the Infanticide Acts was “somewhat anachronistic”.
- 8.25 Based on our consultation meeting with a range of medical and legal experts on the subject of infanticide, we believe that there is sufficient medical evidence on which to justify the offence/defence of infanticide as it stands. Our belief is supported by the work of Professor Brockington, who provided us with tables categorising the different psychiatric disorders associated with infanticide and the different types of infanticide.²⁸ Although no psychiatric disorders (perhaps, bar one) are specific to childbirth, the incidence of certain disorders is higher following childbirth. This temporal connection indicates that some women are more vulnerable to psychiatric disorder in the postpartum period.

²⁵ Professor *emeritus*, Department of Psychiatry, University of Birmingham.

²⁶ Head of the Perinatal Mental Health Research Unit, Institute of Psychiatry, King’s College London.

²⁷ See paras 9.20 to 9.30.

²⁸ See Appendix E. See also, I Brockington, *Motherhood and Mental Health* (1996).

- 8.26 There is also some evidence to support the lactation theory. A recent study conducted by Dr Marks and her colleagues suggests that lactation may increase dopamine sensitivity in some women, which may trigger psychosis.²⁹ Although this evidence is not conclusive, we are not aware of evidence that definitively refutes the lactation theory. Thus, on balance, we recommend retaining the reference to lactation.

Limitation to biological mothers

- 8.27 The link between physiology and psychiatric disorder that underpins the offence/defence of infanticide limits its application to biological mothers. As noted in the CP,³⁰ this limitation prevents other carers, such as fathers, adoptive, foster or step-parents, who may be affected by the stressors associated with caring for an child, from relying on the offence/defence of infanticide.
- 8.28 The potential link between “environmental or other stresses consequent upon birth” and mental disturbance was recognised by the Criminal Law Revision Committee (“CLRC”).³¹ In 1980, the CLRC recommended the amendment of the offence/defence of infanticide to incorporate disturbance of the mother’s mind by reason of the effect of giving birth or circumstances consequent upon that birth.³² This approach formed the basis for the moderate reform position outlined in the CP.³³ The radical expansionist position in the CP also adopted this approach, as well as extending the offence/defence to other carers.³⁴
- 8.29 In the responses to our consultation, there was only limited support for widening the ambit of the offence/defence of infanticide to cover “circumstances consequent upon birth.” There was less support for applying it to other carers. Of those consultees who argued that the offence/defence of infanticide was discriminatory in singling out biological mothers, the majority argued for its abolition (and merger with diminished responsibility) rather than its expansion.

²⁹ M N Marks, A Wieck, A Davies, N Brown, R Mclvor and I C Campbell, “Neuroendocrine Studies in Women at Risk of Post Partum Psychiatric Illness”, (forthcoming).

³⁰ Paras 9.31 to 9.37.

³¹ Criminal Law Revision Committee, Fourteenth Report: Offences Against the Person (1980), Cmnd 7844, para 105.

³² Above.

³³ Paras 9.79 to 9.86.

³⁴ Paras 9.87 to 9.92.

- 8.30 A number of consultees who supported the retention of the offence/defence of infanticide explicitly stated that it should not be extended beyond biological mothers, arguing that male or other carers tend to kill children in notably different circumstances to mothers.³⁵ For example, the Police Federation stated that if the offence/defence of infanticide were extended, it “would be used repeatedly by men or other family members, when the real issue had been failure to control their temper.” This belief was echoed by Professor Leonard Leigh, based on his experience as a member of the Criminal Cases Review Commission. Professor Leigh stated: “It seems right that where it is a male partner who kills, his defence should be restricted to diminished responsibility with its concomitant burden of proof [on the defendant] so minimising any possibility that a spurious excuse will be accepted.”
- 8.31 Based on the evidence supporting the physiological/psychiatric foundation of the offence/defence of infanticide discussed in paragraphs 8.25 to 8.26 above, together with the reluctance of consultees to expand it beyond its current ambit, we are not recommending that the offence/defence of infanticide incorporate ‘circumstances consequent upon birth’. Nor do we recommend that it be extended to fathers or other carers.³⁶

Age limit

- 8.32 Originally under the Infanticide Act 1922 the offence/defence of infanticide applied only in cases where the baby was “newly-born”. However, as a result of concerns that this restriction was leading to injustice, the age limit was extended to 12 months in 1938. At the time the age limit was extended, a number of members of the House of Lords who supported the amendment acknowledged that it was necessarily arbitrary.³⁷ However, according to Viscount Dawson of Penn, the then President of the College of Physicians, who introduced the 1938 Infanticide Bill, “[i]t is rare to have the insanity following child-birth not better within a year.”³⁸ Beyond a year, there was a risk that the Act would “provide a means of escape for the murderer of the unwanted child.”³⁹

³⁵ London Criminal Courts Solicitors’ Association, Professor L Leigh, Police Federation and Refuge. See also the CP, paras 9.33 to 9.36 and 9.83.

³⁶ They should look to our reformulated defence of diminished responsibility.

³⁷ See eg, The Earl of Munster’s comments, Hansard (HL), vol 108, col 306 (22 March 1938).

³⁸ Hansard (HL), vol 108, col 296 (22 March 1938).

³⁹ Viscount Dawson of Penn, Hansard (HL), vol 108, col 296 (22 March 1938).

- 8.33 Many of the issues debated in 1938 regarding the age limit were raised again during our consultation. According to a number of the medical professionals who attended our meeting on infanticide, most postpartum psychiatric disorders linked to infanticide are resolved within 12 months after birth.⁴⁰ The majority of infanticides linked to psychiatric disorder occur within the first three months.⁴¹ Amongst those who attended our meeting, some expressed concern that there is a risk that if the age limit of the victim is increased to two years, then unmeritorious cases (such as cases of ongoing abuse) will fall within the offence/defence of infanticide. The obverse concern is that some cases that would otherwise come within the offence/defence are excluded if the victim is older than 12 months. Further, if a mother kills any older siblings or children other than her own at the same time as her own child (under 12 months), she will only be able to claim infanticide in respect of her own child.⁴² However, it must be kept in mind that cases involving ‘disturbance of the mind’ that occur outside the 12 months limit (or involve older children) will generally fall within the defence of diminished responsibility, albeit without some of the benefits of the offence/defence of infanticide.⁴³
- 8.34 There was some support from consultees to raise the age limit to two years.⁴⁴ However, on balance we do not consider it necessary or appropriate to do so. Further, we do not believe it is either necessary or appropriate to extend the offence/defence to cases where a mother kills a child who is not her own.

Merger with diminished responsibility

- 8.35 Some consultees, notably the Royal College of Psychiatrists, argued that infanticide should be subsumed within diminished responsibility on the basis that postpartum psychiatric disorders should not in principle be distinguished from other disorders when determining criminal liability. Others argued that singling out mental disorders in biological mothers for special treatment tended to “pathologise” motherhood,⁴⁵ and reflected a broader tendency by lay and medical discourse “to represent women – especially in activities connected with reproduction – as lacking in responsibility.”⁴⁶

⁴⁰ Infanticide consultation meeting, 24 March 2006.

⁴¹ Infanticide consultation meeting, 24 March 2006.

⁴² The VLRC also recommended applying the offence/defence of infanticide to the killing of older siblings. This recommendation was not enacted by Parliament: VLRC, *Defences to Homicide: Final Report* (2004) paras 6.38 to 6.41.

⁴³ See Appendix D: R D Mackay, *Infanticide and Related Diminished Responsibility Manslaughters – An Empirical Study* (2006), Part B.

⁴⁴ In Victoria, Australia, Parliament extended the age limit to two years in accordance with a recommendation of the Victorian Law Reform Commission (VLRC): *Crimes (Homicide) Act 2005*, s 5 and VLRC, *Defences to Homicide: Final Report* (2004) paras 6.38 to 6.41. However, Victoria does not have a defence of diminished responsibility which might otherwise cover such cases.

⁴⁵ Justice for Women.

⁴⁶ Professor J McEwan.

- 8.36 We do not consider that infanticide should be subsumed within diminished responsibility. Infanticide cases are unique given the status of the perpetrator and victim, and the link between childbirth and some kinds of psychiatric disorder. We consider that the lesser category of offence, and consequently the more lenient sentences that are customary, are warranted.⁴⁷ If infanticide were merged with diminished responsibility, it would be classed as ‘second degree murder’ under our proposals. We do not believe that such a serious offence label (and possibly less lenient sentence) is appropriate.
- 8.37 Further, merger of infanticide with diminished responsibility presents procedural problems concerning the burden of proof. The burden on the defendant to prove psychiatric disorder in order to successfully plead diminished responsibility may be impossible to discharge in neonaticide cases (the killing of a baby within 24 hours of his or her birth). In such cases, the mother may give birth alone and suffer from a transient disorder. At our meeting on infanticide Professor Brockington, Dr Margaret Oates⁴⁸ and Dr Marks all expressed concern that neonaticide cases must be covered by a special defence because the mother’s culpability is very low. Further, the mother is in a particularly difficult position with regard to discharging the burden of proof.
- 8.38 The offence/defence of infanticide has caused very few problems in practice, as evidenced by the lack of case law in this area. Further, it involves very few cases. As stated in the CP, “it does not seem worth countenancing the perhaps unforeseeable changes that would result from an insistence that such cases be dealt with under section 2 of the Homicide Act 1957.
- 8.39 Finally, we do not believe that the offence/defence of infanticide “pathologises” women or motherhood. Nor does it reflect or reinforce a perception in law that women are less responsible for their actions. Rather, the offence/defence of infanticide recognises that some women do suffer from psychiatric disorders triggered by childbirth (and very possibly lactation), and as a result may kill their infants. We do not believe it serves the feminist or other causes to increase the severity of the offence these mothers have committed, nor the sentence that they may face, by merging infanticide with diminished responsibility. In this unique situation there is only the surface appearance of discrimination: the substantive offence ensures substantive justice.

⁴⁷ We have been informed anecdotally that in some cases women who are convicted of infanticide are given a community-based sentence, when a treatment-based order may be more appropriate given their mental condition. Without treatment, these women may lose contact with their other children. In contrast, a women convicted of diminished responsibility manslaughter is more likely to be given a treatment order. This difference in sentencing is born out by the results of Professor Mackay’s empirical study in Appendix D: R D Mackay, *Infanticide and Related Diminished Responsibility Manslaughters – An Empirical Study* (2006) paras 21 and 42. The answer to this problem is to ensure appropriate sentences (including treatment orders) are passed, rather than merging infanticide with diminished responsibility.

⁴⁸ Consultant Perinatal Psychiatrist, Queen’s Medical Centre, Nottingham.

Causation

- 8.40 A significant feature of section 1(1) of the Infanticide Act 1938 is that there is no requirement of a causal link between the killing of the child and the disturbance of the mind suffered by the defendant. So, any murder of a child under the age of 12 months by its biological mother, whatever the reason, is capable of amounting to infanticide as long as at the time of the murder the balance of her mind was disturbed. Some consultees consider that this is an anomaly that ought to be rectified.⁴⁹
- 8.41 We do not propose any recommendation to change the absence of a causal requirement. The offence/defence of infanticide, as defined, effectively presumes that the mother's mental disturbance contributed to the conduct resulting in the child's death. We believe that, viewed pragmatically, Parliament was right to legislate on the basis of such a working presumption. As far as the medical experts we consulted in our infanticide seminar were concerned, the Act generally works well. This view is supported by the absence of case law.

Application to first degree murder and second degree murder

- 8.42 The offence/defence of infanticide applies to cases that, if not for the Infanticide Act 1938, "would have amounted to murder".⁵⁰ If our recommended statutory framework for homicide offences is adopted,⁵¹ we recommend that the offence/defence of infanticide should apply to both first degree murder and second degree murder. As noted in the CP,⁵² we make this recommendation for two reasons. First, if the offence/defence of infanticide were limited to cases that "would otherwise be first degree murder" it would lead to an unjust anomaly. A mother whose intention was more culpable would be guilty of a lesser offence (first degree murder reducing to infanticide) than a mother whose intention was less culpable (second degree murder). Secondly, the offence/defence of infanticide was introduced in part to avoid labelling as murderers mothers who commit infanticide. During our consultation, we did not receive any responses objecting to the application of the offence/defence of infanticide to both first degree murder and second degree murder.
- 8.43 In relation to this second point, the special circumstances, the exceptionally low level of culpability and the fact that non-custodial sentences are the norm in a true infanticide case make this the right approach. This is so even though, more generally, we have rejected the view that partial defences should reduce second degree murder to a lesser offence.

⁴⁹ Justice and the Royal College of Psychiatrists.

⁵⁰ Infanticide Act 1938, s 1(1). Section 1(2), which operates as a defence, applies when a woman is tried for murder.

⁵¹ See Part 2.

⁵² Para 9.96.

PROCEDURAL ISSUE: RECOMMENDATION AND REASONS

The *Kai-Whitewind* dilemma

- 8.44 In the case of *Kai-Whitewind*⁵³ K, a mother of three, denied killing her youngest child, B, whom it was alleged was conceived in the course of a rape. K had previously told a health visitor that she felt like killing B and could not bond with him. However, K alleged B had died of natural causes. K reported that, five days before he died, B had brought up green vomit and brown fluid and, on the day he died, had suffered a nosebleed and later stopped breathing. The Court of Appeal identified the following dilemma: how should the law deal with cases in which a mother suffering from a postpartum psychiatric disorder kills her child, but denies the killing? Her denial may be a symptom of the very disorder that prompted the killing.⁵⁴ Without the defendant's co-operation, it is virtually impossible under the adversarial system to obtain and present psychiatric evidence in order to found a plea or charge of infanticide. As a result, if the mother's denial is rejected by the jury such cases lead to a murder conviction with a mandatory life sentence.
- 8.45 Currently, this problem can in theory be dealt with under the 'fresh evidence' provisions of the Criminal Appeal Act 1968.⁵⁵ However, this procedure inevitably involves considerable delays, and it is likely that the mother would be held in custody pending appeal. In an attempt to capture more of these cases with the offence of infanticide rather than murder and to accelerate the appeal process, we put forward the following provisional proposal in the CP.⁵⁶

Provisional proposal

- 8.46 We provisionally proposed that:

in circumstances where infanticide is not raised as an issue at trial and the defendant (biological mother of a child aged 12 months or less) is convicted by the jury of murder [first degree murder or second degree murder], the trial judge should have the power to order a medical examination of the defendant with a view to establishing whether or not there is evidence that at the time of the killing the requisite elements of a charge of infanticide were present. If such evidence is produced and the defendant wishes to appeal, the judge should be able to refer the application to the Court of Appeal and to postpone sentence pending the determination of the application.

⁵³ [2005] EWCA Crim 1092, [2005] 2 Cr App R 31.

⁵⁴ Above at [139].

⁵⁵ Criminal Appeal Act 1968, s 23(2)(d). See the discussion in the CP, paras 9.99 to 9.100. See also the recent case of *Neaven* [2006] EWCA Crim 955, [2006] All ER (D) 217.

⁵⁶ Paras 9.102 to 106.

- 8.47 As noted in the CP, this procedure recognises the exceptional nature of these cases. It would expedite the appeal process by allowing the trial judge to certify the matter for appeal rather than requiring the appellant to apply to the single judge of the Court of Appeal for leave.⁵⁷ Certification for appeal would be reliant on credible expert evidence to the effect that the balance of the mother's mind was disturbed by reason of the effect of birth or lactation. This procedure would also enable the trial judge to grant bail pending appeal⁵⁸ to ensure that the mother is not subject to imprisonment for a matter that, if resulting in a verdict of infanticide, is likely to lead to a non-custodial order. If the Court of Appeal considered it appropriate to admit the 'fresh evidence' of the mother's mental disorder⁵⁹ and as a result considers the murder conviction to be unsafe, then it would have the power to substitute a verdict of infanticide for murder.⁶⁰
- 8.48 Under our procedure, there would be no obligation on the defendant to undergo a medical examination (consonant with the adversarial system). In cases in which the mother has other grounds for appeal, such as in *Clark*⁶¹ and *Cannings*,⁶² the defence may advise against the mother undergoing examination. Such cases would continue to be subject to the usual appellate procedure.⁶³
- 8.49 As discussed in the CP, it is possible that a similar dilemma could arise more generally in cases in which the defendant may be suffering from diminished responsibility. However, as stated in paragraph 9.105 of the CP, we did not propose, nor do we now recommend, that this procedure be extended to such cases. Infanticide is a rare offence and in many cases the prosecution will charge infanticide if there is any evidence of a mental disorder. The public interest rarely requires a custodial disposal. By contrast, cases of diminished responsibility can rightly result in lengthy custodial sentences. As stated in the CP, in infanticide cases where a mother is suffering from a mental disorder but denies the killing, "the chasm between the disposal which is appropriate and the one which the judge is forced to impose under the present law is vast."⁶⁴

⁵⁷ Trial judges have the power to certify a matter for appeal, but it is rarely used: Criminal Appeal Act 1968, s 1(2)(b). Our procedure would be an exception to the general principle that an appeal against conviction takes place after the conclusion of the Crown Court proceedings.

⁵⁸ Supreme Court Act 1981, s 81(1)(f).

⁵⁹ Criminal Appeal Act 1968, s 23(2)(d). See the discussion in the CP, paras 9.99 to 9.100. See also the recent case of *Neaven* [2006] EWCA Crim 955, [2006] All ER (D) 217.

⁶⁰ Even if the appeal fails and the matter is remitted back to the Crown Court for sentence, the Crown Court could take the evidence of mental disorder or provocation (eg, due to prolonged stress) into account as a mitigating factor in fixing the minimum term: Criminal Justice Act 2003, s 269 and sch 21 para (11)(c) and (d).

⁶¹ (*Appeal against conviction*) (*No 2*) [2003] EWCA Crim 1020, [2003] 2 FCR 447.

⁶² [2004] EWCA Crim 1, [2004] 1 WLR 2607.

⁶³ The CP, para 9.103.

⁶⁴ Para 9.105.

Consultation

- 8.50 There is no easy solution to the *Kai-Whitewind* dilemma. The procedure we provisionally proposed is not perfect. For example, some consultees were concerned that it would provide a defendant with “two bites of the cherry”⁶⁵ by giving her the opportunity to run one defence at trial and another on appeal. Others were concerned that a mentally impaired defendant who is ‘in denial’ may still refuse to undergo a medical examination even after a murder conviction. Further, the Criminal Bar Association expressed concern that the issue of infanticide would be raised for the first time on appeal from which there would be no appeal. Despite these concerns, our provisional proposal received significant support from consultees, including judges, legal practitioners, academics, police, interest groups, and medical professionals.⁶⁶
- 8.51 A number of consultees suggested alternative procedures for dealing with the *Kai-Whitewind* dilemma. One suggestion was that, like provocation, the trial judge should have the discretion to leave infanticide to the jury, even if the prosecution or defence (or both) objects.⁶⁷ However, as discussed in paragraph 9.101 of the CP, we do not believe this would solve the *Kai-Whitewind* dilemma. The trial judge could only exercise this discretion if there was evidence on which a reasonable jury could reach a verdict of infanticide. Without evidence of a mental disorder to support a finding that the balance of the mother’s mind was disturbed, a reasonable jury could not reach a verdict of infanticide. Evidence of mental disorder is almost certainly dependent upon the defendant consenting to a medical examination. If the defendant is ‘in denial’ she will not provide evidence of a mental disorder. Nor is it likely that the prosecution would or could provide evidence of a mental disorder. Therefore, although in theory the option of giving the judge discretion to leave infanticide to the jury in such cases is appealing, it is unlikely to work in practice.
- 8.52 We considered two alternative ways of solving the *Kai-Whitewind* dilemma. The first solution, which we ultimately rejected because it imposed an excessive burden of administration, is as follows.

⁶⁵ Treacy J.

⁶⁶ Calvert-Smith J, Gage LJ, Wilkie J, London Criminal Courts Solicitors’ Association, Society of Labour Lawyers, Dr Jones and Dr Hiscox, Professor Mackay, Professor O’Donovan, Professor Taylor, Police Federation, Association for Post-Natal Illness, Justice, Liberty, Refuge, Royal College of Paediatrics and Child Health and Dr Henshaw.

⁶⁷ A similar issue arose in relation to murder and manslaughter in the recent case of *Coutts* [2006] UKHL 39, [2006] 1 WLR 2154. Lord Bingham stated at [23]:

The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support.

- 8.53 In the event that a biological mother is convicted of murdering her child under the age of 12 months and she did not raise the defence of infanticide at trial, the trial judge would have an automatic discretion to initiate a further hearing to determine whether, at the time of the murder, the balance of the mother's mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or the effect of lactation.⁶⁸ A positive finding would result in a special verdict of 'murder at the time of a disturbance of balance of the mind'. As a special verdict, this would be different from and exist in addition to an ordinary verdict of infanticide. The judge would then have the power to pass a sentence equivalent to that for second degree murder (a discretionary life sentence).⁶⁹
- 8.54 This issue would need to be determined by a second jury.⁷⁰ On this approach, a jury should determine the ultimate issue because anything short of that would be tantamount to a trial judge being seen to overturn the verdict of the trial jury.⁷¹
- 8.55 As noted in paragraph 8.40 above, section 1(1) of the Infanticide Act 1938 does not require that the act of killing be causally linked to the disturbance of the mind. This lack of a causal link ensures that a finding of guilt of murder, and any possible finding of a special verdict of a disturbance of the balance of the mind, cannot be inconsistent. Further, a separate appeal route for each would be preserved.⁷² Any appeal of the murder verdict could be expedited without disruption to the timetable of the Court of Appeal.⁷³

⁶⁸ There would need to be a reasonable delay between the hearings in order to gather the necessary medical or other expert evidence.

⁶⁹ If our recommendations regarding the structure of murder are not enacted, the sentence could be the equivalent to that for manslaughter.

⁷⁰ It would be a separate issue to the finding of guilty or not guilty of murder, and would therefore require the selection of a jury other than the one which had determined the main issue at trial: Juries Act 1974, s 11(4) and (5).

⁷¹ In Massachusetts trial judges are empowered to substitute a verdict of manslaughter for a jury verdict of second degree murder (Massachusetts Rules of Criminal Procedure, r 25(b)(2)), as occurred in *Commonwealth v Woodward* 1997 WL 694119 (Mass Super). In the appeal from that case, the Supreme Judicial Court of Massachusetts held that the trial judge did not abuse his discretion, stating that the policy was aimed at "promoting judicial responsibility to ensure that the result in every criminal case is consonant with justice." The Court noted that this power had been used infrequently: *Commonwealth v Woodward* 694 NE2d 1277 (Mass 1998) at [6-8].

⁷² The murder verdict at trial would be subject to appeal provided for by the Criminal Appeal Act 1968, ss 1 and 2. The special verdict at the second hearing would not be a conviction and therefore could be appealed by way of reliance on a separate provision, similar to that for findings of disability, such as Criminal Appeal Act 1968, s 15(1).

⁷³ This observation was made by the Criminal Bar Association. The process would not be substantively different to other determinative rulings made in advance of trial.

8.56 There are a number of advantages to this alternative approach.⁷⁴ First, it ensures that the issue of infanticide is raised for the first time at trial rather than at the appeal stage from which there would be no appeal.⁷⁵ Secondly, it provides a disincentive to the defence adopting a “two bites at the cherry” strategy. A positive outcome at the second hearing still results in a finding of murder (albeit as a special verdict) rather than infanticide. Further, the second hearing is at the discretion of the trial judge, it is not an automatic entitlement. Thirdly, it preserves the defendant’s right of appeal with respect to the initial verdict of murder.

Recommendation and reasons

8.57 In spite of its advantages, the solution discussed immediately above to the *Kai-Whitewind* dilemma, with its two stage trial process, may prove unwieldy in practice.

8.58 **Accordingly, based on the responses to our consultation, we recommend that our provisional proposal set out in paragraph 8.46 above be adopted.**

8.59 We believe that our recommendation is the best possible solution in the context of the adversarial system. It would preserve the right of the defendant not to be compelled to give evidence and to instruct her defence counsel at trial. It would expedite the appeal process, while still conforming to our system of appellate justice and the rules on fresh evidence. It would allow the trial judge to postpone sentence until the issue of infanticide is resolved. It would provide a disincentive to the “two bites of the cherry” tactic by requiring the defendant to go through the appeal process as an alternative to entering a plea of infanticide at an early stage at or before trial. It is a power exercised at the trial judge’s discretion, and therefore cannot be relied upon as a defence strategy. Further, the certificate for appeal would depend on credible expert evidence that the defendant was suffering from an imbalance of the mind. It aims to avoid over-convicting or under-convicting the defendant (or an ill-founded acquittal) in line with the interests of justice.⁷⁶ Finally, and most importantly, the procedure we have recommended would only apply to a small number of cases, to remedy a considerable injustice: an unwarranted murder conviction coupled with a mandatory life sentence.

