Murder, manslaughter and infanticide: proposals for reform of the law

Impact Assessment

July 2008
Summary: Intervention & Options

Ministry of Justice | Murder, manslaughter and infanticide: proposals for reform of the law; impact assessment

Stage: Consultation | Version: 1 | Date: 28 July 2008

Related Publications:

This Impact Assessment is available to view or download at:
http://www.justice.gsi.gov.uk/publications/cp1908.htp

Contact for enquiries: murder_review@justice.gsi.gov.uk | Telephone: 020 7035 4211

What is the problem under consideration? Why is Government intervention necessary?
In their 2006 report, “Murder, Manslaughter and Infanticide”, the Law Commission expressed concern at the piecemeal way in which the law on homicide had evolved: some aspects were now out of date and others uncertain. This affects the operation of the law in practice and public confidence in it. The Law Commission made wide-ranging recommendations for reforms. Government intervention is necessary because primary legislation is needed to give effect to the recommendations.

What are the policy objectives and the intended effects?
In this stage of the review, the policy objective is to update and clarify the law in the following areas:
- partial defences of provocation and diminished responsibility;
- the law on complicity as it relates to homicide; and
- infanticide.
Full details are set out in the consultation paper, “Murder, Manslaughter and Infanticide: Proposals for Reform of the Law”, which the Ministry of Justice is publishing alongside this Impact Assessment.

What policy options have been considered? Please justify any preferred option.
In all four areas, we considered doing nothing. In relation to infanticide, we concluded that this was broadly the right approach and are proposing only a minor change to reflect a recent Court of Appeal judgment. In relation to the other areas, we concluded that the law needed to be updated and clarified. In the case of provocation, we think the law can on occasion be too generous to those who kill in anger and are proposing a narrowing of the application of the partial defence. These changes are aimed at bringing clarity to the law, improving justice and enhancing public confidence. Full details are set out in the consultation paper which is being published alongside this Impact Assessment.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?
This is a consultation exercise and the policy proposals will be reviewed in the light of responses received. If the policy is implemented, the cost will be reviewed by monitoring the changes in numbers of people convicted of murder and manslaughter each year. These figures are published annually by the Ministry of Justice.

Ministerial Sign-off For consultation stage impact assessments:

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

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

................................................................. Date: 24/07/08
## Analysis & Evidence

### Policy Option:

### Description:

#### ANNUAL COSTS

<table>
<thead>
<tr>
<th></th>
<th>Description and scale of key monetised costs by 'main affected groups'</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>One-off (Transition)</strong> Yrs</td>
<td>The key costs are expected to arise as a result of increased demand for prison places. We estimate that this will build up to an additional 100 - 200 places at a cost of £4-8 million per year. There may be a small impact on courts, with perhaps one additional trial per year at a cost of £54k.</td>
</tr>
<tr>
<td><strong>£ 4-8 million</strong></td>
<td><strong>Total Cost (PV)</strong> £20.9 million</td>
</tr>
<tr>
<td>Other key non-monetised costs by 'main affected groups'</td>
<td></td>
</tr>
</tbody>
</table>

#### ANNUAL BENEFITS

<table>
<thead>
<tr>
<th></th>
<th>Description and scale of key monetised benefits by 'main affected groups'</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>£</strong></td>
<td>These changes are aimed at bringing clarity to the law, improving justice and enhancing public confidence.</td>
</tr>
<tr>
<td><strong>Total Benefit (PV)</strong></td>
<td>£</td>
</tr>
<tr>
<td>Other key non-monetised benefits by 'main affected groups'</td>
<td></td>
</tr>
</tbody>
</table>

### Key Assumptions/Sensitivities/Risks

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

### Price Base Year

### Time Period Years

<table>
<thead>
<tr>
<th>Net Benefit Range (NPV)</th>
<th>NET BENEFIT (NPV Best estimate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>£</td>
<td>£</td>
</tr>
</tbody>
</table>