⁷⁴ A number of consultees suggested a two-stage trial process, though not one exactly the same as the alternative outlined here: see Criminal Bar Association, Pitchford J and Sir Igor Judge (meeting 23 March 2006).

⁷⁵ This point was emphasised by the Criminal Bar Association.

⁷⁶ See *Coutts* [2006] UKHL 39, [2006] 1 WLR 2154.

PART 9

LIST OF RECOMMENDATIONS

A new Homicide Act

- 9.1 We recommend that there should be a new Homicide Act for England and Wales. The new Act should replace the Homicide Act 1957. The new Act should, for the first time, provide clear and comprehensive definitions of the homicide offences and the partial defences. In addition, the new Act should extend the full defence of duress to the offences of first degree and second degree murder and attempted murder, and improve the procedure for dealing with infanticide cases. (Paragraph 1.63)

Structure within the law of homicide

- 9.2 We recommend the adoption of a three-tier structure of general homicide offences to replace the current two-tier structure of ‘murder’ and ‘manslaughter’. (Paragraph 2.33)
- 9.3 We recommend the retention of the terms ‘murder’ and ‘manslaughter’ to describe at least two of the three tiers in the new structure for the law of homicide. (Paragraph 2.42)
- 9.4 We recommend the division of murder into two tiers, called ‘first degree murder’ and ‘second degree murder’. Second degree murder should be the middle tier offence between first degree murder and manslaughter. Second degree murder will encompass some killings currently regarded as murder and some killings currently regarded as manslaughter. (Paragraph 2.43)
- 9.5 We recommend that first degree murder should encompass:
- (1) intentional killings, and
 - (2) killings with the intent to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death. (Paragraph 2.69)
- 9.6 We recommend that second degree murder should encompass:
- (1) killings intended to cause serious injury; or
 - (2) killings intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death; or
 - (3) killings intended to kill or to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death but successfully pleads provocation, diminished responsibility or that he or she killed pursuant to a suicide pact. (Paragraph 2.70)
- 9.7 We recommend that second degree murder should attract a maximum sentence of life imprisonment, with guidelines issued on appropriate periods in custody for different kinds of killing falling within second degree. (Paragraph 2.71)

9.8 We recommend that the term ‘injury’ should be used instead of the words ‘bodily harm’. (Paragraph 2.85)

9.9 We recommend that manslaughter should encompass:

- (1) killing another person through gross negligence (“gross negligence manslaughter”); or
- (2) killing another person:
 - (a) through the commission of a criminal act intended by the defendant to cause injury, or
 - (b) through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury (“criminal act manslaughter”). (Paragraph 2.163)

The fault element

9.10 We recommend that the existing law governing the meaning of intention is codified as follows:

- (1) A person should be taken to intend a result if he or she acts in order to bring it about.
- (2) In cases where the judge believes that justice may not be done unless an expanded understanding of intention is given, the jury should be directed as follows: an intention to bring about a result may be found if it is shown that the defendant thought that the result was a virtually certain consequence of his or her action. (Paragraph 3.27)

9.11 We recommend that ‘awareness’ of risk should be understood to involve consciously advertent to a risk. (Paragraph 3.35)

9.12 We recommend that a risk should be regarded as ‘serious’ if it is more than insignificant or remote. (Paragraph 3.40)

9.13 We recommend the adoption of the definition of causing death by gross negligence given in our earlier report on manslaughter:

- (1) a person by his or her conduct causes the death of another;
- (2) a risk that his or her conduct will cause death would be obvious to a reasonable person in his or her position;
- (3) he or she is capable of appreciating that risk at the material time; and
- (4) his or her conduct falls far below what can reasonably be expected of him or her in the circumstances. (Paragraph 3. 60)

Complicity in murder

9.14 We recommend that D should be liable to be convicted of P’s offence of first or second degree murder (as the case may be) if:

- (1) D intended to assist or encourage P to commit the relevant offence; or
- (2) D was engaged in a joint criminal venture with P, and realised that P, or another party to the joint venture, might commit the relevant offence. (Paragraph 4.4)

9.15 We recommend that D should be liable for manslaughter if the following conditions are met:

- (1) D and P were parties to a joint venture to commit an offence;
- (2) P committed the offence of first degree murder or second degree murder in relation to the fulfilment of that venture;
- (3) D intended or foresaw that (non-serious) harm or the fear of harm might be caused by a party to the venture; and
- (4) a reasonable person in D's position, with D's knowledge of the relevant facts, would have foreseen an obvious risk of death or serious injury being caused by a party to the venture. (Paragraph 4.6)

Provocation

9.16 We recommend that provocation should be a partial defence, with a successful plea having the effect of reducing first degree murder to second degree murder. (Paragraph 5.1)

9.17 We are recommending that the defence of provocation be reformed as follows:

- (1) Unlawful homicide that would otherwise be first degree murder should instead be second degree murder if:
 - (a) the defendant acted in response to:
 - (i) gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or
 - (ii) fear of serious violence towards the defendant or another; or
 - (iii) a combination of both (i) and (ii); and
 - (b) a person of the defendant's age and of ordinary temperament, i.e., ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or in a similar way.
- (2) In deciding whether a person of the defendant's age and of ordinary temperament, i.e., ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reacted in the same or in a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only

relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.

- (3) The partial defence should not apply where:
 - (a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or
 - (b) the defendant acted in considered desire for revenge.
- (4) A person should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.
- (5) 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. (Paragraph 5.11)

Diminished responsibility

- 9.18 We recommend that diminished responsibility should be a partial defence, with a successful plea having the effect of reducing first degree murder to second degree murder. (Paragraph 5.83)
- 9.19 We recommend that the definition of 'diminished responsibility' should be modernised, so that it is both clearer and better able to accommodate developments in expert diagnostic practice. (Paragraph 5.107)
- 9.20 We recommend adoption of the following definition:
 - (a) a person who would otherwise be guilty of first degree murder is guilty of second degree murder if, at the time he or she played his or her part in the killing, his or her capacity to:
 - (i) understand the nature of his or her conduct; or
 - (ii) form a rational judgement; or
 - (iii) control him or herself,was substantially impaired by an abnormality of mental functioning arising from a recognised medical condition, developmental immaturity in a defendant under the age of eighteen, or a combination of both; and
 - (b) the abnormality, the developmental immaturity, or the combination of both provides an explanation for the defendant's conduct in carrying out or taking part in the killing. (Paragraph 5.112)

Duress

- 9.21 We recommend that duress, if successfully pleaded, should be a full defence to first degree murder. (Paragraph 6.65)
- 9.22 We recommend that duress, if successfully pleaded, should be a full defence to second degree murder and attempted murder. (Paragraph 6.71)
- 9.23 We recommend that for duress to be a full defence to first degree murder, second degree murder and attempted murder, the threat must be one of death or life-threatening harm. (Paragraph 6.76)
- 9.24 We recommend that on a charge of first degree murder, second degree murder and attempted murder, the defendant should bear the legal burden of proving the qualifying conditions of the defence of duress on a balance of probabilities. (Paragraph 6.141)

'Mercy' and consensual killings

- 9.25 We recommend that the Government should undertake a public consultation on whether and, if so, to what extent the law should recognise either an offence of 'mercy' killing or a partial defence of 'mercy' killing. (Paragraph 7.49)
- 9.26 We recommend that, pending the outcome of any public consultation, section 4 of the Homicide Act 1957 should be retained. (Paragraph 7.50)

Infanticide

- 9.27 We recommend that the offence/defence of infanticide be retained without amendment (subject to 'murder' being replaced with 'first degree murder or second degree murder'). (Paragraph 8.23)
- 9.28 We recommend that in circumstances where infanticide is not raised as an issue at trial and the defendant (biological mother of a child aged 12 months or less) is convicted by the jury of murder [first degree murder or second degree murder], the trial judge should have the power to order a medical examination of the defendant with a view to establishing whether or not there is evidence that at the time of the killing the requisite elements of a charge of infanticide were present. If such evidence is produced and the defendant wishes to appeal, the judge should be able to refer the application to the Court of Appeal and to postpone sentence pending the determination of the application. (Paragraphs 8.46 and 8.58)

(Signed) TERENCE ETHERTON, *Chairman*
HUGH BEALE
STUART BRIDGE
JEREMY HORDER
KENNETH PARKER

STEVE HUMPHREYS, *Chief Executive*
1 November 2006

APPENDIX A

SENTENCING IN HOMICIDE CASES

- A.1 Under the terms of reference for the review, the Commission was asked to “take account of the continuing existence of the mandatory life sentence for murder”. The Commission was also asked to ensure that its recommendations would “enable those convicted to be appropriately punished”. The latter request is especially significant in relation to our recommended new offence of second degree murder.
- A.2 The Commission is not making formal recommendations on sentence for second degree murder (other than to say that the maximum sentence should be life imprisonment). This is because there was no opportunity to set out in the CP the sentencing possibilities for that crime and to ask for consultees’ views on them. However, a number of consultees – such as the police and groups representing victims’ families – have spoken to us about sentencing in homicide cases.

MANSLAUGHTER

- A.3 **We recommend that:**
manslaughter should continue to carry a discretionary life sentence.
- A.4 In the CP, we provisionally proposed that, to reflect the ‘ladder principle’, under which manslaughter would become the least serious of the three homicide offences, manslaughter should have a fixed term of years as the maximum sentence. The reason for this is that cases of manslaughter currently most likely to attract a life sentence would fall within second degree murder, under our recommendations. However, most judges have indicated to us that they would be uncomfortable with anything less than a discretionary life sentence being available for manslaughter. The importance of reflecting their knowledge and experience has led us to depart from our provisional proposal.

SECOND DEGREE MURDER

- A.5 **We recommend that:**
second degree murder should attract a discretionary life sentence maximum. There should be sentencing guidelines set down in order to ensure that sentences reflect the serious nature of the crime.
- A.6 There has been broad agreement that there should be a life sentence maximum for second degree murder. There has also been a strong feeling in some quarters that the crime(s) of murder should not become undervalued by the introduction of a three tier structure. We understand those concerns. We will try to meet them in the following ways:
- Longer sentences in second degree murder cases**
- A.7 Under the current law if someone is acquitted of murder and convicted only of manslaughter, the judge is obliged to pass a commensurately lower custodial sentence, to respect the jury’s verdict. If second degree murder became the

middle tier of a three tier structure of homicide law, judges would not be obliged to pass custodial sentences as low as they are currently obliged to do in order to reflect the jury's verdict that the killing is not first degree murder.

- A.8 The following two cases are illustrations of instances in which, were it possible to convict the killers of second degree murder, rather than of manslaughter, we would expect the custodial sentence passed to be substantially higher than the sentence actually passed for manslaughter:

Case 1:¹ the defendant and the victim, both alcoholics, frequently argued when drunk although they lived together as companions. The defendant was a tall, well-built man aged 44, unlike the slightly built 67-year-old victim. Having become drunk, the defendant hit the victim twice with a heavy lump of wood that had a large protruding nail. The first blow fractured the victim's skull, and the second pierced an artery in his arm. No medical attention was sought and the victim bled to death. The defendant pleaded guilty to manslaughter on the basis of lack of intent. The Court of Appeal said that the proper sentence was in the range 4 to 5 years (meaning a minimum term in custody of 2 to 2½ years).

Case 2:² three defendants, aged 28, 21 and 19, had been drinking heavily and taking drugs, when they attacked a 40-year-old man in a car park. He was punched to the ground and kicked by all three defendants in a deliberate and violent but unprovoked beating. The man died due to extensive brain haemorrhage. The defendants pleaded guilty to manslaughter, and on appeal received sentences of 5½ years (meaning a minimum term in custody of 2 years and 9 months).

- A.9 Under our recommendations, a charge of first degree murder would be a very real possibility in these cases because it seems highly arguable that the defendants intended to cause serious injury in the awareness that there was a serious risk of causing death (see Part 2). The prosecution could also justifiably indicate that they would only accept a plea of guilty to second degree murder and not a plea of guilty to manslaughter. The Crown Prosecution Service, in their response to our CP, has endorsed this aspect of our proposals. We believe that a plea of guilty to second degree murder could, and should, lead to a longer custodial sentence being regarded as appropriate, in cases on similar facts, than may be possible or appropriate following conviction for manslaughter under the present law.
- A.10 If a practice of accepting pleas of guilty to second degree murder and refusing to accept pleas of guilty to manslaughter became more common, then it is possible that the overall length of terms of imprisonment actually served by those convicted of homicide would rise. Whether or not that is an acceptable consequence is a matter for the next stage of the review.

¹ *A-G's Reference No 118 of 2001* [2002] EWCA Crim 958; [2002] 2 Cr App R (S) 119.

² *Andrew James Redfern and others* [2001] 2 Cr App R (S) 33.

The statutory minimum terms approach

- A.11 We believe that the recommended starting points for minimum terms for the initial period of custody in murder cases, currently specified in the Criminal Justice Act 2003 for “public policy” cases (cases with aggravating factors), should automatically apply to second degree murder as well as to first degree murder.
- A.12 The current starting point for sentencing an adult committing murder with, say, a firearm, is a life sentence with a minimum of thirty years initially in custody. This would remain the case for first degree murder. What if second degree murder is committed with a firearm? It must be kept in mind that, in broad terms, in any second degree murder case where the judge decides that the offender poses a significant risk of causing serious harm to members of the public, the offender must receive a life sentence in any event.³ A substantial proportion of second degree murder cases are likely to be of this kind. So, in the hypothetical case of second degree murder by firearm, guidelines could be introduced to indicate that the judge should still start by thinking in terms of a minimum of thirty years that would have to be served in custody.
- A.13 The message that Parliament might wish to send would be undermined if the provisions for “public policy” cases were confined to cases of first degree murder. That someone who killed did not intend to kill but intended only serious injury, and was therefore guilty of second degree murder, need not necessarily be regarded as a mitigating factor when the killing in question was a gun slaying or was of a police officer on duty. In such cases, the guidelines for sentencing in cases of second degree murder should be comparable to those applying to first degree murder cases.
- A.14 Life sentences would almost certainly continue to be a measure of first resort in many second degree murder cases with aggravating features, such as the use of a firearm. The restrictions that we are recommending for the scope of some of the partial defences will also result in fewer opportunities to escape the mandatory life sentence. Further, as we have already indicated (see A.12 above), the law would continue to require judges to pass a life sentence in any second degree murder case where the offender poses a significant risk of causing serious harm.

FIRST DEGREE MURDER

- A.15 Under our terms of reference, we have assumed that the mandatory life sentence for murder will continue but that in future it will apply to cases of first degree murder.⁴

³ Criminal Justice Act 2003, s 225(1).

⁴ Section 269 and sch 21 of the Criminal Justice Act 2003 will continue to provide starting points for judges in deciding on the initial custodial element to the life sentence in different types of “first degree murder” case.

APPENDIX B

ATTEMPTED MURDER

- B.1 A person who tries to commit murder may be guilty of attempted murder, contrary to section 1 of the Criminal Attempts Act 1981. In a case where attempted murder is alleged, the 1981 Act requires the defendant (“D”) to have done something that is ‘more than merely preparatory’ towards the commission of murder, with an ‘intent to’ kill.¹ On conviction for attempted murder, a sentence of up to and including life imprisonment is available.
- B.2 A consequence of our recommendations is that attempted murder would become ‘attempted first degree murder’. We are not recommending that an offence of ‘attempted second degree murder’ be created or recognised by the courts.
- B.3 An offence of attempted second degree murder would needlessly complicate the law. It would also in part be covering ground that is already adequately covered by, for example, the extant offences of attempting to inflict grievous bodily harm, and wounding with intent to do grievous bodily harm.
- B.4 If offences of first and second degree murder are created, the courts could, following ordinary principles of interpretation, find that someone can in law attempt either first degree murder *or* second degree murder, contrary to the 1981 Act. It might therefore seem as if specific provision would need to be made to ensure that whilst there can be attempted first degree murder, there cannot be attempted second degree murder. We do not regard that conclusion as inevitable, and so it seems to us that specific legislation relating to attempted murder may be unnecessary.
- B.5 Under an existing legal principle (discussed below), attempted murder requires proof of nothing less than an intention to kill. This is so, even though the fault element for murder itself extends beyond an intention to kill to encompass an intention to do serious harm. We do not recommend departure from this principle, even though under our recommendations (as is the case with murder under the existing law) the fault element for first degree murder extends further than an intention to kill.² That being so, we think it would be open to the courts to find that adherence to this principle dictates that whilst there can be a charge of attempted first degree murder, there can in law be no charge of attempted second degree murder.
- B.6 In this Appendix, we examine briefly the principles governing attempted murder. We believe that they support the view that a charge of attempted murder requires proof of an intention (in the sense discussed in Part 3) to kill. They thus support the view that a charge of attempted first degree murder would lie, whereas a charge of attempted second degree murder would not.

¹ As part of a separate project, the Commission is currently reviewing the law governing attempts to commit crimes. We are likely to recommend that the elements of a criminal attempt remain broadly as they are, albeit with some refinements necessary to make them clearer.

² It extends to an intention to do serious harm, with an awareness that there is a serious risk of causing death.

The meaning of intention in attempted murder³

- B.7 In *Whybrow*,⁴ the Court of Appeal ruled that for D to be guilty of attempted murder, he or she must have intended to cause the death of the victim (“V”). The Court of Appeal rejected the argument that, because an intention to inflict grievous bodily harm is a sufficient mental element for murder itself, it follows that it should be sufficient for attempted murder.
- B.8 This analysis has continued to be followed in cases post-dating the Criminal Attempts Act 1981. In *Walker and Hales*,⁵ for example, the D’s threw V off a third floor balcony. The judge directed the jury that each D was guilty of attempted murder if he ‘intended, if he could, to kill [V]...and was trying to do so’.
- B.9 Elsewhere in this Report, we set out our view that an intention to bring about a consequence can be inferred in a case in which D foresees that consequence as virtually certain to occur.⁶ Whatever the merits of this view where completed crimes are concerned, it could be claimed that it is inappropriate for attempts to commit crimes, where only direct intention – in the case of murder, acting in order to kill - should suffice.
- B.10 The argument is that ‘trying’ or ‘attempt’ implies action undertaken ‘in order to’ produce some result. That implication, if accepted, requires that intention be understood in the narrow sense as ‘purpose’ or ‘aim’. This view has some support in the case law. In *Mohan*,⁷ the Court of Appeal held that attempt requires:
- [S]pecific intent, a decision to bring about, in so far as it lies within the accused’s power, the commission of the offence which it is alleged that the accused attempted to commit, no matter whether the accused desired that consequence or not.⁸
- B.11 However, more recent authority employs something closer to the understanding of intention that we set out in Part 3. In *Walker and Hales*,⁹ the judge (whose direction was upheld on appeal) directed the jury that if each D ‘knew quite well’ that there was a high degree of probability that throwing V off the balcony would kill him, the jurors were, ‘entitled to draw the inference that ...he was actually trying to kill him if he could’.¹⁰ This direction makes it clear that, in certain cases, foresight of a high probability of death is evidence from which ‘a decision to bring about...the commission of the offence’ (to use the language of *Mohan*) can be inferred.

³ This analysis is drawn largely from the excellent discussion of criminal attempts in R A Duff, *Criminal Attempts* (1996) pp 17 to 25.

⁴ (1951) 35 Cr. App. R. 141.

⁵ (1990) 90 Cr. App. R. 226.

⁶ See Part 3.

⁷ [1976] QB 1.

⁸ [1976] QB 1, 11.

⁹ (1990) 90 Cr. App. R. 226.

¹⁰ Above, 228 to 229.

- B.12 The view that attempts to commit crimes may include the case in which D foresees a result as high probability or virtual certainty (although, by great good fortune, the result does not come about) accords with the view of intention taken under the US Model Penal Code, for the purposes of the law governing attempts. Under the US Model Penal Code, D must act ‘with the purpose of causing or with the belief that [the act] will cause’ the result.¹¹ The Canadian Law Reform Commission came to a similar conclusion.¹²
- B.13 In justifying this view, the commentary on the US Model Penal Code says, of the person who believes his or her conduct will cause the result (although, in the event, it does not):
- The manifestation of the actor’s dangerousness is just as great – or very nearly as great – as in the case of purposive conduct. In both instances a deliberate choice is made to bring about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause this result to occur.¹³
- B.14 It would, perhaps, be more accurate to say, in the case of a D who believes (wrongly, as it turns out) that a result will occur, that he or she has ‘accepted’ that that result will happen, rather than that he or she has ‘chosen’ to bring it about and done all within his or her power to bring it about. Even with that refinement, however, the force of the point made in the commentary remains largely undiminished.
- B.15 Take the classic example of the man who puts a bomb on a passenger plane, setting it to explode at a time when, as he knows, the plane will be in mid-air. He does this, not directly to kill, but in order to claim on his insurance policy for the loss of the bag in which the bomb was contained. He does not, then, directly intend to kill the passengers. If by a miracle, they all survived but his bag was destroyed he would regard himself as having successfully achieved his aim. Has he attempted to murder the passengers, if the miracle occurs?
- B.16 It is not wrong to convict him of attempting to murder the passengers. As the Canadian Law Reform Commission puts it, ‘attacks on basic values mounted only as...inevitable side-effects of some other actual goal are none the less attacks’.¹⁴ Such is the extreme recklessness with which D endangers the passengers’ lives that, in the absence of a crime of reckless endangerment of life, it is right that he should be regarded as attempting the kill the passengers.
- B.17 In summary, D should be regarded as attempting to kill V both when killing V is his or her purpose, and when D believes that the steps he or she is taking must inevitably entail V’s death.

¹¹ § 5.01(1)(b).

¹² Law Reform Commission of Canada, Working Paper No. 45, Secondary Liability (1985), 29.

¹³ Commentary to § 501, 305.

¹⁴ Law Reform Commission of Canada, Working Paper No. 45, Secondary Liability (1985), 29.

What must be intended in an attempted murder case?

- B.18 Under existing legal principles, attempted murder requires an intention *to kill*.¹⁵ Murder itself requires, at present, only an intention to do really serious bodily harm. However, it would not make much sense to say that the person who does what they can to fulfil an intention to inflict really serious bodily harm attempts murder. Such a person attempts to inflict really serious - grievous - bodily harm. This is an attempt to commit a wrong (maliciously inflicting grievous bodily harm) that is a crime in its own right.¹⁶ If there were no offence of maliciously inflicting grievous bodily harm, then perhaps there would be a case for regarding an attempt to inflict it as an attempt to commit 'murder'. However, the point is purely academic.
- B.19 Under our recommendations, the mental element for first degree murder will be satisfied by proof of an intention to kill *or* by proof of an intention to do serious injury in the awareness that there is a serious risk of causing death. If someone does a more than merely preparatory act towards killing, then they should be guilty of attempting first degree murder. What if they attempt to do serious injury, in the awareness that there is a serious risk of causing death? Should that be treated as attempted first degree murder?
- B.20 There may be some attractions, in point of simplicity, in making the mental element for attempted first degree murder the same as for first degree murder. None the less, we are not currently minded to suggest that the fault element for attempted first degree murder should be anything less than the intention to kill. The current legal position should be maintained.
- B.21 In a criminal attempt, D's fault element – his or her intent – should be such that, in successfully carrying out that intent, he or she would *necessarily* complete the offence, by bringing about the result whose occurrence is essential to its completion.¹⁷ In first degree murder cases, this condition can obviously only be satisfied if D intends to kill. For, only in carrying out that intent (understood to include doing something thought virtually certain to bring about death) would D necessarily complete the offence.
- B.22 D can successfully carry out an intention to cause serious injury, in the awareness that there is a serious risk of causing death, without necessarily causing any deaths, just as D can successfully carry out an intention to do grievous harm simpliciter without necessarily causing any deaths. So, in these cases, the condition set out in paragraph B.21 is not satisfied. Accordingly, D should not be found guilty of attempted first degree murder, where his or her intention was only to inflict serious injury, even if he or she was aware of a serious risk of causing death.

¹⁵ *Whybrow* (1951) 35 Cr. App. R. 141.

¹⁶ Contrary to the Offences Against the Person Act 1861, s 20. If D wounds another with intent to cause grievous bodily harm, he or she can be charged with a specific offence contrary to s.18 of the 1861 Act. That has a discretionary life maximum sentence, whereas an attempt to inflict grievous bodily harm, however close to success, has the same maximum as the maximum sentence for s.20 (five years). This is yet another of the anomalies that beset the Offences Against the Person Act 1861.

¹⁷ R A Duff, *Criminal Attempts* (1996) pp 24 to 25.

APPENDIX C

DEFENCES TO MURDER

By Barry Mitchell, Professor of Criminal Law and Criminal Justice, Coventry University and Dr Sally Cunningham, University of Leicester

- C.1 This brief report looks at the defences pleaded in a modest sample of cases dealt with in the courts between 1995 and 1996. As such, it forms part of a larger study aimed at discovering whether there is any evidence of possible discrepancies between the law in textbooks and the courts' verdicts, and – if there is – suggesting possible explanations for them. We were granted access to case files held by the Crown Prosecution Service (CPS), and our research is based on a sample of 93 cases.¹ The cases were identified from the homicide index maintained by the Home Office. In about a third of the cases we sought to clarify issues through discussions with those involved in the prosecution and defence, such as police officers, CPS caseworkers and lawyers, and defence lawyers.

Did not kill

- C.2 We found that 21.3% of defendants in our study denied causing the victim's death and 80% of these were subsequently convicted of murder. Neither an admission of presence at the scene, nor of causal responsibility for killing the victim appeared to have any obvious significance to the verdict. Two-thirds of the defendants who denied being responsible for killing the victim were convicted of murder (14 out of 21). In each of these cases there was evidence that, although it did not conclusively refute the defendant's claims, clearly implicated him as having perpetrated the fatal assault. For example, in case 117 the defendant was convicted of murdering his teenage stepdaughter whose body was found in a field. One witness saw a car similar to that of the defendant in the field at the relevant time. A second witness saw the defendant with the car at the entrance to the field and later picked him out in an identity parade. Soil and wheat samples taken from the car matched those in the field and the girl's blood and vaginal fluids were found on the defendant's jacket. In case 121 two students were convicted of murdering a third student outside a college. There were several witnesses to the stabbing, some of whom identified the first defendant (who subsequently denied being there at the time) as being involved and as being in possession of a bloody knife.
- C.3 In most cases an argument that the defendant was not the perpetrator in any assault against the victim is likely to either succeed, leading to acquittal, or fail, leading to conviction for murder. Sometimes, however, denial of being involved in the killing is only one of a number of alternative defences put forward. For example, in case 99 the defendant's original defence was that he was not responsible for the stabbing of the victim, but this defence was undermined by the defendant's step-son who said he saw the defendant kill the deceased (as well as repeat threats to kill him). However, the defendant was convicted of manslaughter rather than murder, probably on the basis of provocation.

¹ We would like to formally acknowledge the co-operation and assistance afforded to us by the CPS in enabling us to undertake the study.

No intent to kill or seriously injure

- C.4 In our study, 39.4% of defendants sought to rely on lack of malice aforethought, either by itself, or in combination with another defence.² Just over half (51.1%) of defendants in our sample were convicted of murder³ and most of these (43 out of 48) were by a jury. The great majority of those who pleaded lack of intent admitted responsibility for causing the victim's death. Rare exceptions included case 48 in which two young men mugged an elderly woman in the street in the early hours of the morning and she died as a consequence of fracturing her skull when she fell to the ground. Each defendant launched a cut-throat defence, admitting their presence but denying participation in the fatal assault. Case 60, on the other hand, in which the defendant killed a man who was having an affair with his (the defendant's) girlfriend, was rather unusual. At trial the defendant initially offered a plea of guilty to manslaughter, but when this was rejected he denied even killing the victim, as well as a lack of malice aforethought. In case 53 the co-accused unsuccessfully sought to rely on an alibi and the defendant in case 78, who had been drinking very heavily, remembered seeing the deceased where the offence occurred, but could not recall attacking him.

Voluntary intoxication

- C.5 We found evidence that defendants had been drinking alcohol or had consumed other drugs in 30 cases – just under a third of the sample. Of these, 17 were convicted of murder (one of whom pleaded guilty), 12 of manslaughter, and one of causing death by dangerous driving. Only eight of the 16 defendants convicted of murder by the jury had sought to rely on a lack of intent to kill or seriously injure. Similarly, just six of the 12 defendants convicted of manslaughter pleaded lack of intent. Thus, a relatively small proportion of those who had been drinking or taking drugs in our study appear to have succeeded in reducing their liability on the basis of their intoxication.

Provocation

- C.6 The partial defence to murder of provocation was the second most frequent defence in our study, featuring either by itself or along with an alternative defence in 22.3% of the cases.
- C.7 In the majority of the 21 cases in which provocation was pleaded,⁴ by itself or in combination with another defence, there were no eye-witnesses who were able to give evidence about what they saw or heard which would have supported the plea (or not). Quite frequently, therefore, apart from possible available forensic evidence, the court had to rely largely on the defendant's account of what had happened at the crucial time. There was usually evidence, albeit uncorroborated, that the defendant became angry. Whilst sometimes there was also evidence of

² 25 out of the 37 defendants relied solely on lack of intent.

³ In 1995 and 1996, 49.3% of defendants charged with murder were convicted of that offence in England and Wales; see Kathryn Coleman, Celia Hird & David Povey, *Violent Crime Overview, Homicide and Gun Crime 2004/05* Home Office Statistical Bulletin 02/06 (2nd edition) London: TSO, Table 2.02.

⁴ Although it was impossible to discern with certainty in many instances, it seemed that in about half the cases, the provocation was self-induced.

a loss of self-control, it was impossible to know whether the court felt the defendant had lost his self-control at the critical moment, or whether more reliance was being placed on the reasonableness of the defendant's reaction.

- C.8 In at least nine cases where provocation was pleaded, it was unclear whether the defendant had lost his self-control at any stage. However, it appeared there was usually very little time lapse between the provocation and the defendant's reaction to it, so that if he did lose his self-control the chances of regaining it were relatively slim. In case 94, for example, a woman killed her common law husband. There was a history of arguments between them. In the course of a row, he called her a "black bitch" and she hit him. When he tried to restrain her she hit him again and then went to the kitchen to get a knife with which she fatally stabbed him.
- C.9 There were very few occasions where it seemed the court had to decide whether any of the defendant's characteristics should be taken into consideration when considering the reasonableness of his reaction to the provocation. However, there were two cases of particular interest in the light of the decisions in *Morgan Smith*⁵ and *Attorney-General for Jersey v Holley*,⁶ both of which concerned cultural issues. In case 57 the defendant was convicted of murdering his estranged wife, both of whom were Punjabi. She had been having an affair with another man, and the defence adduced evidence from an anthropologist that the deceased's conduct would have been severely provocative according to Punjabi notions of honour. Unfortunately, we were unable to discern what, if any, significance was attached to this in the course of the trial, although the nature of the conviction clearly implies that it did not materially influence the jury. Similarly, case 179 also involved the killing of an estranged wife who was having an affair, but the defendant had what were described as "learning difficulties" and depression. According to one psychiatrist, the former condition effectively meant that the defendant had been provoked "beyond his capacity to cope". A second psychiatrist thought that the defendant's cultural identity ought to be relevant to the provocation – both parties were Asian. The jury convicted him of manslaughter, but again it was impossible for us to appreciate how much weight had been attached to the defendant's characteristics.⁷
- C.10 The Law Commission recently recommended a radical change in the definition of provocation. They stated that it should be manslaughter where "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

⁵ [2001] 1 AC 146.

⁶ [2005] UKPC 23, [2005] 2 AC 580.

⁷ Both provocation and diminished responsibility were pleaded. The psychiatric evidence was divided on the strength of the latter defence, and the six-year prison sentence perhaps suggests that the verdict was based more on provocation.

a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or similar way.”⁸

- C.11 One obvious feature of the proposal is that the current loss of self-control requirement would disappear and there would be no alternative requirement as to the manner in which the defendant must react to the provocation.
- C.12 In case 57, discussed earlier, a man was convicted of the murder of his estranged wife. The deceased had been having an affair with a colleague and had filed for divorce. In the light of the anthropological evidence that her actions would offend against their notions of honour, it is arguable that the deceased's conduct constituted gross provocation, which caused the defendant to have a justifiable sense of being seriously wronged. It is not entirely clear whether, under the Law Commission's proposal, the cultural features of this case would or would not be taken into account, although the reference to "the circumstances of the defendant" suggest they might well be.
- C.13 Case 52 is not wholly dissimilar. The defendant was convicted of murdering his wife and four children. His wife had been having an affair with another man. According to his culture and religious beliefs it was a significant disgrace for a woman to be unfaithful to her husband. There was evidence that, by virtue of their beliefs, such a woman does not deserve to live and that the husband is obliged to kill her. It was also suggested that the defendant killed only those of his children who had not been "tainted" by their mother's actions.
- C.14 These cases illustrate the potential significance of the court's decision to take on board cultural and religious issues, since both of them might otherwise simply be viewed as revenge killings. The Law Commission's proposed concept of "being seriously wronged" is likely to be heavily influenced by cultural and religious beliefs.

Self-defence

- C.15 Self-defence is quite frequently pleaded in homicide cases; either by itself or in combination with another defence. It was raised in just over a fifth of the cases in our study.
- C.16 Where self-defence was pleaded, it was more likely, than in provocation cases, that there would be eyewitnesses to the fatal assault, although many of these were friends or relatives of either or both of the parties. Quite frequently, but not necessarily only in those cases resulting in murder convictions, the evidence of an attack against the defendant seemed fairly weak. In these cases the main issue was whether more than reasonable force had been used in self-protection. In case 171 the two defendants arrived at a club and the first defendant told a friend that he had a knife, adding, "I'm ready to stab someone". When he tried to physically prevent a girl from leaving, the victim restrained him. They argued and began fighting, and then separated. The second defendant subsequently urged

⁸ Partial Defences to Murder (2004) Law Com No.290 para 3.168.

the first defendant “to do ‘im”, “stab ‘im”, “juck ‘im”, and the first defendant lunged at the victim, stabbing him fatally in the stomach. It seemed there was no serious threat to the first defendant at the point the attack took place, and in any event the victim had done no more than punch and kick the first defendant. However, the first defendant pleaded self-defence, and was convicted by the jury of manslaughter. Although he had been drinking and smoking cannabis, the first defendant appeared to be well aware of what he was doing, and it is difficult to see how this verdict accords with the “all-or-nothing” nature of the current law on self-defence.

- C.17 The apparent strength of the evidence in support of a defence was not always clearly consistent with the verdict. In case 79 there was some, albeit not particularly strong evidence on which the defendant could rely. As a small group of young men walked by, the defendant threw a bottle, hitting the victim. The defendant subsequently claimed that the victim had given him “a dirty look” and had made a racist remark. The victim returned shortly afterwards with several friends and they encircled the defendant, who became angry and frightened. The two of them argued and fought, and the victim fell to the ground fracturing his skull and subsequently died. The defendant pleaded both provocation and self-defence, claiming that he was afraid that the victim and his friends would “batter him” and that he therefore used pre-emptive violence. He was convicted of manslaughter and sentenced to four and a half years imprisonment.
- C.18 There were instances where the discrepancies between the defence evidence and the verdict were greater. Where the conviction was for manslaughter rather than murder there was usually some other factor relating to the participants and/or to evidential difficulties - which may have influenced the court to reach a more lenient verdict. In case 136, for example, two heroin addicts were thought to have had an argument outside an off-licence over the sale of drugs. The police received very little help from the public. Most of the witnesses were children and the prosecution felt it was not in the public interest to call them as witnesses at trial. A teenager who had been told by the defendant’s brother that the defendant had come into the off-licence to get a baseball bat with which he then killed his victim, was one of the few prosecution witnesses. However, the teenager did not come up to proof, and the prosecution accepted an offer of guilty to manslaughter, part way through the trial, being unable to refute the defence claims of provocation and/or self-defence.
- C.19 Another example was case 100. Having acquired a knife, the defendant deliberately confronted his victim and fatally stabbed him when the victim lunged at him. Both men had criminal records for violence, although the victim’s was worse, and he seemed to have a particularly bad reputation. However, the jury may well have been unaware of the victim’s criminal record. That the defendant would use violence was very predictable, yet the plea of provocation succeeded despite the clear suggestion of revenge. A seven-year prison sentence was imposed subsequently imposed. Similarly, in case 175 the defendant appears to have been given the benefit of the doubt. The defendant had, earlier in the day, said that he wanted to hurt the victim. Three witnesses said they had seen the defendant approach the victim and shoot him. The defendant initially claimed that the victim was the real aggressor and that the gun had been discharged accidentally; although we found no evidence that the trigger pressure on the gun

was unusually light. However, the defendant then changed his story, arguing that the victim had confronted him and stabbed him. A knife was found at the scene and the defendant did have a minor injury to his neck. The jury convicted him of manslaughter, but his sentence was increased on appeal from seven to nine years' imprisonment.

Implicit defences

- C.20 The preceding discussion is based on defences formally relied on; i.e. on the plea entered by the defendant or the defence strategy at trial. Obviously, there can be no certainty that the nature of the verdict means that the defence was successful. The verdicts may also result from a perceived weakness in the prosecution case or for some other reason. Very occasionally, however, it appeared to us that cases could be best understood on the basis of some other defence, which was not formally pleaded by the defence.⁹ For example, in case 105 the victim, a young man described by his family as bad tempered, paranoid and aggressive, was killed by his brother who, in contrast, was said to be quiet and studious and who usually "turned the other cheek". There were no actual witnesses to the stabbing, but their father had heard the defendant shouting "leave me alone" and their mother had heard raised voices. Both parents then saw the victim clutching his chest. The defendant said that his brother had followed him into the kitchen, spat at him, and that he (the defendant) replied in similar fashion. The victim then attacked him and they struggled. The defendant stated he became frightened when his brother picked up a knife and blocked the exit from the room, so he too picked up a knife, purely for self-defence. The victim advanced towards him and the defendant stabbed him in order to save himself. Members of the family said that the victim had attacked them in the past. Approximately two years previously, the mental health team from the social services department had tried to persuade the victim to accept help but he refused. The prosecution accepted a plea to manslaughter by provocation, and the defendant was sentenced to two years' imprisonment suspended for two years. Arguably, the case would be more appropriately treated as one of self-defence, although that would have warranted a complete acquittal.
- C.21 It is also worth mentioning case 108, where the defendant strangled his girlfriend. They had had a stormy relationship during which they had separated and then reconciled. They argued and the girlfriend was continually punching the defendant until, in his words, he "couldn't take it any more". The defence pleaded provocation and, less confidently, self-defence. However, defence counsel strongly advised us that the manslaughter verdict was based on lack of intent to kill or cause serious injury and that this was ultimately a case of unlawful and dangerous act manslaughter.

⁹ Our statistical calculations are based on the defences actually/expressly pleaded, although the number of cases where we think there is a better implicit defence is very small and would thus make only minimal difference to the percentage figures.

Suicide pacts

- C.22 There was just one case in our study where the defence was that the killing was carried out in pursuance of a suicide pact under section 4 of the Homicide Act 1957. In case 102 the defendant successfully relied on such a plea. A suicide note addressed to the defendant's former wife was found in his car. In the early hours one morning, he phoned her and told her that he and the deceased, his friend, had agreed to commit suicide and that he had already electrocuted the deceased and that he was going to kill himself. The prosecution seem to have been unconvinced by the plea of suicide pact, at least partly because the deceased owed money to the defendant. The jury accepted the plea by a majority verdict and the defendant was sentenced to five years' imprisonment.

Single and multiple defences

- C.23 It was noticeable that some defences were more commonly pleaded by themselves. For example, lack of intent was twice as likely to be pleaded by itself than with another defence, and roughly two out of every five defendants who pleaded self-defence did not make alternative pleas. In contrast, about three in every four provocation pleas were combined with another defence. Obviously, some combinations of pleas were superficially inconsistent, such as provocation and lack of intent, and self-defence and lack of intent,¹⁰ although presumably these pleas were argued in the alternative. We found no evidence of any pattern which would suggest that certain defences are more commonplace in specific kinds of homicide or contexts. In virtually every defence category, cases reflected variations in the surrounding circumstances and apparent motives. For example, not unexpectedly, the majority of defendants who killed their victims in a fight pleaded self-defence and/or lack of intent.
- C.24 Since we only studied cases which resulted in convictions for a homicide offence of some kind, we were unable to *fully* examine the effectiveness of different defences at trial. Nonetheless, some defences pleaded by themselves, and some combinations thereof, appeared to be more successful than others are. In each category of defences, there were wide differences in sentences, even though the verdicts were the same.¹¹ Of the 20 defendants who simply denied causing death, 16 were nonetheless convicted by the jury of murder.¹² Where provocation was pleaded by itself all five defendants were convicted of manslaughter only, as were six of the eight who relied solely on self-defence. More than two-thirds of those who denied malice aforethought were convicted of manslaughter or causing death by dangerous driving. As to cases where two defences were pleaded, all five defendants who combined lack of intent with self-defence were convicted of manslaughter. So too were four of the six who pleaded self-defence and provocation. Conversely, when provocation was relied on in combination with

¹⁰ Normally, these two pleas are inconsistent, although it is just possible that a defendant may argue that he was trying to defend himself and only meant to cause *some* rather than *serious* harm.

¹¹ For example, in the five cases resulting in manslaughter convictions where self-defence and lack of intent was pleaded, the sentences ranged from two to 12 years' imprisonment, and from a suspended sentence to 7 years where provocation was pleaded.

¹² Clearly, there is an element of risk in such a defence in that it forces the jury to make a stark choice between guilty or not guilty of murder.

lack of intent or diminished responsibility seven out of ten defendants were convicted of murder. However, the figures in most of these cases are too small to warrant any firm implications. Nevertheless, these results were particularly interesting since interviews with barristers and solicitors conducted after the examination of CPS case files indicated that it is common for defence lawyers to adopt the tactic of adducing evidence of as many justifications, excuses or other mitigation as possible. This was notwithstanding the theoretical inconsistencies between the defences, especially if there was to be a full trial.

APPENDIX D

INFANTICIDE AND RELATED DIMINISHED RESPONSIBILITY MANSLAUGHTERS: AN EMPIRICAL STUDY

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D.1 The Infanticide Act 1938, section 1(1) provides:

Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of her giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

D.2 Section 1(2) of the 1938 Act provides that a woman indicted for the murder of her child under twelve months of age may be acquitted of that offence and convicted of infanticide if the requirements of section 1(1) above are satisfied. It is clear, therefore, that infanticide can either be charged as an offence in its own right or can be used as a defence to a charge of murder.

D.3 Diminished responsibility (“DR”) reduces murder to manslaughter but, unlike infanticide, is not an offence in its own right. The essentials of the plea are contained in section 2(1) of the Homicide Act 1957, which provides:

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility in doing or being a party to the killing.

¹ Acknowledgments:

- To the Law Commission whose generous funding made this research possible.
- To the Crown Prosecution Service for authorising the research and in particular to all the staff at the Departmental Records office whose assistance was invaluable.
- To the Home Office for help with homicide statistics.
- To David Hughes and Keren Murray of the Law Commission’s Criminal Law Team for helpful comments on earlier drafts.

- D.4 The requirements of each of these provisions are markedly different, both in relation to the abnormal states of mind required and in respect of who may avail themselves of which plea. Infanticide is restricted to biological mothers of a child killed where the child is under 12 months old at the time. By contrast, the partial defence of DR has no such constraints in terms of perpetrator or victim.
- D.5 Despite these obvious differences, there is a clear overlap between infanticide and DR. This led to the Butler Report on Mentally Abnormal Offenders to suggest that the offence of infanticide was no longer necessary, and that the defence of DR could be used instead.² Both provisions have been the subject of much criticism as is clearly outlined in the Law Commission's Consultation Paper entitled "A New Homicide Act for England and Wales?"³ However, as the Commission points out "Recent research into the significant features or characteristics of particular cases [of infanticide] dealt with either by the courts or the prosecuting authorities is limited."⁴ As a result the research described below was commissioned as part of the Commission's review of the law of homicide.
- D.6 In order to explore the nature of some infanticide cases and their relationship with DR it was decided to study, through the use of Crown Prosecution Service (CPS) files, a sample of infanticide convictions during the years 1990 to 2003 together with a sample, during the same period, of DR manslaughter convictions of biological mothers who had killed their children aged three years and under. The former sample, which will be discussed first in section A, contains 49 cases, while the latter, discussed in section B, is a sample of 35 cases.

The Research Findings

A. The Infanticide Sample

- D.7 Although, during the research period of 1990 to 2003, there was a total of 49 defendants⁵ who were convicted of infanticide, in 11 of these cases, for a variety of reasons, no access was available to the relevant CPS files, leaving only skeleton statistical data. This means that in some cases only limited information was available and, where this is the case, this is made clear in the relevant Tables.
- D.8 Tables 1a and 1b give a breakdown of the age distribution of the defendants. The mean age was 24.7 (age range 13 to 44) with the majority (67.3%, n=33) aged 25 and under.

² Committee on Mentally Abnormal Offenders (Butler Report), Cmnd 6244 (1975), para 19.27.

³ Law Commission Consultation Paper No 177, Parts 6 and 9.

⁴ Above, para 9.3.

⁵ A very brief account of each case is given in Annex A. The cases are numbered 1 to 49 so as to include all the relevant defendants in the sample. Any reference to a case number in the text can be followed up in the appendix. Cases 22 and 23 concern the same defendant in respect of two victims 6 years apart and, for the sake of convenience, are treated as two separate cases.

Table 1a: age range of accused

	Frequency	Percent
0-16	6	12.2
17-20	10	20.4
21-25	17	34.7
26-30	5	10.2
31-35	3	6.1
36-39	7	14.3
40-44	1	2.1
Total	49	100.0

Table 1b: age of accused

	Frequency	Percent	Cumulative Percent
13.00	1	2.0	2.0
15.00	2	4.1	6.1
16.00	3	6.1	12.2
17.00	1	2.0	14.3
18.00	2	4.1	18.4
19.00	4	8.2	26.5
20.00	3	6.1	32.7
21.00	3	6.1	38.8
22.00	5	10.2	49.0
23.00	4	8.2	57.1
24.00	3	6.1	63.3
25.00	2	4.1	67.3
26.00	2	4.1	71.4
29.00	2	4.1	75.5
30.00	1	2.0	77.6
31.00	1	2.0	79.6
32.00	1	2.0	81.6
35.00	1	2.0	83.7
36.00	2	4.1	87.8
37.00	3	6.1	93.9
39.00	2	4.1	98.0
44.00	1	2.0	100.0
Total	49	100.0	

D.9 The ethnic breakdown of defendants is presented in Table 2a and shows that of the 40 cases where relevant data were available 72.5% (n=30) were white with only one born outside the UK while of the ten non-white, eight were born outside the UK.

Table 2a: born UK * ethnic group Crosstabulation

		ethnic group					Total
		white	black	asian	filipino	unknown	
born UK	yes	29	0	2	0	9	40
	no	1	3	4	1	0	9
Total		30	3	6	1	9	49

D.10 With regard to criminal records, out of a total of 40 cases, only 5% (n=2) of the sample had previous convictions. As for psychiatric history, 65% (n=26) had had contact with psychiatric services. In relation to marital status, Table 2b below shows that of 40 cases where this information was available, 45% (n=18) were single at the time of the offence.

Table 2b: marital status

	Frequency	Percent	Cumulative Percent
single	18	36.7	36.7
married	12	24.5	61.2
co-habiting	10	20.4	81.6
no information	9	18.4	100.0
Total	49	100.0	

D.11 Victims' sex/age distribution is presented in Tables 3a, 3b and 3c. The age range for victims was under 24 hours to 11 months. It can be seen that the majority, 65.3% (n=32), were female/daughters. With regard to age, 30.6% (n=15) were newborn in the sense of being aged under 24 hours while an additional 22.4% (n=11) were aged between one day and one month. By contrast, only 12.2% (n=6) were aged more than 6 months.

Table 3a: age range of victims

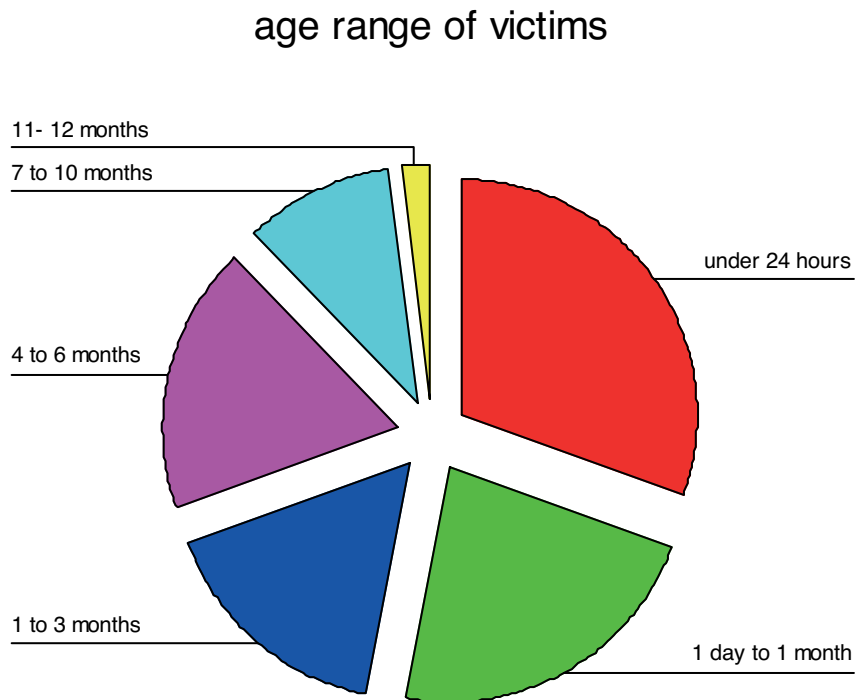


Table 3b: age range of victims

	Frequency	Percent	Cumulative Percent
under 24 hours	15	30.6	30.6
1 day to 1 month	11	22.4	53.1
1 to 3 months	8	16.3	69.4
4 to 6 months	9	18.4	87.8
7 to 10 months	5	10.2	98.0
11 - 12 months	1	2.0	100.0
Total	49	100.0	

Table 3c: age range of victims * sex of victim Crosstabulation

	sex of victim		Total
	male	female	
under 24 hours	6	9	15
1 day to 1 month	3	8	11
1 to 3 months	2	6	8
4 to 6 months	3	6	9
7 to 10 months	3	2	5
11 - 12 months	0	1	1
Total	17	32	49

- D.12 Table 3d shows that all the newborn victims (n=15) were killed by those aged 25 years and under.

Table 3d: age range of victims * age range of accused Crosstabulation

	age range of accused							Total
	0-16	17-20	21-25	26-30	31-35	36-39	40-44	
under 24 hours	6	2	7	0	0	0	0	15
1 day to 1 month	0	0	4	2	1	4	0	11
1 to 3 months	0	5	2	1	0	0	0	8
4 to 6 months	0	1	1	1	2	3	1	9
7 to 10 months	0	2	2	1	0	0	0	5
11 - 12 months	0	0	1	0	0	0	0	1
Total	6	10	17	5	3	7	1	49

- D.13 Table 3e shows that all except one of the newborn victims were killed by a mother who was single at the time of the offence.

Table 3e: age range of victims * marital status Crosstabulation

		marital status			Total
		single	married	co-habiting	
age range of victims	under 24 hours	10	0	1	11
	1 day to 1 month	1	6	3	10
	1 to 3 months	2	3	3	8
	4 to 6 months	2	2	2	6
	7 to 10 months	3	0	1	4
	11 - 12 months	0	1	0	1
Total		18	12	10	40

- D.14 The place or venue where the killing actually took place is given in Table 4. It can be seen from this that the vast majority of the offences took place in the matrimonial/partner's/family home (89.8%, n=44).

Table 4: venue of offence

	Frequency	Percent	Cumulative Percent
matrimonial/partner's/family home	44	89.8	89.8
accused's home ⁶	1	2.0	91.8
street	2	4.1	95.9
maternity unit/hospital	2	4.1	100.0
Total	49	100.0	

⁶ See case 10 in Annex A.

D.15 Tables 5a and 5b give the “method of killing” and show that the most prevalent method was suffocation (36.7%, n=18) followed by battering (14.3%, n=7). Table 5c reveals that of the six victims who died of neglect, all but one was aged under 24 hours.

Table 5a: method of killing

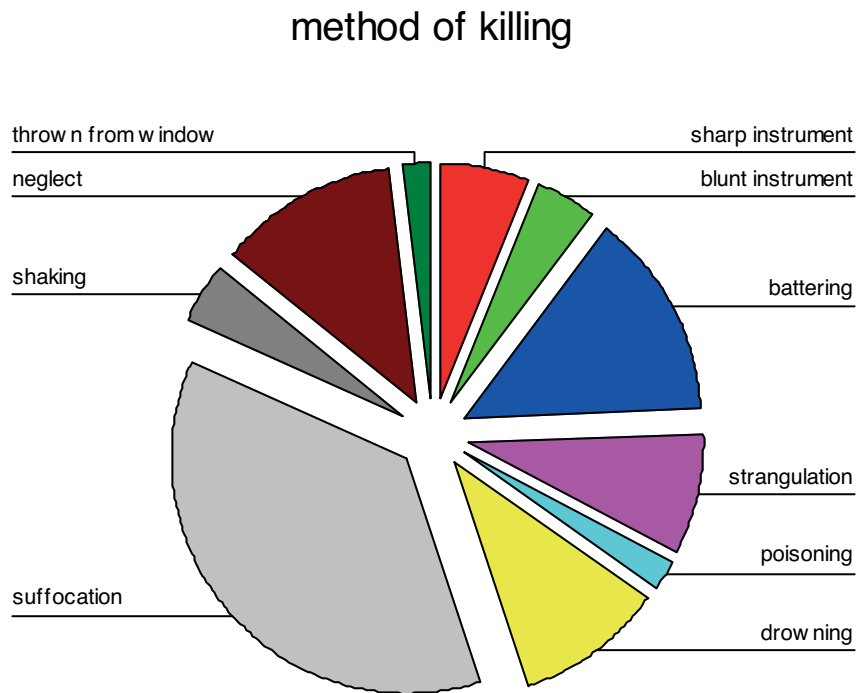


Table 5b: method of killing

	Frequency	Percent	Cumulative Percent
sharp instrument	3	6.1	6.1
blunt instrument	2	4.1	10.2
battering	7	14.3	24.5
strangulation	4	8.2	32.7
poisoning	1	2.0	34.7
drowning	5	10.2	44.9
suffocation	18	36.7	81.6
shaking	2	4.1	85.7
neglect	6	12.2	98.0
thrown from window	1	2.0	100.0
Total	49	100.0	

Table 5c: method of killing * age range of victims Crosstabulation

		age range of victims						
		Under 24 hours	1 day to 1 month	1 to 3 months	4 to 6 months	7 to 10 months	11- 12 months	Total
method of killing	sharp instrument	2	1	0	0	0	0	3
	blunt instrument	0	2	0	0	0	0	2
	battering	2	0	2	1	2	0	7
	strangulation	2	0	1	1	0	0	4
	poisoning	0	0	1	0	0	0	1
	drowning	1	1	0	2	0	1	5
	suffocation	3	6	2	4	3	0	18
	shaking	0	0	1	1	0	0	2
	neglect	5	1	0	0	0	0	6
	thrown from window	0	0	1	0	0	0	1
Total		15	11	8	9	5	1	49

ASPECTS OF THE TRIAL

- D.16 The CPS files could not shed light on all of the intricacies of the trial process in each case but the following data were extracted and may help to explain a number of different aspects of what took place.
- D.17 Table 6a shows that the majority of the defendants were initially charged with murder (75.5%, n=37) compared to 24.5% (n=12) facing an infanticide charge. However, table 6b shows that by the time the charges were finalised, after pre-trial negotiations, this had altered dramatically to 63.3% (n=31) of the accused facing a charge of infanticide and 36.7% (n=18) facing charges of murder and infanticide.

Table 6a: initial charge

	Frequency	Percent	Valid Percent
murder	37	75.5	75.5
infanticide	12	24.5	24.5
Total	49	100.0	100.0

Table 6b: final charge(s)

	Frequency	Percent	Valid Percent
infanticide	31	63.3	63.3
murder and infanticide	18	36.7	36.7
Total	49	100.0	100.0

- D.18 Table 7 shows that there was no jury trial in all but two of the cases (95.9%, n=47). The two cases in question are described briefly in the Appendix A in cases 30 and 34. In both cases the defendants maintained a not guilty plea which in turn necessitated a full trial.

Table 7: jury trial

	Frequency	Percent
yes	2	4.1
no	47	95.9
Total	49	100.0

- D.19 Table 8 reveals that in all but a single case the verdict was infanticide. The exception is case 34 where a jury rejected infanticide and convicted the defendant on a separate count of common law manslaughter.

Table 8: verdict

	Frequency	Percent
infanticide	48	98.0
CL manslaughter	1	2.0
Total	49	100.0

- D.20 Table 9 below gives the sentence for each case. This reveals that a non-custodial sentence was given in the vast majority of cases (83.7%, n=41), with five (10.2%) defendants (described in cases 4, 6, 8, 30 and 34) receiving hospital orders, two with restrictions. This leaves three (6.1%) defendants who were given sentences of imprisonment. These cases are described in cases 22, 23 and 27. In this connection it is important to emphasise that cases 22 and 23 refer to the same defendant who killed two of her children.⁷ The first killing some six years earlier only came to light after she killed the second child when suspicions were aroused. It was clear from the sentencing judge's remarks that the second killing meant that a term of imprisonment was necessary. In case 34 although the defendant was given a term of 4 years detention in a young offenders institution, this was subject to a hospital direction under section 45A of the Mental Health Act 1983.

Table 9: sentence

	Frequency	Percent	Cumulative Percent
between 3 and five years	3	6.1	6.1
probation with treatment	20	40.8	46.9
probation order	19	38.8	85.7
hospital order	3	6.1	91.8
restriction order	2	4.1	95.9
supervision order	2	4.1	100.0
Total	49	100.0	

⁷ For the sake of convenience the two killings are treated as two separate cases.

THE PSYCHIATRIC REPORTS

- D.21 The psychiatric reports on the CPS files which addressed the issues of infanticide/DR were all analysed. The maximum number of such reports in any one file was four. However, it can be seen from Table 10 below that in 11 cases there were no reports available owing to lack of access to the files. It was also clear in some cases that there were other reports which although referred to were not contained in the CPS files. What this means is that the CPS files clearly did not contain all relevant reports and the following analysis must be read with this caveat in mind. However, despite this deficiency in the data, the reports reveal much of interest. First, Table 10 reveals that only one file contained the maximum of four reports, compared to 18 files which each had two reports. The grand total of reports was 67.

Table 10: psychiatric reports on file

	Frequency	Percent	Cumulative Percent
one	15	30.6	30.6
two	18	36.7	67.3
three	4	8.2	75.5
four	1	2.0	77.6
none	11	22.4	100.0
Total	67	100.0	

- D.22 Table 11 below shows that the defence requested 41.6% (n=28) of the overall number of reports, followed by the prosecution at 32.8% (n=22).

Table 11: report sources

	Frequency	Percent	Cumulative Percent
court	4	6.0	6.0
prosecution	22	32.8	38.8
defence	28	41.8	80.6
police	6	9.0	89.6
unclear	7	10.4	100.0
Total	67	100.0	

- D.23 Tables 12a and 12b reveal that the most frequent primary diagnosis⁸ used in connection with the infanticide was postnatal depression (28.6%, n=14) followed by depression (14.3%, n=7), and puerperal psychosis (12.2%, n=6). It should be pointed out that there were eleven cases which contained no relevant information as to diagnosis owing to lack of access to the files.

⁸ The primary diagnosis was the one which an overall analysis of the infanticide reports in each case seemed to support the plea. Clearly, in some cases there was a lack of unanimity over diagnosis. In short the primary diagnosis is based on a cumulative view of the reports in each case.

Table 12a: primary diagnosis

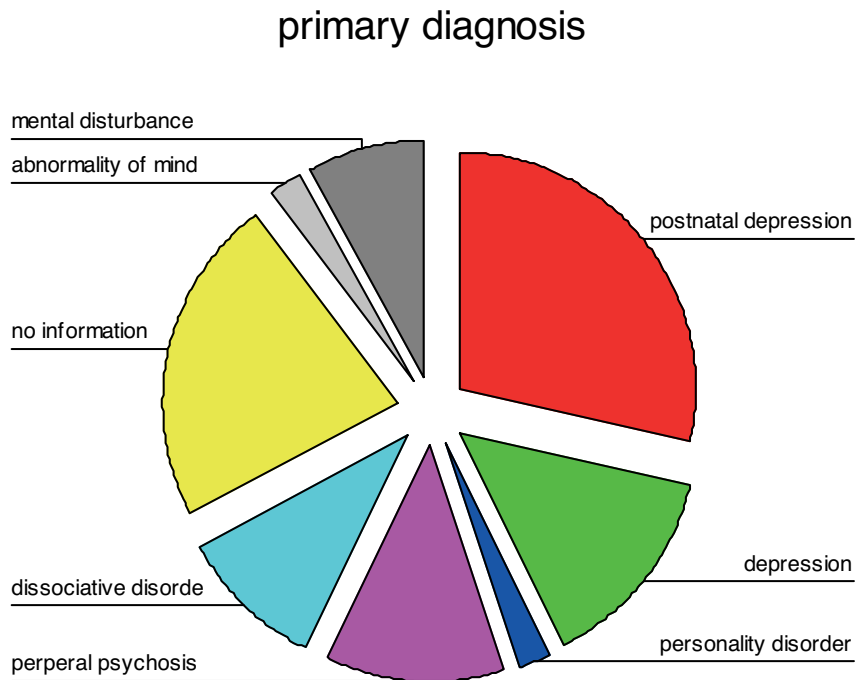


Table 12b: primary diagnosis

	Frequency	Percent	Cumulative Percent
post natal depression	14	28.6	28.6
depression	7	14.3	42.9
personality disorder	1	2.0	44.9
puerperal psychosis	6	12.2	57.1
dissociative disorder	5	10.2	67.3
no information	11	22.4	89.8
abnormality of mind	1	2.0	91.8
mental disturbance	4	8.2	100.0
Total	49	100.0	

D.24 Table 12c below reveals that all cases where the primary diagnosis was depression led to a probation order without a condition of mental treatment, as did seven of the cases on which there was “no information” as to diagnosis. By contrast, in four of the five cases where the primary diagnosis was dissociative disorder, a probation order with a condition of treatment was made. Further, nine of the 14 cases where the primary diagnosis was postnatal depression resulted in a probation order with a condition of treatment.

Table 12c: primary diagnosis * sentence Crosstabulation

		Sentence						Total
		between 3 and 5 years	probation with treatment	probation order	hospital order	restriction order	supervision order	
primary diagnosis	postnatal depression	1	9	2	1	0	1	14
	depression	0	0	7	0	0	0	7
	personality disorder	0	0	0	0	1	0	1
	puerperal psychosis	0	2	1	2	1	0	6
	dissociative disorder	0	4	0	0	0	1	5
	no information	0	4	7	0	0	0	11
	abnormality of mind	0	0	1	0	0	0	1
	mental disturbance	2	1	1	0	0	0	4
	Total	3	20	19	3	2	2	49

D.25 The psychiatric reports are of course vital as to how the plea progresses. Table 13 below shows the broad opinions given in all the reports in respect of whether or not the report writer favoured the plea.

Table 13: report opinions on infanticide

	Frequency	Percent	Cumulative Percent
no mention of infanticide	23	34.3	34.3
favours infanticide	43	64.2	97.0
for the court to decide	1	1.5	100.0
Total	67	100.0	

D.26 It can be seen from this that, while 23 reports made no mention of infanticide of the 43 that did address the issue all of the report writers favoured infanticide. An additional report made it clear that although D's condition was a disturbance of the mind which fell within the Infanticide Act 1938, it was a matter for the court to determine if D's description of her state of mind was an accurate one. In those reports which favoured infanticide, some typical examples of the ways in which psychiatrists would couch their conclusions as to the ultimate issue are given with reference to case numbers:

Case 1

D.27 "This case comes within the ambit of the Infanticide Act 1938 and in my opinion at the time of her child's death the accused was suffering from a disturbance of mind due to the fact that she had not fully recovered from the effects of childbirth."

Case 2

- D.28 "If infanticide is the charge, she would fall within the provisions of the 1938 Act, since she had not fully recovered from the effects of giving birth. To be more precise, she was not suffering from a puerperal psychosis but was depressed and poorly adjusted to motherhood."

Case 3

- D.29 "She would appear to be emerging from the acute phase of a mental illness, in the context of which she caused the death of her two week old son, which, in my view amounted to a disturbance of the balance of her mind within the terms of the Infanticide Act 1938."

Case 10

- D.30 "The concept of disturbance of balance of mind is normally only used in a legal context. To the extent that it is a medical issue.... her reaction to pregnancy can be interpreted as a form of dissociative disorder and the effect of giving birth may be regarded as a crisis which upset the previous and pathological equilibrium, thus disturbing the balance of her mind at the material time."

Case 18

- D.31 "The law on [infanticide] seems to have been interpreted as a technical exercise to be lenient to women suffering from postnatal depression who kill their children. By defining postnatal depression in the accused the requirements of infanticide are fulfilled that is at the time of the acts the balance of her mind was disturbed by not having fully recovered from the effect of giving birth."

Cases 22 & 23

- D.32 "Thus it appears to me that insofar as the criteria of the 1938 Act can be applied today; there is some medical evidence in support of infanticide. More importantly, the defendant's condition falls within the range of conditions which have been accepted by the courts as laying a basis for this defence even in the absence of identifiable mental disorder or proper analysis or discussion of the legal criteria."

Case 29

- D.33 "In my opinion the nature and degree of her mental illness and its temporal relationship to childbirth would afford her a defence of infanticide under the terms of the Infanticide Act 1938."

Case 34

- D.34 "The balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to her child. This arose against the setting of a disorder of personality...for this reason I believe she would have a defence of infanticide under section 1 of the Infanticide Act 1938."

D.35 With regard to the criteria contained in the 1938 Act, Table 14 below shows that, in those reports which directly addressed the issue, 35 expressly relied on “balance of her mind disturbed by reason of childbirth” rather than lactation which was not expressly relied upon in any of the reports. Also, in one report (classed as “balance of mind disturbed unspecified”) although no actual mention was made of infanticide the author stated that “her balance of mind was disturbed to a significant degree by her postnatal depression to cause her not to know the causes or consequences of her actions” (Case 33).

Table 14: 1938 Act criteria * report opinion Crosstabulation

		Report opinion			Total
		No mention of infanticide	Favours infanticide	For jury to decide	
1938 Act criteria	not mentioned	12	5	0	17
	balance of mind disturbed effects of childbirth	0	36	1	37
	balance of mind disturbed unspecified	1	0	0	1
	mental disorder	10	2	0	12
Total		23	43	1	67

D.36 In relation to the 12 “mental disorder” reports, two favoured infanticide on the basis of D’s mental disorder but did not mention the 1938 Act’s mental disturbance criterion. However, four opined that D’s condition satisfied the requirements for DR plea but made no mention of infanticide. The remaining six concluded simply that D suffered from a postnatal form of mental disorder but again made no mention of infanticide.

D.37 Tables 15a and 15b show that while 26 (38.9%) reports favoured DR rather than or as an alternative plea to infanticide, only two reports (3.0%) arising from the same case (no. 34) positively concluded that D’s condition would not fall within section 2 of the Homicide Act 1957. In both reports it was opined that the personality disorder from which D suffered would not constitute an abnormality of mind within the meaning of the Homicide Act 1957. This is of interest in view of earlier concerns which have been expressed, particularly by the Criminal Law Revision Committee⁹, that not all cases of infanticide would fall within section 2 as the requirements contained in the latter are stricter and more difficult to satisfy.

⁹ Criminal Law Revision Committee, *Offences against the Person*(1980) Report 14, Cmnd 7844, para 102.

In this connection, however, one cannot be confident that in the 39 (58.1%) reports which did not mention DR, the authors might not have regarded D's condition as satisfying the section 2 criteria, had they addressed that issue. Nevertheless, it is also of interest to note that almost 39% of the reports did favour DR and, with this in mind Table 15c below shows that none of the six reports which diagnosed "dissociative disorder" favoured DR but rather relied on other diagnostic categories. Although it must be repeated that one can only speculate about this matter, it does seem possible that those reports which diagnosed "dissociative disorder" would not have concluded that it constituted an "abnormality of mind" within section 2 of the 1957 Act. It may be more than mere coincidence that not one of these six reports concluded otherwise. In this connection it is also of interest to note that Table 15d below shows that of the five cases where the primary diagnosis was "dissociative disorder", all of the victims were "newborn" in the sense of being aged under 24 hours. Again, therefore, it seems possible that such a form of "mental disturbance" while triggering a verdict of infanticide might be less likely to fall within section 2.

Table 15a: possible DR Plea

	Frequency	Percent
no	2	3.0
yes	26	38.9
not mentioned	39	58.1
Total	67	100.0

Table 15b: report opinion on infanticide* possible DR Plea Crosstabulation

		Possible DR Plea			
		No	Yes	Not mentioned	Total
report opinion on infanticide	no mention of infanticide	0	4	19	23
	favours infanticide	2	22	19	43
	for jury to decide	0	0	1	1
Total		2	26	39	67

Table 15c: primary diagnosis * possible DR plea Crosstabulation

		Possible DR plea			
		No	Yes	Not mentioned	Total
primary diagnosis	postnatal depression	0	10	18	28
	depression	0	5	7	12
	personality disorder	2	0	1	3
	puerperal psychosis	0	5	6	11
	dissociative disorder	0	0	6	6
	abnormality of mind	0	1	0	1
	mental disturbance	0	5	1	6
	Total	2	26	39	67

Table 15d: primary diagnosis * age range of victims Crosstabulation

		Age range of victims						
		under 24 hours	1 day to 1 month	1 to 3 months	4 to 6 months	7 to 10 months	11- 12 months	Total
primary diagnosis	postnatal depression	1	5	3	2	2	1	14
	depression	3	0	3	1	0	0	7
	personality disorder	0	0	1	0	0	0	1
	puerperal psychosis	0	3	0	2	1	0	6
	dissociative disorder	5	0	0	0	0	0	5
	no information	4	1	1	3	2	0	11
	abnormality of mind	1	0	0	0	0	0	1
	mental disturbance	1	2	0	1	0	0	4
	Total	15	11	8	9	5	1	49

Concluding Remarks

D.38 In order to explore the nature of some infanticide cases and their relationship with DR it was decided first to study a sample of 49 infanticide convictions during the years 1990- 2003. In doing so the data from this particular empirical research study reveal the following points:

- (1) Although during the research period of 1990 to 2003 there was a total of 49 defendants who were convicted of infanticide, in 11 of these cases for a variety of reasons no access was available to the relevant files leaving only skeleton statistical data.

- (2) The mean age of defendants was 24.7 (age range 13 to 44) with the majority (67.3%, n=33) aged 25 and under.
- (3) The age range for victims was under 24 hours to 11 months. The majority, 65.3 % (n=32), were female/daughters. 30.6% (n=15) of all victims were newborn in the sense of being aged under 24 hours. All the newborn victims were killed by those aged 25 years and under, see Table 3d.
- (4) The vast majority of the offences took place in the matrimonial/partner's/family home (89.8%, n=44).
- (5) The most prevalent method of killing was suffocation (36.7%, n=18) followed by battering (14.3%, n=7). Table 5c reveals that of the victims who died of neglect all but one was aged under 24 hours.
- (6) Table 6a shows that while the majority of the defendants were initially charged with murder (75.5%, n=37) compared to 24.5% (n=12) facing an infanticide charge, by the time the charges were finalised, after pre-trial negotiations, this had altered dramatically to 63.3% (n=31) of the accused facing a charge of infanticide and 36.7% (n=18) facing charges of murder and infanticide, see Table 6b.
- (7) There was no jury trial in all but two of the cases (95.9%, n=47). The two cases in question are described briefly in Appendix A in cases 30 and 34. In both cases the defendants maintained a not guilty plea which in turn necessitated a full trial.
- (8) Table 8 reveals that in all but a single case the verdict was infanticide. The exception is case 34 where a jury rejected infanticide and convicted the defendant on a separate count of common law manslaughter.
- (9) A non-custodial sentence was given in the vast majority of cases (83.7%, n=41), with five (10.2%) defendants (described in cases 4, 6, 8, 30 and 34) receiving hospital orders, two with restrictions. This leaves three (6.1%) defendants who were given sentences of imprisonment, see Table 9.
- (10) The grand total of relevant psychiatric reports was 67.
- (11) The most frequent primary diagnosis used in connection with the infanticide was postnatal depression (28.6%, n=14) followed by depression (14.3%, n=7) and puerperal psychosis (12.2%, n=6), see Tables 12(a) and 12(b).
- (12) Of those reports that did address the issue, all of the report writers favoured infanticide (64.2%, n=43). 35 of these reports expressly relied on "balance of her mind disturbed by reason of childbirth" rather than lactation which was not expressly relied upon in any of the reports, see Table 14.
- (13) While 26 (38.9%) reports favoured DR rather than or as an alternative plea to infanticide, only two reports (3.0%) arising from the same case (no. 34) positively concluded that D's condition would not fall within s 2 of the Homicide Act 1957, see Table 15(a).

ANNEX A – INFANTICIDE CASE SYNOPSES

Case 1

- D.39 D, aged 29, got married after it was discovered she was pregnant. D had a normal pregnancy and gave birth to, V, a son. After three months D became depressed. She was eventually referred to a psychiatrist who diagnosed postnatal depression. D was given medication and her condition improved. Some two weeks later while alone in the matrimonial home, D described constant crying and putting a pillow over V's head. D then ran a bath and placed V in it face down. She then took some pills and slashed her wrists. The cause of V's death aged five and half months was drowning. A single report on file diagnosed postnatal depression and favoured both infanticide ("disturbance of mind due to the fact that she had not fully recovered from the effects of childbirth") DR. It recommended a probation order with psychiatric treatment. D was initially charged with murder and a second count of infanticide was later added by the CPS to which D was allowed to plead guilty. D was given a three year probation order with mental treatment.

Case 2

- D.40 D, aged 19, had learning difficulties and had been referred to a psychiatrist as a child. The pregnancy was unplanned. D gave birth to a daughter, V. Ten weeks later V died from a blow to the back of the head. D claimed she had bumped V's head accidentally. The CPS said this failed to explain the severity of the injury. D was charged with murder and additional counts of infanticide and child cruelty by way of neglect were later added. D pleaded guilty to infanticide and was given a three year probation order. Two reports, one for the defence and one for the CPS, both favoured infanticide on the basis of her depressed mood and learning difficulties.

Case 3

- D.41 D, aged 36, had an unplanned pregnancy. She gave birth to a son, V. After the birth D was prescribed medication for postnatal depression and some ten days after the birth V died as a result of blows to the head. At first D claimed that she had dropped V but later admitted holding V by the ankles and hitting his head against the stairs. A single report on file favoured infanticide. D was given a two year probation order with mental treatment.

Case 4

- D.42 D, aged 35, had a long psychiatric history relating to pregnancy and childbirth. She had been given a three year probation order for attempted infanticide some five years earlier, having thrown her five week old baby from a third floor window. She gave birth to a daughter, V, and was receiving progesterone injections. D got up from bed and immersed V in a partly filled sink. She then got dressed and asked her boyfriend, who was not V's father, to call the police. V was pronounced dead shortly after the ambulance arrived. D was admitted to hospital under section 48 of the Mental Health Act 1983. D was charged with murder and a count of infanticide was later added by the CPS to which D was allowed to plead guilty. A single report on file diagnosed puerperal psychosis and concluded that both infanticide and DR manslaughter charges would be appropriate. D was given a hospital order.

Case 5

- D.43 D, aged 18, lived with her parents. D's partner ended their relationship five days before the birth but resumed it shortly afterwards. D gave birth to a daughter, V. Some 11 weeks later D suffocated V by putting a plastic nappy bag over her head. V died three days later. D was charged with murder and a count of infanticide was later added by the CPS to which D was allowed to plead guilty. Two reports both favoured infanticide and DR if the charge was to be murder. D was given a three year probation order.

Case 6

- D.44 D, aged 26 was born in Bangladesh and understood little English. She had had two daughters by her husband and gave birth to a third daughter, V, after a normal pregnancy. Two days after the birth she mentioned that her two daughters had been sexually abused and seemed very anxious. Three days later D's husband found V's dead body. Death was due to neck wounds caused by a razor blade. In addition, D's eldest daughter was found with neck wounds which required six stitches. D admitted the offences and said she had done this to save them from all the problems they might face in the world. D was admitted to hospital under section 48 of the Mental Health Act 1983. D was charged with murder and attempted murder. A count of infanticide was later added by the CPS to which D was allowed to plead guilty. Two reports (one an addendum with the main report not on file) both diagnosed puerperal depressive illness following childbirth. Neither mentioned infanticide but the report for the CPS favoured DR. Both reports favoured a hospital order. D was given a restriction order.

Case 7

- D.45 D, aged 22, gave birth to a son, V. They both suffered infections in hospital. After discharge D was readmitted believing she had already killed V. There were signs of depression and D remained in hospital for two weeks. After discharge D said she was hearing voices. Two days later D suffocated V, aged five weeks, with her hand. She called the police but V was pronounced dead after an ambulance arrived. D was charged with murder and a count of infanticide was later added by the CPS to which D was allowed to plead guilty. A single report on file favoured infanticide on the basis of puerperal psychosis and recommended a probation order with mental treatment. D was given a two year probation order.

Case 8

- D.46 D, aged 22, gave birth to a second child, V, a daughter. Some six days short of V's first birthday D placed V in a shallow bath and allowed her to drown. D's husband had returned unexpectedly but was refused entry to the matrimonial home. D had a psychiatric history, having attempted suicide on three occasions. D called the police but V could not be revived. D was charged with murder and a count of infanticide was later added by the CPS to which D was allowed to plead guilty. A report for the CPS favoured infanticide on the basis of postnatal depression with associated delusional ideas which led to the mistaken belief that D had to kill V for altruistic reasons. A second report (one of three the other two were not on file) did not mention infanticide but concluded that "her mental state was severely disordered and her responsibility for her actions was diminished". D was given a hospital order.

Case 9

- D.47 D, aged 37, was born in Pakistan. She was married and had four daughters and one son before giving birth to V, her fifth daughter. Two days after the birth while D was still a patient at the maternity unit D was found by a nurse in a distressed state. V was in her cot with blood coming out of her nose. She could not be revived. The death was due to rib fractures showing the use of force to the chest. Two of D's other daughters had died in similar circumstances and were investigated as suspicious. D had a psychiatric history having received prior treatment for depression. D was charged with murder and a count of infanticide was later added by the CPS to which D was allowed to plead guilty. Two reports for the CPS found no evidence of any psychiatric disorder. A third report made no mention of infanticide but concluded that D had little control over her biology or her environment and could not cope. It favoured a non-custodial option. A fourth report favoured infanticide on the basis of postnatal depression. The CPS eventually accepted that D had held V excessively tightly against her body until V ceased to breathe. D was given a three year probation order with a condition of mental treatment.

Case 10

- D.48 D, aged 20, hid her pregnancy throughout. She gave birth, alone in a toilet where she worked, to a daughter, V. She was seen to go out shortly afterwards and then was seen returning from a nearby lake. A day later V's body was found in the lake wrapped in a bin liner. D claimed that after the birth V had not moved but a pathologist stated that V was born alive and survived for about 15 minutes. There was uncertainty as to the cause of death which was thought more likely to be due to neglect as opposed to drowning. D was charged with murder and concealing the birth. A count of infanticide was later added by the CPS to which D was allowed to plead guilty. A single report on file favoured infanticide on the basis of a dissociation culminating in a crisis due to the effects of giving birth which had disturbed the balance of her mind at the material time. D was given a two year probation order.

Case 11

- D.49 D, aged 22, gave birth to V, a daughter. The pregnancy was unplanned and unexpected. Her partner suggested an abortion so D decided to return her parents' home to have the baby. Soon after the birth she returned to her partner who abused her physically. Some three months after the birth V was admitted to hospital due to shortage of breath. Some six months later, aged nine months, D brought V to hospital. V was already dead as a result of suffocation. A mitten was found lodged in the area below V's tongue. D was charged with murder and a count of infanticide was later added by the CPS to which D was allowed to plead guilty. A single report on file for the CPS diagnosed postnatal depression and stated that although this was a disturbance of the balance of her mind within the Infanticide Act 1938 it was for the court to determine whether D's description of her state of mind was accurate. D was given a two year probation order.

Case 12

- D.50 D, aged 22, was born in Nigeria. D gave birth to V, a daughter, in hospital and was discharged the following day. D arrived at friend's house having phoned earlier to say that V had been stillborn. Some days later D told the police that V had been sent to Nigeria but later admitted that she had abandoned V in a rubbish chute. A search was made and V was found dead, naked except for a nappy. Initially the CPS alleged that D had formed an intent to kill prior to birth. However two reports both favoured DR on the basis postnatal depression. One of the reports also favoured infanticide. D had been charged with murder but a count of infanticide was later added by the CPS to which D was allowed to plead guilty. D was given a two year probation order with a condition of mental treatment.

Case 13

- D.51 D, aged 19, gave birth to V, a son. D had a psychiatric history and had taken several overdoses of pills. After the birth D was found to be depressed but she did not receive any psychiatric treatment. V was taken to hospital and died aged four months. The cause of death was suffocation. Initially D denied causing any injury to V and the CPS charged her with murder and cruelty. Later D wished to plead guilty to manslaughter but this was at first rejected by the CPS in the light of the first report for the CPS finding no evidence of mental disorder or postnatal depression or DR. However, a later report for the CPS diagnosed serious personality disorder and depression. It favoured both infanticide and DR. A third report on file for the defence also favoured both infanticide and DR on the basis of the same diagnoses. A count of infanticide was added by the CPS to which D was allowed to plead guilty. D was given a three year probation order with a condition of residence for the first six months.

Case 14

- D.52 D, aged 16, was born in Jamaica. D lived at home with her mother. D said she was raped by her mother's boyfriend but did not disclose this. D had no idea she was pregnant prior to the birth of V, a female. D had come home from school and went upstairs for a rest. She gave birth to V alone in her bedroom. Fearing her mother's wrath D cut the umbilical cord and opened the window. D placed V on the window ledge to get it out of sight. D said V rolled off the ledge and fell to the ground. In the morning D's mother noticed blood on the sheets and floor and asked where the baby was. V died of head injuries and exposure. D had been charged with murder but a count of infanticide was later added by the CPS to which D was allowed to plead guilty. The first report on file favoured infanticide on the basis of extreme psychological stress which led to the balance of her mind being disturbed. A second report for the CPS noted that D had pleaded guilty to infanticide and recommended a supervision order. D was given a supervision order until aged 19.

Case 15

- D.53 D, aged 29, had a psychiatric history of depression. D learned she was pregnant by her partner who was also her employer. The labour was prolonged and D gave birth to V, a son. D was in hospital for ten days. D experienced psychological difficulties caring for V and her depression increased. D lived with

her parents. Her condition deteriorated and when V was aged seven months she strangled him with a towel. D told her parents what she had done and then tried to commit suicide. D admitted the offence but said she had never planned anything. D was charged with murder and a count of infanticide was later added by the CPS to which D was allowed to plead guilty. Two reports both diagnosed puerperal psychosis and favoured infanticide (one of the reports also mentioned DR as an alternative but concluded that the case more warranted an infanticide rather than a manslaughter conviction). They both recommended probation. D was given a three year probation order with a condition of mental treatment.

Case 16

- D.54 D, aged 24, was born in Bangladesh. She was married and had two children aged three and 14 months before giving birth to V, a daughter. D did not want a third child and was depressed after the birth. When V was aged eight weeks an ambulance was called as she was having breathing difficulties. V had no pulse and was declared dead. Death was due to severe head trauma and a post mortem showed that V had been the subject of repeated violence up to four weeks before death. D admitted repeatedly hitting V on the head but denied any intent to kill. D was transferred under section 48 of the Mental Health Act 1983. D was charged with murder and a count of infanticide was later added by the CPS to which D was allowed to plead guilty. Two reports both diagnosed postnatal depression. Neither report mentioned infanticide but both made it clear that her condition was present at the time of the offence. D was initially made the subject of a hospital order but the hospital refused to admit her. As a result a sentence review took place which culminated in D being given a three year probation order with conditions of mental treatment and residence for the first 12 months.

Case 17

- D.55 D, aged 44, lived with her partner. She was shocked to discover she was pregnant as she said this would interfere with her career. D visited her family and saw a psychiatrist for depression. She was prescribed medication. After the birth of V, a daughter, D was prescribed medication for postnatal depression but she did not take it. She suggested V should be put in care. At aged five months D held V under the bath water. She confessed and said she could no longer cope. Two reports, both for the police, diagnosed postnatal depression. Only one mentioned infanticide and opined that D's condition fell clearly within the 1938 Act. As a result of medical opinion the CPS charged D with infanticide to which she pleaded guilty. D was given a three year probation order.

Case 18

- D.56 D, aged 21, was born in Germany while her father was in the forces. D lived with her partner and became pregnant. D had a psychiatric history relating to drug abuse. D gave birth to twins after a C section. Some ten weeks after the births D's daughter (V1) had difficulty breathing and was taken to hospital where she died. There was a bruise found under V1's jaw and a post mortem found rib fractures and brain injury due to shaking which was the cause of death. The other twin, a son, V2, was examined and several old fractures were found. D was charged with murder in respect of V1 and section 18 grievous bodily harm in respect of V2. Two reports both favoured infanticide on the basis of postnatal depression and DR. As a result of these medical opinions the CPS charged D with infanticide to which she pleaded guilty together with the section 18 offence. D was given a three year probation order with a condition of mental treatment.

Case 19

- D.57 D, aged 18, had experienced behavioural problems at school and had been referred to a psychologist and a psychiatrist. By age 16 D had had two abortions. She then formed a relationship with a partner and again became pregnant. The relationship ended and D went home to live with her parents. D then got a council flat. D gave birth to a daughter; V. Some two months later D visited her GP who found her to be moderately depressed. After another two months V was rushed to hospital as she was blue and lifeless. V was resuscitated and discharged the following day. Some two weeks later V died aged five months. D confessed to suffocating V with her hands and a blanket. A post mortem found V to have been suffering from a heart virus which might have been treated as a cot death had D not confessed. Two brief reports for the police both found D to be emotionally immature and to have mild depressive illness but neither mentioned infanticide. Shortly after the offence D was admitted to a psychiatric hospital under section 2 of the Mental Health Act 1983. A statement for the CPS on file makes it clear that the psychiatrist in charge of D's care diagnosed depression following V's birth and "at the time of the killing D's mind was disturbed by reason of her not having fully recovered from the effects of giving birth". The CPS charged D with infanticide to which she pleaded guilty. D was given a three year probation order.

Case 20

- D.58 D, aged 16, was a sixth form student. D went on a camping holiday and became pregnant. She said this was as a result of rape. She kept her pregnancy a secret throughout and gave birth to a son, V, at home alone. D tried to clean V but he did not respond. She put V in a rucksack. Shortly afterwards D noticed the bag was moving and picked up a plastic boot jack with which she hit the bag until the movement stopped. D put the bag under the bed but later told her mother about it. D admitted the killing. There was one report on file which diagnosed severe dissociative state at the time of the birth but failed to mention infanticide. However, the summary of the prosecuting advocate on file mentions infanticide as a suitable disposal. D was charged with murder but a count of infanticide was later added by the CPS to which D was permitted to plead guilty. D was given a two year probation order with a condition of mental treatment.

Case 21

- D.59 D, aged 19, was a university student. She had a failed relationship with a fellow student. She left university having attempted suicide. She later became pregnant and gave the child up for adoption. Two years later D got pregnant again and falsely told her partner she had had an abortion. D later gave birth to a son, V, alone in her flat. Several weeks later a friend found V's body in the freezer wrapped in plastic bags. A post mortem opined that the likely cause of death was suffocation. D admitted placing a flannel over V's mouth and then holding a pillow over his face. D said V was unwell and that she had helped him to die. A single witness statement on file by a doctor mentioned severe psychiatric illness and the fact that D was a psychiatric in-patient. After D's confession the CPS charged her with infanticide and concealment of birth. D pleaded guilty to the former and the latter was to lie on file. D was given a three year probation order.

Case 22

- D.60 D, aged 25, was married. She had two abortions aged 16 and 19. She gave birth to V1, a daughter who was premature. 13 days later an ambulance was called as V was not breathing properly. V was pronounced dead at the hospital. A post mortem found a pulmonary haemorrhage for which there was no explanation. No injuries were found and as there was no cause for concern no further action was taken until some six years later, see case 23 in which D is the same person.

Case 23

- D.61 D, aged 30, gave birth to her second daughter, V2. Some 15 days later an ambulance was called as V2 had stopped breathing. V2 was put on a ventilator and 9 days later was pronounced brain dead. A post mortem revealed concerns about possible suffocation. D was arrested but at first denied harming V. Later D admitted responsibility for the deaths of V1 and V2 through suffocation. A single report on file diagnosed a depressive reaction at the time of both killings and favoured infanticide. It did not consider that D's abnormality of mind was likely to fall within section 2 of the Homicide Act but considered that this was properly a matter for the jury. The CPS initially charged two counts of murder but later charged infanticide for both offences to which V was permitted to plead guilty. The trial judge's sentencing remarks state that D's depression was not severe and that she bore a significant moral responsibility for the deaths. In the light of the second death it was considered appropriate to pass a custodial sentence. Accordingly, D was sentenced to three years' imprisonment and three years' imprisonment concurrent.

Case 24

- D.62 D, aged 37, was born in India. D came to the UK for an arranged marriage. D gave birth to a daughter, V. D seemed happy with her daughter. Some 11 days after the birth D's husband came home from work and found V dead. A post mortem showed skull fractures and concluded that the death was due to severe head injury. D denied the killing and blamed her brother's wife. However, there

was evidence that D had been celebrating the birth and had been drinking alcohol. D had been left alone with V before the death. D admitted drinking alcohol and taking pain killers prior to the killing. Two reports both diagnosed postnatal depression and favoured infanticide. One of the reports also favoured DR. The CPS initially charged murder but later charged infanticide to which V was permitted to plead guilty. D was given a three year probation order with a condition of mental treatment.

Case 25

- D.63 D, aged 16, lived with at home with her mother. D got drunk at a party and had a brief relationship. As a result she became pregnant. D hid the pregnancy and gave birth at home alone to a son, V. D said V showed no signs of breathing. A post mortem opined that V had survived for several hours and had died as a result of strangulation. D said that V's head had become entangled in her pants and umbilical cord. D had put V in a box. V was later found with a pair of pants wound tightly round his neck. Two reports both diagnosed a dissociative disorder and favoured infanticide. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year supervision order.

Case 26

- D.64 D, aged 39, had a psychiatric history of depression for which she had received in-patient treatment. After her marriage she had a planned pregnancy. D gave birth to a son, V. At first D was coping well but later became depressed. Some 12 weeks after the birth, on the day D was due to see her psychiatrist, she phoned the emergency services and said she had killed V by putting a pillow over his head. D then cut her wrists. A post mortem revealed that death was due to suffocation. D was transferred to hospital under section 48 of the Mental Health Act 1983. Three reports all diagnosed manic depressive psychosis in the postnatal period and favoured infanticide. Two of the reports also favoured DR. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year probation order with a condition of mental treatment.

Case 27

- D.65 D, aged 18, had a psychiatric history and previous convictions. She formed a relationship with V's father, became pregnant and gave birth to V, a son. V's father was sentenced to a term of imprisonment several days before the offence. V was placed on the child protection register. At age seven months D phoned an ambulance stating that she had found V with no signs of life. A post mortem revealed the cause of death as due to a severe impact to the back of V's head which was too severe to be accidental. D eventually admitted the offence as due to frustration at V's constant crying. Two reports both diagnosed personality disorder and postnatal depression. They both favoured infanticide and DR. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D who had been the subject of an interim hospital order under section 38 of the Mental Health Act was given a term of four years detention in a young offenders institution together with a hospital direction under section 45A of the Mental Health Act 1983.

Case 28

- D.66 D, aged 13, had a relationship with a 26 year old male and got pregnant. D hid her pregnancy throughout. D gave birth to V, a daughter, at home alone. D held V under the water to stifle her cries. She then wrapped the body in a towel and hid it in her school bag. D phoned a friend in a distressed state and the friend's mother phoned the police. A post mortem revealed that the cause of death was drowning. Two reports both diagnosed depressive symptoms and post traumatic stress disorder arising out of the circumstances of the birth. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a two year supervision order.

Case 29

- D.67 D, aged 32, was married and gave birth to V, a son, after a planned pregnancy. After the birth D began to have abnormal thoughts including the belief that V was Jesus. D saw her GP who diagnosed hypomania. D was later admitted to hospital under section 2 of the Mental Health Act 1983. She was discharged some two weeks later on the basis of a full recovery. Some three months later D phoned her husband to say that V, aged six months, was dead. D admitted that she had smothered V with a pillow because she could not cope. D was admitted to a psychiatric hospital shortly after the offence. Two reports both diagnosed bipolar affective disorder with psychotic symptoms. Only one of the reports addressed infanticide and favoured it. The CPS charged D with infanticide to which she pleaded guilty. D was given a two year probation order with a condition of mental treatment.

Case 30

- D.68 D, aged 36, was born in Nigeria. D had a common law husband and gave birth to her first child, a son. D later became pregnant again and gave birth to V, a son. At aged five months the police found V in a bin liner wrapped in a quilt in a rubbish chute. A post mortem concluded that death was due to severe head injuries. D had told her brother that V was in hospital. D at one stage admitted what she had done but later denied that she had harmed V. D pleaded not guilty. Three reports all diagnosed puerperal psychosis at the time of the offence. Only one of the reports addressed infanticide and favoured it and DR. One of the other reports also favoured DR. D was charged with murder but a count of infanticide was later added to the indictment by the CPS which was considered by a jury first. As a result the jury convicted D of infanticide and a not guilty verdict was returned on the murder charge. D was given a Hospital Order under section 37 of the Mental Health Act 1983.

Case 31

- D.69 D, aged 23, had a psychiatric history. She hid her pregnancy from her boyfriend. She gave birth to V, a daughter, alone at home. She breast fed V and then placed a hand over V's mouth and nose until she stopped breathing. D wrapped the body up and put it in a wardrobe. She later left the body on some nearby common land. A single report for the CPS found no formal mental disorder but

favoured infanticide on the basis that she was suffering from the effects of childbirth to such a degree that the balance of her mind was disturbed owing to physical and mental exhaustion. The report also favoured DR on the basis that the mental disturbance amounted to an abnormality of the mind. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year probation order.

Case 32

- D.70 D, aged 25, was living with her boyfriend and her parents. She became pregnant but D hid this and was in denial. D gave birth to a son, V, alone at home in the bathroom. D claimed V was stillborn and had been left upside down in the toilet. D wrapped V in a towel and a carrier bag. She drove to the beach where she left V's body. A post mortem revealed that V had lived for at least five minutes and that the cause of death was neonatal anoxia probably due to blocked airways as a result of neglect. A single report diagnosed hysterical dissociation and favoured infanticide. D was charged with infanticide and concealment of birth to which she pleaded guilty. D was given a three year probation order with a condition of mental treatment.

Case 33

- D.71 D, aged 20, had a relationship with her half brother. She had a psychiatric history. She had a daughter of ten months before giving birth to a second daughter, V. While in hospital D took an overdose. Three months after the birth D called the emergency services saying that V had stopped breathing. V was pronounced dead later that day. A post mortem stated that the cause of death was due to obstruction of airways rather than natural causes. D denied harming V at first but later admitted placing a pillow over V's head. A single report diagnosed a major depressive disorder. Although the report did not mention infanticide by name it stated the balance of her mind was disturbed to a significant degree by postnatal depression to cause her not to know the causes or consequences of her actions. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year probation order with a condition of mental treatment.

Case 34

- D.72 D, aged 19, suffered from epilepsy and had a psychiatric history. D had a relationship with her partner and gave birth to a son, V. They were married after the birth. V had been in the maternity hospital and was readmitted within 24 hours. V died some 12 days later aged five weeks. A post mortem revealed that the cause of death was poisoning from a high dosage of D's epilepsy medication found in V's feeding bottles. D denied harming V. At first the CPS charged murder but later took the view that in the light of D's mental disorder it was not appropriate to proceed with a murder charge. D then pleaded not guilty to charges of infanticide and common law manslaughter. The latter charge was based on the fact that D might have given V the medication in the misguided belief that this would help V to whom D had passed on her epilepsy. Three reports all diagnosed epilepsy and personality disorder. Two of the reports favoured infanticide on the basis that the balance of D's mind was disturbed and

that this arose against the setting of a disorder of personality. Both reports also concluded that the personality disorder in question would not constitute an abnormality of mind within the meaning of section 2 of the Homicide Act 1957. A third report did not mention infanticide or DR. The jury rejected infanticide but convicted D of common law manslaughter. D was given a hospital order with restrictions under section 41 of the Mental Health Act 1983.

Case 35

- D.73 D, aged 26, had been happily married for six years. She became pregnant and gave birth to a son, V. She had a psychiatric history having suffered from depression and having taken an overdose two years before the birth. She was given medication and remained well until two days after the birth when she said she felt different and unable to cope. She began to have irrational thoughts and felt a compulsion to neglect V and herself. On the day of the offence D picked up V, aged three months, from her mother-in-law and threw him out of an upstairs window. V did not recover. One report for the CPS on file was incomplete with the conclusion missing. A second report for the police diagnosed a psychotically depressed state at the time of the act but did not mention infanticide. A note on file from the CPS stated that it was in the public interest to proceed with infanticide. As a result D was charged with infanticide to which she pleaded guilty. D was given a three year probation order with a condition of mental treatment.

Case 36

- D.74 D, aged 17, lived with her parents. At aged 15 she gave birth to a daughter having hidden the pregnancy. She eventually told her parents who were supportive but told her they would throw her out if it happened again. D did become pregnant once more and hid the pregnancy. D gave birth to a second daughter, V, and in order to stop her crying put her hands over V's mouth and covered her face with some clothing. She put V in a plastic bag and into a drawer. D told a friend in the morning that V was stillborn. A post mortem revealed that V had died from asphyxia as a result of compression of the face and neck. Two reports both diagnosed reactive depression and favoured infanticide. One of the reports opined that it was a matter of small moment whether D's condition brought her within infanticide or DR and considered that she satisfied both criteria. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year probation order.

Case 37

- D.75 No reports on file but details of offence as follows. D, aged 17, gave birth to a son, V, who died aged seven months. A post mortem concluded that V had died from SIDS. However, following an argument with her partner D confessed to her mother that she had smothered V with a pillow. She said she had done this as she was angry that all her friends were out enjoying themselves and she had to stay at home to look after V. The CPS initially charged murder but later charged infanticide to which V was permitted to plead guilty. D was given a three year probation order with a condition of mental treatment.

Case 38

- D.76 D, aged 22, was born in the Philippines. She worked as a nanny to a Kuwaiti family and got pregnant. She hid the pregnancy and gave birth alone in her flat to a son, V. D immediately hit V's head on the floor several times. She then placed V in a plastic bag and bin liner and dropped him into a communal rubbish chute. D was bleeding heavily and sought help. She was taken to hospital where the placenta was found still to be in her body. D denied having given birth but eventually the police found V who was taken to hospital but could not be revived. A single report on file diagnosed a disturbance of D's mind due to a combination of her reaction to childbirth and "her characterological naivety" which fell within infanticide. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year probation order with a condition of mental treatment.

Cases 39

- D.77 No reports on file but details of offence as follows. D, aged 19, was an orphan who had been in care. She began a relationship with an older married man and got pregnant. D gave birth to a daughter, V. She suffered from depression after the birth but seemed able to cope until V was aged three months when she strangled her. D went to a neighbour's house holding V's lifeless body. D admitted the killing saying as she could not stop V's crying she grabbed the first thing to hand, a dressing gown cord, and put it round V's neck and pulled. V turned blue and she panicked. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year probation order with a condition of mental treatment.

Case 40

- D.78 D, aged 15, met her boyfriend when she was 13 and began a sexual relationship with him at aged 14. She got pregnant and at one stage she thought she had lost the baby and told her boyfriend. Later she realised she was still pregnant but did not tell him this. She then hid her pregnancy from everyone. She gave birth at home alone to a daughter, V. She cut the cord with a knife but said she could remember nothing further. Her father found her on the living room floor with a bloody duvet around her. She was taken to hospital where she said it was a heavy period. The hospital thought D had had a miscarriage but when the father searched at home he found V in a bag under the bed. A post mortem revealed that V had been alive for several minutes before D stabbed her to death with a kitchen knife. A single report on file diagnosed dissociative state throughout labour and delivery and supported infanticide. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year supervision order with a condition of mental treatment.

Cases 41 to 49 – No reports on file and only the following very brief offence details available.

Case 41

- D.79 D, aged 37, put her daughter, V, aged six months into her cot while V's father was asleep. D put a battery from a laser pen into V's mouth and then gave V a little milk. D had seen a TV programme about the dangers of poisons in the home shortly before. The battery was found to be forced into V's throat. The CPS alleged that D had intended to kill V with the battery. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year community rehabilitation order with a condition of residence at a probation hostel.

Case 42

- D.80 D, aged 24, was being treated for postnatal depression after the birth of her daughter, V, who cried a lot. After a visit to a local health clinic V began to cry and D shook her violently causing her a severe brain injury from which she died. The CPS charged infanticide to which D pleaded guilty. D was given a three year probation order with a condition of mental treatment.

Case 43

- D.81 D, aged 23, hid her pregnancy from family and friends. She gave birth to a daughter, V, alone at home in her bedroom. D put her newly born daughter in a carrier bag and left her in the garden overnight. It was very cold and V died of exposure. D was charged with manslaughter but the CPS later charged infanticide to which D pleaded guilty. D was given a three year probation order.

Case 44

- D.82 D, aged 22, gave birth to a daughter, V. D put her newly born daughter in a bag and left V in a park. V died of neglect. The CPS charged infanticide to which D pleaded guilty. D was given a three year probation order with a condition of a pregnancy test every six months.

Case 45

- D.83 D, aged 23, gave birth to a daughter, V. D put a bed cover over her newly born daughter's neck for about a minute. V died of suffocation. The CPS initially charged murder but later charged infanticide to which D was permitted to plead guilty. D was given a three year community rehabilitation order with a condition of mental treatment.

Case 46

- D.84 D, aged 19, hid her pregnancy. She gave birth to a son, V, alone in her bedroom. D strangled her newly born son and put his body in rubbish sack in her car. The CPS charged infanticide to which D pleaded guilty. D was given a three year probation order with a condition of mental treatment.

Case 47

- D.85 D, aged 21, gave birth at home to a daughter, V. An ambulance was called as D was bleeding heavily. V's body was found with multiple stab wounds. The CPS charged infanticide to which D pleaded guilty. D was given a three year probation order with a condition of mental treatment.

Case 48

- D.86 D, aged 24, lived with her partner. She gave birth to a son, V, but suffered from severe postnatal depression. At first she rejected V but later came to accept him. Some four months after V's birth D's partner came home to find him gasping for breath. V was put on a ventilator but was pronounced dead two days later. A post-mortem revealed skull fractures. D admitted hitting V's head on the bedroom wall several times. D was charged with murder but the CPS later charged infanticide to which D pleaded guilty. D was given a two year probation order with a condition of mental treatment.

Case 49

- D.87 D, aged 39, went into her six month old daughter's bedroom, placed her on the floor and strangled her with her hands. D was charged with murder but the CPS later charged infanticide to which D pleaded guilty. D was given a three year probation order with a condition of mental treatment.

B. The Diminished Responsibility Sample

- D.88 In paragraph 6 above it was stated that, in an attempt to further explore the nature of some infanticide cases and their relationship with DR, it was decided also to study a sample, during the years 1990 to 2003, of 35 cases of DR manslaughter convictions of biological mothers who had killed their children aged three years and under.
- D.89 As with the infanticide sample, although there were 35 defendants¹⁰ who were convicted of DR manslaughter, in 9 of these cases for a variety of reasons no access was available to the relevant files, leaving only skeleton statistical data. This means that in some cases, only limited information was available and, where this is the case, this is again made clear in the relevant Tables.
- D.90 Tables 1a and 1b give a breakdown of the age distribution of the defendants. The mean age was 28.7 (age range 18 to 45) with the majority (60.0%, n=21) aged 29 and under. In contrast to the Infanticide Sample it is of note that none of the DR accused were under 17 years of age.

Table 1a: age range of accused

	Frequency	Percent
17 to 20	4	11.4
21 to 25	8	22.9
26 to 30	10	28.6
31 to 35	9	25.7
40 to 44	3	8.6
45 to 49	1	2.9
Total	35	100.0

¹⁰ A very brief account of each case is given in Annex B. The cases are numbered 1-35 so as to include all the relevant defendants in the sample. Any reference to a case number in the text can be followed up in the appendix.

Table 1b: age of accused

	Frequency	Percent	Cumulative Percent
18.00	2	5.7	5.7
19.00	1	2.9	8.6
20.00	1	2.9	11.4
21.00	1	2.9	14.3
22.00	3	8.6	22.9
23.00	1	2.9	25.7
25.00	3	8.6	34.3
26.00	2	5.7	40.0
27.00	3	8.6	48.6
28.00	1	2.9	51.4
29.00	3	8.6	60.0
30.00	1	2.9	62.9
31.00	3	8.6	71.4
32.00	2	5.7	77.1
34.00	2	5.7	82.9
35.00	2	5.7	88.6
41.00	1	2.9	91.4
42.00	2	5.7	97.1
45.00	1	2.9	100.0
Total	35	100.0	

D.91 The ethnic breakdown of defendants is presented in Table 2 and shows that of the 33 cases, where relevant data were available, 26 were white while 7 were black or Asian. Of the 26 white defendants, all were born in the UK, while of the 7 black or Asian, 4 were born in the UK.

Table 2: born UK * ethnic group Crosstabulation

		ethnic group					Total
		white	black	asian	chinese	unknown	
born UK	yes	26	3	1	0	0	30
	no	0	2	1	1	1	5
Total		26	5	2	1	1	35

D.92 With regard to criminal records, out of a total of 26 cases where data were available, only 23.0% (n=6) of the sample had previous convictions. As for psychiatric history, again out of 26 cases 73.1% (n=19) had had contact with psychiatric services. In relation to marital status, Table 2b below shows that of 27 cases where this information was available, 28.6% (n=10) were single at the time of the offence.

Table 2b: marital status

	Frequency	Percent	Cumulative Percent
single	10	28.6	28.6
married	6	17.1	45.7
co-habiting	6	17.1	62.9
divorced	1	2.9	65.7
separated	4	11.4	77.1
not known	8	22.9	100.0
Total	35	100.0	

D.93 Turning to victims, there was one case (no. 3) where the accused killed her four children, three of whom, being aged 3 and under, fell within the sample. This means that there was a total of 37 relevant victims. Their sex/age distribution is presented in Tables 3a, 3b and 3c. The age range for victims was under 24 hours to 47 months, with only 24.3% (n=9) under 12 months, so capable of qualifying for a verdict of infanticide. It can be seen, in contrast to the infanticide sample, that a bare majority, 51.4 % (n=19), were female/daughters.

Table 3a: age range of victims

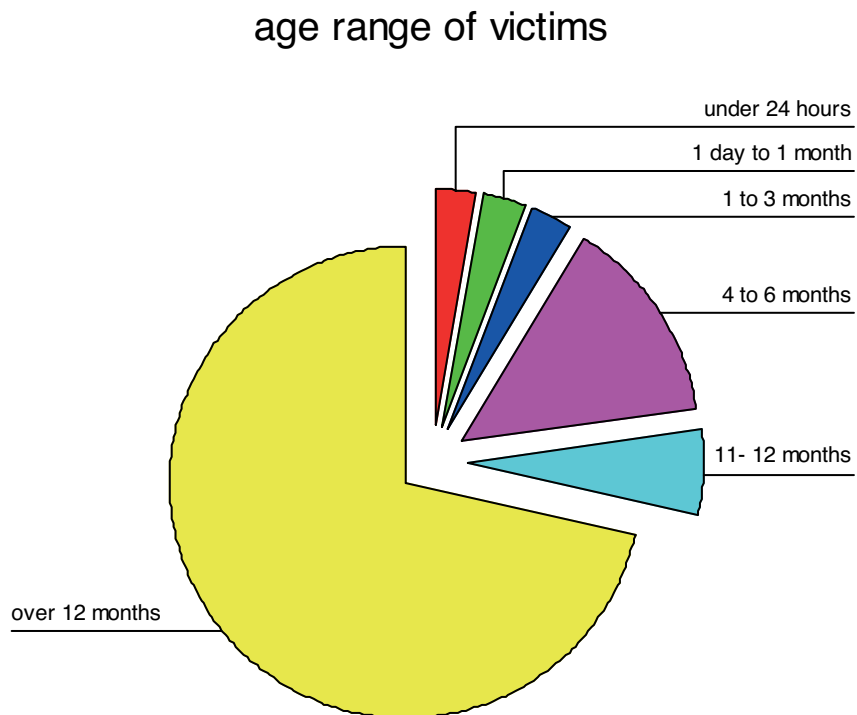


Table 3b: age range of victims

	Frequency	Percent	Cumulative Percent
under 24 hours	1	2.7	2.7
1 day to 1 month	1	2.7	5.4
1 to 3 months	1	2.7	8.1
4 to 6 months	5	13.5	21.6
11 to 12 months	1	2.7	24.3
over 12 months	28	75.7	100.0
Total	37	100.0	

Table 3c: age range of victims * sex of victim Crosstabulation

		sex of victim		
		male	female	Total
age range of victims	under 24 hours	0	1	1
	1 day to 1 month	1	0	1
	1 to 3 months	1	0	1
	4 to 6 months	4	1	5
	11 to 12 months	0	1	1
	over 12 months	12	16	28
Total		18	19	37

D.94 The place or venue where the killing actually took place is given in Table 4. It can be seen from this that the vast majority of the offences took place in the matrimonial/partner's/family home (88.6%, n=31).

Table 4: venue of offence

	Frequency	Percent	Cumulative Percent
matrimonial/partner's/family home	31	88.6	88.6
victim's home ¹¹	1	2.9	91.4
street	1	2.9	94.3
canal	1	2.9	97.1
river	1	2.9	100.0
Total	35	100.0	

D.95 Tables 5a and 5b give the "method of killing" and show that the most prevalent method was suffocation (34.3%, n=12) followed by drowning (20.0%, n=7) and strangulation (14.3%, n=5). Table 5c reveals that all but one of those who was suffocated was over 12 months of age.

¹¹ See case 9 in Annex B.

Table 5a: method of killing

method of killing

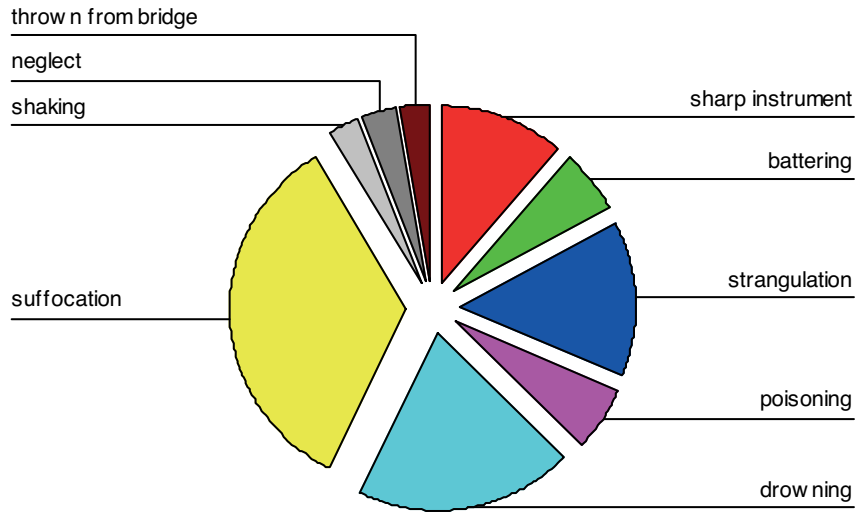


Table 5b: method of killing

	Frequency	Percent	Cumulative Percent
sharp instrument	4	11.4	11.4
battering	2	5.7	17.1
strangulation	5	14.3	31.4
poisoning	2	5.7	37.1
drowning	7	20.0	57.1
suffocation	12	34.3	91.4
shaking	1	2.9	94.3
neglect	1	2.9	97.1
thrown from bridge	1	2.9	100.0
Total	35	100.0	

Table 5c: method of killing * age range of victims Crosstabulation

		age range of victims						Total
		under 24 hours	1 day to 1 month	1 to 3 months	4 to 6 months	11 to 12 months	over 12 months	
method of killing	sharp instrument	0	0	0	1	0	3	4
	battering	0	0	0	1	0	1	2
	strangulation	0	0	0	1	0	6	7
	poisoning	0	0	0	0	0	2	2
	drowning	1	0	0	1	0	5	7
	suffocation	0	0	0	0	1	11	12
	shaking	0	0	1	0	0	0	1
	neglect	0	1	0	0	0	0	1
	thrown from bridge	0	0	0	1	0	0	1
Total	1	1	1	5	1	28	37	

ASPECTS OF THE TRIAL

- D.96 The CPS files could not shed light on all of the intricacies of the trial process in each case, but the following data were extracted and may help to explain a number of different aspects of what took place. First, all 35 cases were pleas of guilty to manslaughter by reason of DR which, in the light of the medical reports, were accepted by the prosecution. So in none of the cases within the sample were any of these female defendants required to prove their DR defence to a jury. This may say something about the nature of these cases. In any event, earlier research into the operation of the DR plea revealed that, in a more general sample of 157 cases, no jury trial took place in 77.1% of cases and that out of a total of 29 females only four (13.8%) came before a jury compared to 32 (25%) males out of a total of 128.¹²
- D.97 With regard to verdicts, it follows that all cases bar one (n=34) resulted in verdicts of DR manslaughter. The only exception was a single case (no. 26) where the defendant was found unfit to plead. However, the psychiatric reports did favour DR and, had she been fit to plead, this would more than likely have been the verdict.
- D.98 Table 6a below gives the sentence for each case. This reveals that a hospital order was given in the majority of cases (57.1%, n=20). Of those 20, 14 defendants received hospital orders with restrictions and six without restrictions. In only one case was the accused sentenced to a term of imprisonment (case no. 28) while the remaining defendants (40%, n=14) were all given probation orders. The number of hospital orders stands in stark contrast to those made in the infanticide cases.

¹² See R.D. Mackay "The Diminished Responsibility Plea in Operation – An Empirical Study" Law Com No 290 at page 145.

Table 6a: sentence

	Frequency	Percent	Cumulative Percent
between 3 and five years	1	2.9	2.9
probation with treatment	12	34.3	37.1
probation order	2	5.7	42.9
hospital order	6	17.1	60.0
restriction order	14	40.0	100.0
Total	35	100.0	

D.99 Table 6b shows that in relation to the nine victims under 12 months of age (i.e. those capable of qualifying for an infanticide verdict) 44.4% (n=4) were given a restriction order while the rest (55.6%, n=5) all received probation orders.

Table 6b: age range of victims * sentence Crosstabulation

		sentence					
		between 3 and 5 years	probation with treatment	probation order	hospital order	restriction order	Total
age range of victims	under 24 hours	0	1	0	0	0	1
	1 day to 1 month	0	1	0	0	0	1
	1 to 3 months	0	0	1	0	0	1
	4 to 6 months	0	1	0	0	4	5
	11 to 12 months	0	1	0	0	0	1
	over 12 months	1	8	1	6	10	26(+2) ¹³
Total		1	12	2	6	16	35(+2) ¹³

THE PSYCHIATRIC REPORTS

D.100 The psychiatric reports on the CPS files which addressed the issues of DR/infanticide were all analysed. The maximum number of such reports in any one file was five. However, it can be seen from Table 7 below that in nine cases there were no reports available owing to lack of access to the files. It was also clear in some cases that there were other reports which, although referred to were not contained in the CPS files. What this means is that the CPS files clearly did not contain all relevant reports and the following analysis must be read with this caveat in mind. However, despite this deficiency in the data, the reports reveal much of interest. First, Table 7 reveals that only one file contained the maximum of five reports, compared to 11 files which each had two reports. The grand total of reports was 67.

¹³ It will be recalled that there are 37 victims but only 35 defendants/sentences. See case 3 in Annex B where three of the victims fell within the sample. D was given a restriction order.

Table 7: psychiatric reports on file

	Frequency	Percent	Cumulative Percent
one	3	8.6	8.6
two	11	31.4	40.0
three	7	20.0	60.0
four	4	11.4	71.4
five	1	2.9	74.3
none	9	25.7	100.0
Total	67	100.0	

D.101 Table 8 below shows that the defence requested 55.1% (n=37) of the overall DR reports followed by the prosecution at 35.9% (n=24).

Table 8: report sources

	Frequency	Percent	Cumulative Percent
court	4	6.0	6.0
prosecution	24	35.9	41.9
defence	37	55.1	97.0
unclear	2	3.0	100.0
Total	67	100.0	

D.102 With regard to diagnostic groups, Tables 9a and 9b reveal that by far the most frequent primary diagnosis¹⁴ used in connection with these DR pleas was depression (51.4%, n=18). It should be pointed out that although there were nine files containing no DR reports in six of these cases it was possible to identify the primary diagnosis from other sources. In only three cases could this not be achieved.

¹⁴ The primary diagnosis was the one which an overall analysis of the DR reports in each case seemed to support the plea. Clearly, in some cases there was disagreement over diagnosis. In short the primary diagnosis is based on a cumulative view of the reports in each case.

Table 9a: primary diagnosis

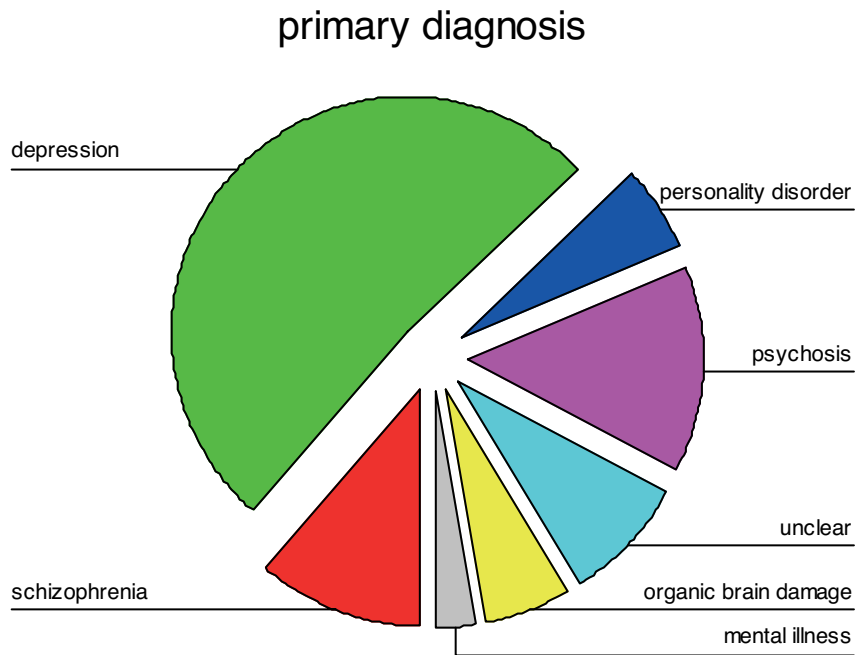


Table 9b: primary diagnosis

	Frequency	Percent	Cumulative Percent
schizophrenia	4	11.4	11.4
depression	18	51.4	62.9
personality disorder	2	5.7	68.6
psychosis	5	14.3	82.9
no information	3	8.6	91.4
organic brain damage	2	5.7	97.1
mental illness	1	2.9	100.0
Total	35	100.0	

D.103 Table 10 below shows the relationship between diagnosis and sentence. This reveals that the majority of those with a diagnosis of depression (n=10) received a hospital order, six of whom were given restriction orders. The remaining restriction orders were given to all those diagnosed with schizophrenia (n=4) and to all those except one with a diagnosis of psychosis (n=4). Unlike the infanticide sample it is of interest to note that all except two of the DR probation orders carried a condition of mental treatment. This may say something about the different nature of the conditions which resulted in successful verdicts of infanticide as opposed to DR manslaughter. In particular, none of the infanticide sample diagnosed with depression who were given probation orders had a condition of mental treatment imposed.

Table 10: primary diagnosis * sentence Crosstabulation

		sentence					Total
		between 3 and 5 years	probation with treatment	probation order	hospital order	restriction order	
primary diagnosis	schizophrenia	0	0	0	0	4	4
	depression	1	6	1	4	6	18
	personality disorder	0	1	1	0	0	2
	psychosis	0	1	0	0	4	5
	no information	0	2	0	1	0	3
	organic brain damage	0	2	0	0	0	2
	mental illness	0	0	0	1	0	1
Total		1	12	2	6	14	35

D.104 The psychiatric reports are of course vital as to how a DR plea progresses. Table 11 below shows that all the reports in the CPS files which addressed the issue favoured DR.

Table 11: report opinions on DR

	Frequency	Percent
no mention of DR	7	10.4
favours DR	60	89.6
Total	67	100.0

D.105 With regard to infanticide, Table 12 below shows that 12 reports addressed this issue with eight in favour and four of the view that D's condition did not fall within the 1938 Act. It will be recalled that there were only nine victims under the age of 12 months which in turn means that only nine defendants were capable of qualifying for a verdict of infanticide. The cases in question are numbers 1, 2, 3, 7, 10, 12, 17, 20 and 21. In one of these cases (n. 20) there was only a single report which favoured DR but did not mention infanticide. However, in the other eight cases, infanticide was considered in 12 of the reports.

Table 12: possible infanticide plea

	Frequency	Percent	Cumulative Percent
yes	8	11.9	11.9
no	4	6.0	17.9
not mentioned	55	82.1	100.0
Total	67	100.0	

D.106 First, there were the eight reports from the five cases which favoured infanticide. Brief details are as follows.

Case 3

D.107 One of the reports for the defence states that “at the time of the offence the balance of her mind was disturbed by reasons of mental disorder, and by reason of the effects of the birth and that this will substantially impair her mental responsibility”. Although this report mentions concepts contained in the 1938 Act, it goes on to make it clear that DR is the appropriate plea.

Case 7

D.108 A report for the defence concluded that “the defence of infanticide is based on outdated psychiatric theories and strictly speaking is rarely sustainable. Nevertheless, the Act is usually interpreted very widely and is held to encompass cases very much like this one”.

D.109 A second report for the defence made mention of “abnormality of mind” but not DR. Rather it concluded that “infanticide would be an appropriate finding in view of the evidence for the disturbance of the balance of her mind at the time”.

Case 10

D.110 A report for the defence having favoured DR added that “Also within the terms of s 1(1) of the Infanticide Act 1938 the balance of her mind was disturbed”.

D.111 A report for the CPS stated “The depression she was suffering from at the time of the killing constitutes a disturbed balance of mind within the terms of s 1(1) of the Infanticide Act 1938”.

Case 12

D.112 A report for the defence stated that “Her mental condition might also be construable as at least aggravated by the birth and certainly by the caretaking of her son. The question, therefore, of whether she had not recovered from the effect of giving birth to her son is a possible construal of events, making a plea possible under the Infanticide Act 1938. Both factors, namely her disease of the mind impairing her responsibility for her actions and the greater vulnerability brought about by the birth of her son are relevant. As both conditions as legal criteria permit the substitution of a manslaughter plea for the murder charge the difference is perhaps academic”.

Case 17

D.113 A report for the defence stated that “In this case the childbirth further disturbed the balance of her mind such that she had not fully recovered from its effects at the material time. It can be argued therefore that the killing also amounts to infanticide within the meaning of the Infanticide Act 1938”.

D.114 A report for the CPS stated “Although I agree that her mental state would fulfil the definition of infanticide within the meaning of the Infanticide Act 1938, it would appear more logical from a medical point of view to consider this a case of DR”.

D.115 It is difficult to come to any firm conclusions as to why infanticide was not successfully used in these five cases, which produced a total of eight reports favouring infanticide. However, as is noted below, in case 12, where D was given a restriction order, there was also a report which expressly rejected infanticide. With regard to the other four cases, two (cases 7 and 10) resulted in a probation order with the other two (cases 3 and 17) being given restriction orders. What seems more than likely is that, as all these reports also favoured DR, this was the route eventually favoured by the CPS to settle these particular cases.

D.116 Further, there were four reports from four cases which rejected infanticide. Brief details are as follows.

Case 1

D.117 A report for the defence concluded "I can find no evidence that at the material time the balance of her mind was disturbed by reason of her not having fully recovered from the effects of giving birth ...I am therefore of the opinion that the defence of infanticide would not be open to her".

Case 2

D.118 A report for the defence opined "In that the killing did not result from a disturbance of the balance of her mind as a result of giving birth to the victim, I do not believe that she fulfils the criteria for the legal concept of infanticide".

Case 12

D.119 A report for the CPS stated that "It is also difficult to say that the balance of her mind was disturbed by reason of her not having recovered from the effect of giving birth to her son (Infanticide Act 1938). It is not possible to say the illness recurred because she gave birth to her son"

Case 21

D.120 A report for the defence concluded "She did not form an intent to kill or to do serious harm to the baby therefore her alleged offence does not fit the definition of infanticide".

D.121 Despite these rejections of infanticide, all four reports did favour DR. In addition, there were other reports in each of these four cases which also clearly supported DR.

Concluding Remarks

D.122 As has already been emphasised, this study seeks to further explore the nature of the relationship of infanticide with DR by presenting data on 35 cases of DR manslaughter convictions of biological mothers who had killed children aged three years and under during the years 1990 to 2003. In doing so, the data from this particular empirical research study reveal the following points:

- (1) There was a sample of 35 defendants who were convicted of DR manslaughter. In nine of these cases, for a variety of reasons, no access was available to the relevant files leaving only skeleton statistical data.

- (2) The mean age was 28.7 (age range 18 to 45) with the majority (60.0%, n=21) aged 29 and under. In contrast to the Infanticide Sample none of DR defendants was aged under 17 years of age.
- (3) There was a total of 37 victims. The age range for victims was under 24 hours to 47 months, with only 24.3% (n=9) under 12 months so capable of qualifying for a verdict of infanticide. A bare majority, 51.4 % (n=19), were female/daughters.
- (4) The vast majority of the offences took place in the matrimonial/partner's/family home (88.6%, n=31).
- (5) The most prevalent method of killing was suffocation (34.3%, n=12) followed by drowning (20.0%, n=7) and strangulation (14.3%, n=5)
- (6) All 35 cases were pleas of guilty to manslaughter by reason of DR which in the light of the medical reports were accepted by the prosecution.
- (7) All cases bar one (n=34) resulted in verdicts of DR manslaughter. The only exception was in a single case (no. 26) where the defendant was found unfit to plead, although the psychiatric reports did favour DR.
- (8) A hospital order was given in the majority of cases (n=20), with 14 defendants receiving hospital orders with restrictions and six without restrictions. In only one case was the accused sentenced to a term of imprisonment (case no. 28) while the remaining defendants (40%, n=14) were all given probation orders.
- (9) In relation to the nine defendants who killed victims under 12 months of age (i.e. those capable of qualifying for an infanticide verdict) 44.4% (n=4) were given a restriction order while the rest 55.6% (n=5) all received probation orders.
- (10) With regard to diagnostic groups, Tables 9a and 9b reveal that by far the most frequent primary diagnosis used in connection with these DR pleas was depression (51.4%, n=18).
- (11) The majority of those with a diagnosis of depression (n=10) received a hospital order, six of whom were given restriction orders. The remaining restriction orders were given to all those diagnosed with schizophrenia (n=4) and to all those except one with a diagnosis of psychosis (n=4).
- (12) All of report writers whose reports were in the CPS files which addressed the issue (89.6%, n=60) favoured DR.
- (13) With regard to infanticide, 12 reports, arising from nine cases where the victims were under the age of 12 months, addressed this issue with eight in favour and four of the view that D's condition did not fall within the 1938 Act. The eight reports which favoured infanticide also supported a plea of DR as did the four reports which rejected infanticide. All the other reports in these cases also supported a plea of DR.

ANNEX B – DIMINISHED RESPONSIBILITY CASE SYNOPSES

Case 1 (V under 12 months)

- D.123 D, aged 26, had had two abortions and had given birth to a son who had died of meningitis at aged seven months. She began a relationship with her partner and gave birth to a daughter whom he said was not his child. Some time after this D's friends remarked on her weight gain but D denied she was pregnant. D eventually gave birth alone upstairs to V, a second daughter, while her partner was downstairs with her first daughter. D put V in a bath and she drowned but also had a skull fracture. D put V in a bag and two days later the police were called after the body was found. D denied causing any injury to V. The CPS charged D with murder, as infanticide was not supported by the medical reports. D had had an emergency operation on the base of her brain some ten years before. Five reports, two for the CPS and three for the defence, all diagnosed organic brain damage. The two CPS reports opined that D's condition was an abnormality of mind. One report concluded that it was not possible to consider the extent to which D's responsibility was diminished while the other, although it initially thought this issue should be decided by the jury, later in an addendum concluded that as a result of the findings of a CAT scan section 2 was satisfied. The three defence reports all favoured DR. One of them found no evidence of the balance of D's mind being disturbed and that therefore a defence of infanticide was not open to her. D's plea of DR was eventually accepted by the CPS and she was given a three year probation order with a condition of mental treatment.

Case 2 (V under 12 months)

- D.124 D, aged 31, was married, had a son but later divorced. D became depressed and sought psychiatric help. D then met her partner and gave birth to a daughter, V. D again suffered from depression and spoke of killing V and herself. A day later D drove to her former husband's home and said V, aged 11.5 months, was dead. D said she had put a pillow over V's face. The police were called and V was found suffocated at D's home. D tried to hang herself and later said she had heard voices telling her to kill V. D was admitted to a psychiatric hospital. Four reports, three for the CPS and one for the defence, all diagnosed depression and favoured DR. One of the CPS reports stated that the killing did not result from a disturbance of the balance of her mind as a result of giving birth to V and so did not fulfil the criteria for the legal concept of infanticide. D's DR plea was accepted and the trial judge stated that, having regard to the medical reports, any jury properly directed would bring in a DR verdict. D was given a three year probation order with a condition of mental treatment.

Case 3 (One V under 12 months)

- D.125 D, aged 32, was born in Hong Kong and came to the UK when aged 13. She was married and had four children. She had a psychiatric history and three weeks before the index offences she attempted suicide. She said that she decided to kill all her children with the same tie she had tried to strangle her husband with. The tie snapped while she was strangling her eldest child, a son V1 aged five, so she then used a belt to strangle her other three children in chronological order, a son V2 aged three, a daughter V3 aged two and a son V4 aged four months. D had

suffered from depression exacerbated by pregnancy and had difficulty coping with her children. Although the CPS considered an infanticide charge in respect of the youngest V, DR manslaughter was accepted as a plea for all four Vs as all three reports, two for the CPS and one for the defence, favoured DR on the basis of depressive psychosis. One of the reports for the CPS also opined that at the time of the offence the balance of her mind was disturbed by reason of mental disorder and that, by reason of the effects of birth, this would have substantially impaired her mental responsibility. D was given a hospital order with restrictions.

Case 4

- D.126 D, aged 27, had a relationship which lasted four months. Later she wrote to her ex-partner saying she was pregnant. He advised an abortion. D was devastated by this rejection. She lived with her parents and became depressed. She gave birth to a daughter, V. Some 15 months later she went to a neighbour to say she could not wake up V. An ambulance was called and V was pronounced dead. Hospital staff were suspicious and D admitted suffocating V with a pillow. D said she could not take any more and had decided it was either V or herself. Two reports, one for the defence and one for the CPS, both favoured DR on the basis of depressive disorder and personality problems. D's plea of DR was accepted by the CPS and she was given a hospital order.

Case 5

- D.127 D, aged 29, was married and had two children, one aged six and V aged three. D's husband was a coal miner and there was a fear of pit closure and job loss. D became depressed and was diagnosed with "acute psychotic depression" for which she received in-patient treatment. D's condition seemed to improve but there were concerns over her medication. D went to a neighbour to say that she had strangled V with a belt. D said her mind went blank and then all that came into her mind was to kill V. Two reports for the defence both favoured DR on the basis of psychotic depression. D's plea of DR was accepted by the CPS and she was given a hospital order with restrictions.

Case 6

- D.128 D, aged 35, had been married for some time. She had two children aged 15 and 13. She separated but kept in contact with her husband. D became pregnant after a relationship with a married man. D gave birth to a son, V. When V was 18 months he was found dead after D had attempted suicide. The cause of death was drowning. D admitted giving V a sleeping pill and putting him in the bath in order to save from all the hurt in the world. D had a psychiatric history and had told a psychiatrist that she could not cope and sometimes felt like drowning V. A single report for the CPS favoured DR on the basis of abnormality of mind as a result of mental illness although it was difficult to assess a precise psychiatric diagnosis. D's plea of DR was accepted by the CPS and she was given a hospital order.

Case 7 (V under 12 months)

- D.129 D, aged 19, lived with her partner and gave birth to a son, V. D had a psychiatric history and had been referred to a psychiatrist during the pregnancy. V, aged 14 weeks, was admitted to hospital suffering from brain injuries. A post-mortem revealed sub-dural haemorrhaging suggesting violent shaking. D at first said V's father was responsible but later admitted the offence. D continued to give conflicting accounts of the death. D was charged with murder and child cruelty. A report for the defence diagnosed an abnormal personality which it opined was an abnormality of mind within section 2 but that it was for the jury to decide if there was a substantial impairment of mental responsibility. This report also concluded that the Infanticide Act "is usually interpreted very widely and is held to encompass cases very much like this one". A second report for the defence made mention of "abnormality of mind" but not DR. Rather it concluded that "infanticide would be an appropriate finding in view of the evidence for the disturbance of the balance of her mind at the time." D's plea of DR was accepted by the CPS and she was given a three year probation order with a condition of residence.

Case 8

- D.130 D, aged 22, was married and gave birth to a daughter, V. After the birth D suffered psychiatric problems and was admitted to hospital for four months. She later took an overdose. On the day of the offence D left V, aged 30 months, with friends. When D collected V she seemed upset. D went home and cut V's throat with an electric carving knife. She then tried to kill herself. D said she had decided to kill herself and that the need to kill V followed on from this. Two court reports both diagnosed schizophrenia but made no mention of DR. A third report for the defence also diagnosed schizophrenia and favoured DR. D's plea of DR was accepted by the CPS and she was given a hospital order with restrictions.

Case 9

- D.131 D, aged 26, had separated from her husband when she found out she was pregnant. D gave birth to a son, V. D was admitted to a psychiatric hospital suffering from "psychotic depression". V was taken into care. On her discharge D was allowed supervised access to V. D lived with her mother and V with a foster mother. D went to visit V and asked the foster mother if she could stay overnight. D was allowed to sleep with V and suffocated him with her hands. D told police that if she could not have V then no one else could. Two reports, one for the CPS and one for the defence, both favoured DR on the basis of schizophrenia. D's plea of DR was accepted by the CPS and she was given a hospital order with restrictions.

Case 10 (V under 12 months)

- D.132 D, aged 27, suffered from sickle cell anaemia. She lived with her partner and gave birth to a son, V, who suffered from gastro-oesophageal reflux. During and after the pregnancy, D was frequently admitted to hospital because of her condition. When V was aged six months D called an ambulance saying that he had slipped under the water in the bath. V was alert and needed no treatment.

Three hours later D again called an ambulance and V was found unconscious. V was taken to hospital and died of a massive head injury. D said she had accidentally dropped V and was angry and had hit him with the TV remote control. Two reports, one for the CPS and one for the defence, both diagnosed depression and favoured DR and infanticide on the basis that the balance of her mind was disturbed within the 1938 Act. D's plea of DR was accepted by the CPS and she was given a three year probation order with a condition of treatment.

Case 11

- D.133 D, aged 18, had lived with her partner who had a child by another woman. D got pregnant and gave birth to a son, V, who was born 11 weeks premature. D's partner had another affair and moved out. D became depressed and saw her GP. D went to her mother's house and told her that V, aged 33 months, was dead. D said she had suffocated V with her hands. Two reports, one for the defence and the other from an unclear source, both diagnosed depression and favoured DR. D's plea of DR was accepted by the CPS and she was given a hospital order.

Case 12 (V under 12 months)

- D.134 D, aged 28, had a history of manic-depressive illness for which she was receiving medication. D had a relationship and got pregnant. They never cohabited and she received very little support. D gave birth to a son, V. On the day of the offence when V was six months old, D called the police and said someone had entered her flat and stabbed V. The cause of death was multiple stab wounds. On that day D was due a visit from a new health visitor and eventually admitted that she wanted everything to be perfect so in order to keep V quiet she picked up a knife and stabbed him. Three reports, one for the court, defence and CPS, all diagnosed manic-depressive psychosis and favoured DR. The defence report opined that infanticide was a possible plea while the CPS report stated that "it is not possible to say the illness recurred because she gave birth to her son" and so rejected infanticide. D's plea of DR was accepted by the CPS and she was given a hospital order with restrictions.

Case 13

- D.135 D, aged 31, was married and gave birth to a son, V1 aged seven, and a daughter, V2 aged 44 months. D got depressed after V2's birth and thought the neighbours were against her and would harm her children. D's husband arranged for her to see her GP but before this happened she strangled both Vs and slashed her wrists. D admitted killing both Vs saying she had done so to save them from being sexually abused by her neighbours. Four reports all diagnosed paranoid psychosis. Two of these reports, both for the defence, favoured DR. D's plea of DR was accepted by the CPS and she was given a hospital order with restrictions.

Case 14

- D.136 D, aged 34, was married but had a history of depressive illness. She had two sons, V1 aged 47 months and V2 aged 24 months. D got divorced. Several months later she contacted her father saying she needed help. On arrival at D's home the father found her sitting holding V2. V1 was found dead upstairs. D had cut her wrists and admitted smothering V1 with a pillow and trying to kill V2. Three reports, two for the CPS and one for the defence, all diagnosed severe depressive illness and favoured DR. D's plea of DR was accepted by the CPS and she was given a three year probation order with a condition of treatment. D also pleaded guilty to the attempted murder of V2.

Case 15

- D.137 D, aged 27, lived with her partner for four years. She gave birth to a son, V. D was later admitted to hospital suffering from postnatal depression. D was discharged from hospital five days before V's death. D admitted to her partner that she had manually strangled V, aged 16 months. D was later sectioned under the Mental Health Act 1983. There was only one report on file, although there was reference on the CPS file to others. This report for the police did not address DR but diagnosed manic depressive psychosis. D's plea of DR was accepted by the CPS and she was given a hospital order with restrictions.

Case 16

- D.138 D, aged 25, met her partner and after four months was pregnant. D gave birth to a son, V1 aged eight. Five years later D gave birth to a second son, V2 aged 35 months. She separated from her partner three months later. D's partner married another woman. D became depressed. D's friends realising something was wrong, broke into D's home and found V1's body in a bunk bed and V2's body in a state of decomposition. D had severe cuts to her left wrist. A post-mortem revealed the cause of both deaths to be manual strangulation. Four reports, three for the defence and one for the CPS, all diagnosed severe depressive illness and favoured DR. D's plea of DR was accepted by the CPS and she was given a hospital order

Case 17 (V under 12 months)

- D.139 D, aged 23, was married and had a planned pregnancy. D gave birth to a son, V. D had a long psychiatric history and became paranoid that social services would remove V from her, as they had already removed her older daughter, aged ten. D eventually threw V, aged four months, from a bridge and he died of head injuries. Two reports, one for the CPS and one for the defence both diagnosed schizophrenia and favoured DR. Both reports also favoured infanticide but the CPS report considered it more logical from a medical point of view to consider it as a case of DR. D's plea of DR was accepted by the CPS and she was given a hospital order with restrictions.

Case 18

- D.140 D, aged 31, had a daughter aged eight when she met a female partner. D and her partner wished for another child and selected a father they both knew. D became pregnant and was seen by psychiatric services as she had a history of depression. D had a son, V. D's relationship with her partner ended but D wanted her back. D eventually went to hospital and admitted killing V. A post mortem revealed the cause of death as drowning. D said she held V under the bath water. Three reports, two for the CPS and one for the defence, all diagnosed severe depressive illness and favoured DR. D's plea of DR was accepted by the CPS and she was given a hospital order with restrictions.

Case 19

- D.141 D, aged 22, had a relationship and got pregnant. D gave birth to a daughter, V. D had irregular contact with V's father. D went to her neighbours to say V was dead as she had stopped breathing but V was found to be fit and well. Several hours later D summoned the neighbours again and on this occasion V was found dead. A post mortem revealed the cause of death as asphyxiation. D admitted placing her hands round V's neck and forcing her face into her chest. Three reports, two for the defence and one for the CPS, all diagnosed depression and personality disorder and favoured DR. D's plea of DR was accepted by the CPS and she was given a three year probation order with a condition of mental treatment.

Case 20 (V under 12 months)

- D.142 D, aged 29, had her first child at age 17 but found it difficult to cope and social services were involved. When aged 22 she met her second partner and had a second child who was adopted. D suffered from depression and had received in-patient psychiatric treatment. D gave birth to a third child, V, a daughter. When V was aged five months D phoned her partner to say V had been abducted. V was eventually found drowned in the canal. D said she heard voices telling her to do this. D was admitted to hospital under section 48 of the Mental Health Act 1983. A single report for the defence favoured DR on the basis of puerperal psychosis. D's DR plea was accepted and she was given a hospital order with restrictions.

Case 21 (V under 12 months)

- D.143 D, aged 30, had attended a school for children with learning problems and had a history of behavioural and personality difficulties. D separated from her husband when her first son was only a month old. D eventually had an off and on relationship with another man and got pregnant. D concealed the pregnancy from her parents as she lived alone with her now four year old son. D gave birth alone to a second son, V. D carried on as normal and told no one about the baby. V was eventually found dead outside a neighbour's house. V, aged 25 days, was left in a cardboard box and had died of neglect. D denied intending to harm V but the CPS alleged V was unwanted and charged murder by omission. Three reports, two for the defence and one for the CPS, all diagnosed personality disorder and favoured DR. One of the reports for the defence ruled infanticide out as a defence as D did not form any intent to kill or cause GBH. D's plea of DR was accepted by the CPS and she was given a three year probation order with a condition residence.

Case 22

- D.144 D, aged 25, had two older children. D stabbed V, her 18 month old daughter and set fire to her flat. D stabbed herself four times intending to kill herself. Two reports favoured DR on the basis of depression. Ds DR plea was accepted and she received a restriction order.

Case 23

- D.145 D, aged 42 born in Malaya, drowned V, her two year old son. There was a background of domestic violence and psychiatric problems. A custody battle was underway with her husband who was violent towards D. D said she could think of no other way to keep V safe. She felt overwhelmed with blackness. A report for the defence favoured DR on the basis of depression. A report for the CPS also favoured DR but diagnosed borderline personality disorder. Ds DR plea was accepted and she was given a three year probation order.

Case 24

- D.146 D, aged 20 born in Uganda, suffocated her 40 month old daughter at home due to depression and suicidal thoughts. Two psychiatric reports for the defence both favoured DR on the basis of depression. D's DR plea was accepted and she received a hospital order.

Case 25

- D.147 D, aged 45 born in Guyana, was divorced. D had two children of this marriage. D married again and gave birth to a daughter, V. D had a psychiatric history of puerperal psychosis and found it difficult to care for V. D eventually stabbed V, aged 43 months, with a knife. D said she was told to do this as voices in her head were telling her it was God's will. Two reports, both for the defence, diagnosed psychosis and favoured DR. Both reports also considered that D's condition satisfied the insanity defence. D's DR plea was accepted and she received a restriction order.

Case 26

- D.148 D, aged 42, smothered her daughter, V aged 22 months. Four reports all diagnosed schizophrenia and favoured DR. However, D was found unfit to plead and was given a restriction order.

Cases 27 to 35 No reports on file and only the following very brief offence details available

Case 27

- D.149 D, aged 18, strangled her daughter, V, aged 41 months with an electric flex. D was suffering from depression and became upset because she could not afford to buy V an ice cream. D's DR plea was accepted and she was given a three year probation order with a condition of mental treatment.

Case 28

- D.150 While suffering from postnatal depression D, aged 21, suffocated her daughter, aged 14 months, and then tried to kill herself. D's DR plea was accepted and she was given a sentence of four years imprisonment.

Case 29

- D.151 D, aged 29, parked by a river, partially undressed her daughter, V aged 17 months, and threw her in. V's drowned body was found three and a half miles downstream some 11 days later. V was on the at risk register and likely to be taken into care. D said if she could not have V then no one could. D's DR plea was accepted and she was given a hospital order.

Case 30

- D.152 D, aged 25, took her younger son to hospital and admitted poisoning him and her daughter, V, aged 29 months, who had already died. V's body was exhumed and a post-mortem revealed that death was due to a paracetamol overdose. D's DR plea was accepted and she was given a three year probation order with a condition of mental treatment.

Case 31

- D.153 D, aged 22, who had been receiving treatment for depression suffocated her daughter, V, aged 13 months. D's DR plea was accepted and she was given a three year probation order with a condition of mental treatment.

Case 32

- D.154 While suffering from depression D, aged 41, poisoned her son, V aged 26 months, by giving him her own epilepsy medication and a linctus sedative. D then tried to kill herself. Ds DR plea was accepted and she was given a three year probation order with a condition of mental treatment.

Case 33

- D.155 D, aged 32, suffocated her son, V aged 15 months, and then inflicted injuries upon herself. D had had a brain operation recently and had a history of mental health problems. D's DR plea was accepted and she was given a three year probation order with a condition of mental treatment.

Case 34

- D.156 D, aged 35, had a downs syndrome daughter, aged 22 months. The police were called to D's house and found V drowned in the bathroom. D's DR plea was accepted and she was given a three year probation order with a condition of mental treatment.

Case 35

- D.157 D had recently separated from her husband and was suffering from depression. D gave her daughter, V aged 15 months, some sleeping pills and beat her with a walking stick. Although a trial began, the jury was directed to return a DR verdict by the trial judge. D was given a hospital order with restrictions.

APPENDIX E

INFANTICIDE: DISORDERS AND CLASSIFICATION

PROFESSOR IAN BROCKINGTON*

TABLE 1

Mental Disorder during parturition and the post-partum period

Group	Disorder	Frequency	Relevance to infanticide
Psychopathology of Parturition ¹	Parturient delirium and stupor	These have always been rare in supervised deliveries. Their incidence in clandestine deliveries is unknown.	All these are of crucial importance to neonaticide.
	Parturient rage		
	Fainting, delirium or stupor immediately after delivery		
Organic (neuro-psychiatric) postpartum psychosis ²	Chorea, eclampsia (with and without seizures), infective delirium, cerebral vascular disease (five disorders), epilepsy, hypopituitarism, water intoxication, ethanol withdrawal, urea cycle disorders.	These are now rare in the developed world.	These are biological disorders causing delirium, thus these mothers are 'McNaughton mad', that is (to paraphrase the 1843 legislation), they did not know what they were doing. But few cases of infanticide have been associated with organic psychoses.
Puerperal bipolar disorder (including mania, depressive psychosis and acute polymorphic psychosis) ³		This is the form of 'puerperal psychosis' now seen in Europe and North America. Its incidence is rather less than 1/1,000 births. It is considered to belong to the manic depressive (bipolar) group, with high heredity and a lifelong diathesis. Thus childbirth is one of the triggers of this biological group of psychoses.	These disorders rarely begin immediately after childbirth. The peak incidence of mania is in the second week, and of depression somewhat later. Thus they are relevant to filicide, not neonaticide.
Psychogenic psychoses		Only a few cases have been described.	Their interest is the occasional occurrence of psychosis in adoptive mothers and fathers of the newborn. None have been associated with filicide.
Mother-infant relationship ('bonding') disorders ⁴		About 0.5% of infants are emotionally rejected by their mothers.	This is a controversial diagnosis (see below). It is relevant to fatal child abuse and neglect.

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Postpartum depression ⁵		This is common, affecting about 5% of newly delivered mothers at a clinical level of severity. But it is not a unitary disease. It is a complex group of disorders with several subtypes, many causes and a wide range of severity. In most cases depressed mothers have other disorders as well, such as anxiety, obsessions, bonding disorders or others.	Severe suicidal depression, whatever its cause, is the most important cause of filicide.
Other disorders ⁵	Postpartum anxiety	This is as frequent as depression. Specific fears include fear of cot death and phobia for the infant.	These can be discounted in a discussion of infanticide.
	Obsessional thoughts and impulses of child harm	These occur after about 1% of deliveries.	
	Post-traumatic stress and querulant (complaining) disorders	These complicate 1-5% of deliveries	

- 1 This is the subject of chapter 3 of my monograph *Eileithyia's Mischief: the Organic Psychoses of Pregnancy, Parturition and the Puerperium* (with 250 references).
- 2 These are the subject of chapters 1, 2 and 4 to 7 of *Eileithyia's Mischief* (with 1,000 references).
- 3 For review, see *Motherhood and Mental Health*, chapter 4 (500 references).
- 4 For review, see *Motherhood and Mental Health*, chapter 6.
- 5 For review, see *Motherhood and Mental Health*, chapter 3.

TABLE 2

Classification of infanticide⁶

Neonaticide (killing of the newborn within 24 hours, but usually immediately after the birth)		Historically this is probably the commonest cause of murder. It has become rare in Europe and North America (<5/10 ⁵ births). There are instances of serial neonaticide – up to eleven babies has been claimed.	Most of these infants die a violent death – by suffocation, drowning, head trauma or knife wounds. Death by neglect is uncommon, and can result unintentionally from exhaustion or fainting. Assaults occur in extreme emotional crises including rage, panic and desperation. These are 'mental disturbances', but not (in the opinion of most authorities) 'mental illness'. But delirium is also known to occur, and rage and delirium can be associated.
Filicide Associated with mental illness.	Melancholic filicide	This is probably the commonest cause of filicide (bearing in mind that many mothers commit suicide at the time they kill their children). It can occur at any time, not only in the first month after childbirth, or even the first year. Often more than one child is killed. Depressed fathers also kill their children, and indeed the whole family.	These parents are in the grip of an extremely severe mood disorder. They are not 'McNaughton mad', but clearly have diminished responsibility. They are sick, grieving mothers, and need hospital treatment. Punishment is inappropriate and stigmatization as convicted felons regrettable.
	Puerperal bipolar disorder	Infanticide is rare in patients with manic or acute polymorphic psychosis.	Ditto, but these parents suffer from psychosis rather than depression.
	Delusional disorders	This is another rare cause, which also involves fathers.	
	Trance states	A few cases of infanticide during somnambulism or epileptic automatism (all in mothers) have been described.	These mothers are 'McNaughton mad' and should be acquitted.
Filicide Due to abuse and neglect	Child neglect	An example of this is starving a child to death. This is rare, and may, to some extent, involve both parents.	All these mothers have a severe mother-infant relationship disorder (with hatred and rejection of the child), but its status as a mental illness is debatable. Mother-infant psychiatric teams diagnose and successfully treat many of these mothers, and consider these disorders to be in the medical domain.
	Delayed killing of unwanted children		
	Child abuse	The child dies as a result of a violent assault. This is the second relatively common cause, which rivals melancholic filicide in frequency.	
	Munchausen by proxy	This is the deliberate poisoning, suffocation or induction of illness in a child.	
Filicide By sane parents	Euthanasia	This is rare.	There is no defence on grounds of mental illness.

⁶ For review, see *Motherhood and Mental Health*, chapter 8. With only 150 references, this does not do justice to the vast continental literature on this subject, but there is at present no more extensive review.

APPENDIX F

ASSESSMENT PROCESS IN CHILD HOMICIDE CASES

PROFESSOR BAILEY'S KEY CONCERNS AND RECOMMENDED APPROACH TO ASSESSMENT¹

- F.1 The assessment of child defendants in homicide cases can be divided into three areas:
- (1) mental health/cognitive/developmental issues;
 - (2) legal issues; and
 - (3) welfare issues.
- F.2 Each area should be tackled separately and clearly described. However, all areas should be brought together in the end through a 'Needs Assessment' approach (see F.7 below).
- F.3 The person conducting the assessment should have the core competencies to assess any young person under 18 years of age.
- F.4 Assessment of cognitive functioning should be mandatory and should be conducted by a clinical child and adolescent psychologist.
- F.5 A structured approach to assessment should be adopted (see the FACTS assessment templates at F.7 below).
- F.6 There should be a behavioural analysis of problems and a full multi-axial diagnosis (see F.7 and F.14 below) so that a clinician can express an evidence-based view as to whether a young person is 'developmentally immature'.

PROFESSOR BAILEY'S SUGGESTED TESTS FOR ASSESSMENT OF CHILD DEFENDANTS

- F.7 What follows is a summary of a FACTS assessment template, which provides for a structured assessment approach:

Report / Test	Assesses	Description	Outcomes
Psychology report (WISC-III and WORD)			
WISC-III (Wechsler Intelligence Scale for Children – third Edition)	Cognitive functioning	Uses a number of sub-tests to examine the individual's ability to apply reason to both verbal and non-verbal problem solving. The assessment yields intelligence quotients (IQs) as	IQ centile: subdivided into verbal IQ and performance IQ. Recommendations

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		well as highlighting any strengths and weaknesses.	in final report.
WORD (Wechsler Objective Reading Dimensions)	Literacy	Uses a number of sub-tests to assess the individual's reading abilities and can be used to compare an individual's ability with actual levels of attainment.	Index scores. Recommendations in final report.
ICD-10 Multiaxial diagnosis	Mental state	Uses six different axes to examine the individual's mental state ranging from tests for clinical psychiatric syndromes to associated abnormal psychosocial situations. Axis six is a global assessment of functioning (see F.14 below).	A 'formulation': a summary of the psychiatrist's assessment.
Needs assessment	Needs	Assesses the individual's needs in relation to 24 different problem areas to determine whether those needs are not a problem, are currently met, are met in part, or are unmet.	Identifies met and unmet needs.
HoNOSCA (Health of the Nation Outcome Scales for Children and Adolescents)	Needs associated with mental disorder	Part of the 'Health of the Nation Outcome Scales' developed by the Department of Health as part of its 'Health of the Nation' strategy. Uses a set of scales to globally assess the needs of children and adolescents associated with mental disorder.	Rates each problem area on a scale of one to four (9 if unknown). Added together for a total score.
SAVRY (Structured Assessment of Violence Risk in Youth)	Risk of violence in youth	Assesses the individual against 30 different risk factors. Factors are subdivided into historical risk factors, social and contextual risk factors, individual risk factors and protective factors.	Scores for each factor and identifies 'critical items'. Risk assessment: risk to self, others and property. Conclusions and recommendations to manage risk safely and meet needs.

F.8 The following tables and lists summarise more fully the key components of each test and report incorporated in the FACTS assessment template.

Preliminary information

F.9 Prior to setting out the various tests and reports, the FACTS assessment template requires some preliminary information concerning the child’s personal details, the background to his or her referral for assessment and the sources of information used in the assessment.

Background history

F.10 For the purposes of assessment, the template requires the following information on the child:

- | | |
|-----------------------------------|-------------------------------|
| 1. Family composition and history | 7. Care history |
| 2. Family functioning | 8. History of substance abuse |
| 3. Developmental history | 9. Medical history |
| 4. Childhood history | 10. Psychiatric history |
| 5. Education | 11. Psychosexual history |
| 6. Social history | 12. Forensic History |

Psychology report

F.11 The psychology report is prefaced by the following statement (‘A’ refers to the name of the child):

[A] was seen at the [place] on [date] for an assessment of intellectual ability. The aim of the assessment was to provide information on [A’s] level of cognitive functioning and to assess aspects of [A’s] presentation which may be suggestive of [something].

F.12 The following table sets out each component of the psychology report together with any relevant information.

Component	Sub-components and further information
Test behaviour	
Measures used	[A] was assessed using the Wechsler Intelligence Scale for Children – third edition (WISC-III) which examines the individual’s ability to apply reason to both verbal and non-verbal problem-solving. The assessment yields intelligence quotients (IQs) as well as highlighting any specific strengths and weaknesses. [A’s] results are detailed in the appendix and discussed here with reference to verbal and performance scores. [A] was also assessed using the Wechsler Objective Reading Dimensions (WORD). This measure assesses someone’s reading abilities and can be used to compare an individual’s ability with actual levels of

Component	Sub-components and further information
	attainment.
Summary of findings (one of two): WISC-III	At the time of testing [A] was aged [#]. The results [A] obtained are detailed in the appendix and indicate [FSIQ/PIQ/VIQ etc].
Verbal sub-tests completed by [A]:	
1. Information	<p>This sub-test measures general knowledge. It asks questions about the subject's knowledge of common events, information, objects, places and people. Questions include: "What are the four seasons of the year?" and "How many hours are there in a day?" etc.</p> <p>Scores on this sub-test can be influenced by alertness, opportunities, curiosity, hobbies, reading, etc.</p>
2. Similarities	<p>This sub-test requires individuals to recognise relationships between things and ideas. Questions start by asking, for example, "In what way are a piano and a guitar alike?". The questions increase in difficulty and require higher level abstract reasoning. For example, "In what ways are the numbers nine and 25 alike?". The test requires accurate categorisation into logical groups.</p> <p>Scores on this sub-test may be influenced by thinking styles, for example flexibility versus concreteness.</p>
3. Arithmetic	<p>This sub-test involves mental arithmetic without the use of pen or paper.</p> <p>Scores on this sub-test can be influenced by anxiety and the ability to work under time-pressure. Also, concentration and attention can be factors.</p>
4. Vocabulary	<p>This sub-test questions word meanings and assesses abilities to express meanings verbally. Again the tasks gradually increase in difficulty. For example, early questions ask "What is a hat?" and progress to questions such as "What does aberration mean?".</p> <p>Scores on this sub-test can be influenced by alertness, opportunities, curiosity, hobbies, reading, etc.</p>
5. Comprehension	<p>This sub-test requires an understanding of social rules and concepts and looks at problem-solving abilities of everyday difficulties.</p> <p>Scores on this sub-test can be influenced by moral development, cultural factors and thinking styles, for example, flexibility versus concreteness.</p>

Component	Sub-components and further information
6. Digit span	<p>This assesses short-term auditory memory. This test requires the individual to listen to and then repeat back increasingly long strings of numbers. In the first part of the test the individual repeats the numbers forwards, and in the second part of the test he or she repeats them backwards. The backward retrieval taps into auditory working memory.</p> <p>Scores on this sub-test can be influenced by anxiety, concentration and attention. Flexibility is required.</p>
Performance sub-tests completed by [A]:	
1. Picture completion	<p>This involves recognising the missing parts of common objects and assesses sensitivity and alertness to detail.</p> <p>Scores on this sub-test can be influenced by alertness, concentration, working under time-pressure and being able to respond when uncertain.</p>
2. Coding	<p>This is a measure of visual motor speed. Individuals are required to copy a range of symbols that correspond to numbers.</p> <p>Scores on this sub-test can be influenced by a range of factors. These include visual perception problems, anxiety, concentration, motivation and persistence. Also, ability to work under time-pressure and obsessive concern with detail can be contributory factors.</p>
3. Picture arrangement	<p>This involves arranging a series of pictures into meaningful orders and requires anticipation of consequences to actions.</p> <p>Scores on this sub-test can be influenced by flexibility, creativity, working under time-pressures and cultural factors.</p>
4. Block design	<p>In this sub-test, blocks are arranged according to patterns. This sub-test measures ability to analyse abstract figures visually and construct them from component parts.</p> <p>Scores on this sub-test can be influenced by visual-spatial problems, flexibility, the ability to work under time-pressure and persistence.</p>
5. Object assembly	<p>In this sub-test, jigsaw-like pieces have to be put together. This test examines spatial abilities, visual motor co-ordination and persistence.</p> <p>Scores on this sub-test can be influenced by exposure to jigsaw puzzles, visual-perceptual problems, flexibility, the ability to work under time-pressure and persistence.</p>

Component	Sub-components and further information
Conclusion	At the time of testing, it would appear that the result [A] obtained suggests [X]. This was evidenced across a range of sub-tests. The age-equivalents for scores range from [# to #] years.
Summary of findings (two of two): WORD	<p>[A's] scores on the WORD assessment, which is a measure of literacy, were as follows:</p> <ul style="list-style-type: none"> • Basic reading: [#]%. The age equivalent is: [#] years old. • Spelling: [#]%. The age equivalent is: [#] years old. • Reading comprehension: [#]%. The age equivalent is: [#] years old. <p>Are the predicted WORD standard scores significantly different to his or her actual WORD scores?</p>
Recommendations	<p>1. Is there a significant global delay in intellectual functioning?</p> <p>2. Does he or she require:</p> <p>a. additional educational support?</p> <p>b. More time</p> <p>c. Breaks</p> <p>3. Does he or she appear to understand</p> <p>a. Information formats</p> <p>b. Brief instructions</p> <p>c. Consequences of actions</p> <p>4.. Social understanding</p> <p>5. Other services</p>

F.13 The results of the two parts of the psychology report (WISC-III and WORD) are set out in tables annexed to the assessors' report, as follows:

Cognitive functioning: WISC-III			
Full scale IQ	[X] centile		
Verbal IQ	[X] centile		
Sub-test	Raw score	Scaled score	Age equivalent

Information			
Similarities			
Arithmetic			
Vocabulary			
Comprehension			
Digit span			
Performance IQ	[X] centile		
Sub-test	Raw score	Scaled score	Age equivalent
Picture completion			
Coding			
Picture arrangement			
Block design			
Object assembly			
Symbol search			
WISC-III index scores	Index	Score	Centile
Verbal comprehension			
Perceptual organisation			
Freedom from distractability			
Processing speed			

NB: average IQ range: 85 to 115; average sub-test score: eight to 12; full range: one to 19.

Literacy attainments: WORD			
Scores	Basic reading	Spelling	Reading comprehension
Age equivalent			
Standard score			
Centile			

Predicted standard score			
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ICD 10 Multiaxial diagnosis

F.14 What follows is a more detailed specification of the multiaxial diagnosis referred to in F.7 above.

Axis	Diagnosis	
1	Clinical psychiatric syndrome	
2	Specific disorders or psychological development	
3	Intellectual level	
4	Medical conditions	
5	Associated psychosocial situations	1. Abnormal intrafamilial relationships
		2. Mental disorder/deviance or handicap in the child's primary support group
		3. Inadequate or distorted intrafamilial communication
		4. Abnormal qualities of upbringing
		5. Abnormal immediate environment
		6. Acute life events
		7. Societal stressors
		8. Chronic interpersonal stress associated with school/work
		9. Stressful events/situations resulting from the child's own disorder/disability
6	Global assessment of functioning	

Needs assessment

F.15 This test assess [A's] needs in different areas to determine whether those needs are:

- (1) not a problem: no evidence that [A] has difficulties in this area;
- (2) currently met: [A] is receiving a considerable amount of help to deal with this problem area;
- (3) met in part [A] is receiving some help with this problem; or
- (4) unmet [A] is currently receiving little or no help for this problem area.

F.16 The following table sets out the relevant problem areas, and provides space for identifying met and unmet needs:

Problem area	Met and unmet needs
Impact of physical illness	
Communication problems	
Autistic features	
Learning difficulties	
Educational attendance	
Educational performance	
Destructive behaviour	
Hostile behaviour to persons	
Oppositional behaviour	
Deliberate self-harm	
Psychological distress	
Inappropriate sexual behaviour	
Family relationships and functioning	
Peer/social relationships	
Leisure/activities	
Self-care	
Diet/food	
Living situation	
Hallucinations, delusions and paranoid beliefs	
Depressed mood	
Cultural and racial identity	
Substances misuse	
Weekday occupation	
Money/benefits/allowances	

HoNOSCA

- F.17 Health of the Nation Outcome Scales for Children and Adolescents (HoNOSCA) is part of the Health of the Nation Outcome Scales that originate from the Health of the Nation Strategy (Department of Health 1992). This strategy identified three targets for mental health: two concerned with the reduction of suicide and the other to significantly improve the health and social functioning of people with mental disorder. A set of scales to globally assess needs associated with mental disorder was therefore developed. These are called the HoNOSCA scales. HoNOSCA is now also a criterion of the Minimum Data Health Standard. Therefore, HoNOSCA must be carried out as part of the assessment.

Problem area	Scale (zero to four; nine if unknown)	Evidence
Section A		
1. Disruptive, antisocial or aggressive behaviour		
2. Over-activity attention and concentration		
3. Non-accidental self-injury		
4. Alcohol, substance/solvent misuse		
5. Scholastic or language skills		
6. Physical illness or disability problems		
7. Hallucinations and delusions		
8. Non-organic somatic symptoms		
9. Emotional or related symptoms		
10. Peer relationships		
11. Self-care and independence		
12. Family life and relationships		
13. Poor school attendance		
Section A: Total score		
Section B		
14. Lack of knowledge		
15. Lack of information - services/management		
Sections A and B: total score		

SAVRY: Structured Assessment of Violent Risk in Youth

- F.18 SAVRY is a structured assessment of the risk of violence in youth. It is founded on research evidence relating to violence in adolescence. It is important to remember that most youths who present as violent during adolescence do not persist in this behaviour in later life. The nature and degree of violence risk may frequently change and vary. The values assigned to the risk factors in the assessment are likely to change over time and this risk assessment represents *current* opinion only.
- F.19 The historical risk factors are mainly static in nature (and can only worsen). The social/contextual and individual risk factors are dynamic in nature and indicate potential opportunities for therapeutic interventions to reduce the risk of violence. Protective factors are similarly dynamic and represent strengths that counterbalance the adverse risk factors, and can be built upon to reduce the risk of violence. Critical items are those items that seem particularly relevant to the risk of violence in individual cases, e.g. risk associated with mental illness such as paranoid psychosis, affective disorders, and pervasive developmental disorders.

Item	Score	Critical item
Historical risk factors		
History of violence		
History of non-violent offending		
Early initiation of violence		
Past supervision/intervention failures		
History of self-harm or suicide attempts		
Exposure to violence in the home		
Childhood history of maltreatment		
Parental/caregiver criminality		
Early caregiver disruption		
Poor school achievement		
Social and contextual risk factors		
Peer delinquency		
Peer rejection		
Stress and poor coping		
Poor parental management		

Lack of personal and social support		
Community disorganisation		
Individual risk factors		
Negative attitudes		
Risk taking/impulsivity		
Substance use difficulties		
Anger management		
Lack of empathy/remorse		
Attention deficit		
Poor compliance		
Low interest/commitment to school		
Protective factors		
Pro-social involvement		
Strong social support		
Strong attachments and bonds		
Positive attitude towards intervention and authority		
Strong commitment to school		
Resilient personality traits		

F.20 Based on the risk items identified in the above table, the assessor is required to make a 'risk assessment', subdivided into 'risk to self', 'risk to others' and 'risk to property'. The assessor is then required to set out his or her 'conclusions and recommendations to manage risk safely and meet needs'.

CHILD DEFENDANTS: OCCASIONAL PAPER 56, ROYAL COLLEGE OF PSYCHIATRISTS

F.21 In its recent occasional paper (March 2006) on Child Defendants, the Royal College of Psychiatrists' (the 'RCP') made a number of recommendations regarding the assessment of child defendants who are facing serious criminal charges. The RCP said that:

This assessment should include both psychiatric, psychological and social work components, to give an opinion on the child's mental state, fitness to plead and diminished responsibility, to look at the welfare needs of the child and also to inform sentencing in relation to compliance with treatment.²

F.22 Specifically, the RCP recommended that:

5. All child defendants facing serious criminal charges should be seen as 'children in need' in terms of the Children Act 1989 (section 17) and should be subject to an assessment of their needs using the Government's assessment framework.³

...

9. There should be assessment by a clinical psychologist of all child defendants facing serious criminal charges, including murder, manslaughter, abduction, rape, arson or grievous bodily harm.

10. There should be an assessment by a child psychiatrist of all children facing serious criminal charges, including murder, manslaughter, abduction, rape, arson or grievous bodily harm.

11. The Royal College of Psychiatrists and the British Psychological Society should produce a joint statement laying out the principles of such psychiatric and psychological assessments. This statement would provide guidance for assessments of child defendants, would prevent the development of idiosyncratic psychiatric and psychological assessment methods and would provide the courts with consistent expert reports.⁴

F.23 The RCP paper includes a chapter on 'developmental psychology and child development'. Within this chapter, the RCP discusses fitness to plead and sets out Professor Thomas Grisso's "conceptual framework for competence in juveniles ... based on legal and psychological definitions of competence."⁵ Grisso's framework consists of four stages, as set out in the following table:⁶

² Royal College of Psychiatrists, *Child Defendants* (March 2006) Occasional Paper OP 56, at p 8.

³ Department of Health, Department for Education and Employment, Home Office, *Framework for the Assessment of Children in Need and their Families* (2000)

⁴ Royal College of Psychiatrists, *Child Defendants* (March 2006) Occasional Paper OP 56, at pp 12 to 13.

⁵ Above, at p 45, referring to T Grisso, "What We Know About Youths' Capacities as Trial Defendants" in T Grisso and R G Schwartz (eds), *Youth on Trial* (2000), at pp 139 to 171.

⁶ Above, at p 46.

Understanding	Ability
1. Understanding charges and potential consequences	Ability to understand and appreciate the charges and their seriousness
	Ability to understand possible sentencing consequences
	Ability realistically to appraise the likely outcomes
2. Understanding the trial process	Ability to understand, without significant distortion, the roles of participants in the trial process (for example, judge, counsel, prosecutor, witness, jury)
	Ability to understand the process and potential consequences of pleading and plea bargaining
	Ability to grasp the general sequence of pre-trial/trial events
3. Capacity to participate with counsel	Ability to adequately trust or work collaboratively with counsel
	Ability to disclose to counsel reasonably coherent description of facts pertaining to the charges, as perceived by the defendant
	Ability to reason about available options by weighing their consequences, without significant distortion
	Ability to realistically challenge prosecution witnesses and monitor trial events
4. Potential for courtroom participation	Ability to testify coherently, if testimony is needed
	Ability to control own behaviour during trial proceedings
	Ability to manage the stress of the trial

APPENDIX G

PERSONS AND ORGANISATIONS WHO PARTICIPATED IN AND CONTRIBUTED TO THE CONSULTATION PROCESS

Although this report is presented by the current Commissioners, the overwhelming majority of the work was carried out under the leadership of the previous Chairman, the Honourable Mr Justice Toulson. We are extremely grateful to him.

We are also grateful to the large number of other individuals and organisations who participated in and contributed to the consultation process, and especially those who provided the material that we have published in Appendices C to F.

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HHJ Michael Brodrick
Sir Henry Brooke
Lord Justice Buxton
Mr Justice Calvert-Smith
Mr Justice Cooke
Mr Justice Elias
Lord Justice Gage
Sir Iain Glidewell
Lady Justice Hallett
Lord Justice Hughes
Mr Justice Jackson
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Lord Justice Latham
Lord Justice Leveson
Lord Justice Longmore
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Mr Justice Nelson
Mr Justice Openshaw
Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales
Mr Justice Pitchers
Mr Justice Pitchford
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HHJ Jeremy Roberts QC
Mr Justice Silber
Mr Justice Simon
HHJ James Stewart QC
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Mr Justice Wilkie
The Criminal Sub Committee of the Council of HM Circuit Judges
The Permanent Judges of the Central Criminal Court

Non-governmental organisations

ALERT

The Association for Post-Natal Illness

British Council of Disabled People

Care Not Killing Alliance

Criminal Cases Review Commission

Dignity in Dying

The Homicide Review Advisory Group

JUSTICE

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Victim Support

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The Bar of the North Eastern Circuit
The Bar of the Wales and Chester Circuit
The Bar of the Western Circuit
The Criminal Bar Association
The Justices' Clerks' Society
The Law Society
The London Criminal Courts Solicitors' Association
The Police Federation of England and Wales
The Police Superintendents' Association
The Royal College of Paediatrics and Child Health
The Royal College of Psychiatrists
The Society of Labour Lawyers Criminal Law Group

Religious Bodies

The Christian Medical Fellowship
The Devon Forum for Social Justice
The Lawyers Christian Fellowship
The Mission and Public Affairs Council of the Church of England



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