### What is the geographic coverage of the policy/option?

England and Wales

### On what date will the policy be implemented?

To be decided

### Which organisation(s) will enforce the policy?

CJ agencies

### What is the total annual cost of enforcement for these organisations?

£ 4-8 million

### Does enforcement comply with Hampton principles?

Yes

### Will implementation go beyond minimum EU requirements?

N/A

### What is the value of the proposed offsetting measure per year?

N/A

### What is the value of changes in greenhouse gas emissions?

N/A

### Will the proposal have a significant impact on competition?

No

### Annual cost (£-£) per organisation (excluding one-off)

<table>
<thead>
<tr>
<th>Micro</th>
<th>Small</th>
<th>Medium</th>
<th>Large</th>
</tr>
</thead>
<tbody>
<tr>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

### Are any of these organisations exempt?

N/A

### Impact on Admin Burdens Baseline (2005 Prices)

No impact

### Increase of £  

### Decrease of £  

### Net Impact £  

**Key:** Annual costs and benefits: Constant Prices (Net) Present Value
Evidence Base (for summary sheets)

Murder Review Costs Analysis

Introduction

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

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

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

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

Provocation

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

The Government therefore proposes to abolish the existing law on provocation and to replace it with new partial defences tailored to those who kill as a response to:
- a fear of serious violence; and/or
- in exceptional circumstances, a justified sense of being seriously wronged.

“Fear of serious violence”

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

“A justified sense of being seriously wronged”

This partial defence would apply only in exceptional circumstances and have a narrower application than the current partial defence of provocation. This is likely to impact on both trials and outcomes.
From our sample of 2005 cases, we identified 20 where provocation appeared to be the basis of the manslaughter conviction, and 15 (including 17 defendants) where pleas of provocation appeared to have failed and resulted in a murder conviction.

We think trials would be likely to be affected in two ways by the new, narrower partial defence. On the one hand, the CPS would accept fewer pleas to manslaughter, thus increasing the number of trials. On the other hand, some defendants who currently plea manslaughter un成功fully would plead guilty to murder in future (because their chances of succeeding with a manslaughter plea would be so reduced), thus reducing the number of trials. We think that these effects would broadly cancel one another out: our analysis of the 2005 cases suggested perhaps one additional trial overall, at a cost of £54,000 per trial.

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

Impact of changing provocation

In summary, we expect that the additional costs resulting from the changes to provocation would be in the region of £4-8 million annually. The “do-nothing” option would have no direct financial costs associated with it. However the benefits of the change would be greater clarity in the law, improved justice and increased public confidence.

Diminished responsibility

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

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

Infanticide

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

The current law appears to be working satisfactorily. The Government proposes a minor change to make clear, in the light of a recent Court of Appeal judgment, that infanticide cannot be

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charged in circumstances which would not otherwise be homicide. We do not think that this is happening in practice – the loophole being plugged is a theoretical one – so we do not expect the change to have any impact on courts or sentencing.

**Complicity to murder**

The law of complicity governs the circumstances in which defendants may be found guilty of murder or manslaughter for their role in participating in a fatal crime where they did not necessarily inflict the fatal injuries.

The current law is complex and uncertain. The way that it has developed has also created a gap whereby gang members involved in murder may escape liability for any homicide offence if there is no evidence that the entire gang agreed to a particular course of action, despite all having agreed seriously to harm the victim.

The Government is proposing three changes in this area:

- restricting secondary liability for murder in cases where the defendants are not jointly engaged in a criminal venture;
- addressing problems caused by the common law fundamental difference rule; and
- creating a new form of manslaughter based on principles of secondary liability.

**Impact of restricting secondary liability for murder in non-joint criminal venture cases**

In cases of aiding and abetting where there is no joint criminal venture, the Government proposes to restrict liability for murder to cases where the defendant intended the murder to occur.

We believe that such a change would have little impact on the number of people convicted of murder, because there will be few cases where a defendant has assisted or encouraged a murder without being part of the joint criminality. The Law Commission acknowledged this in their report, as consultees raised it as an argument for leaving the law as it is. However, we believe that there may be exceptional cases where it is right that those who assist or encourage a murder should be guilty of a lesser offence, for example where they acted only out of fear of violence.

Because the change is aimed at only exceptional cases and a criminal conviction of some sort would still result, we believe that the cost implications would be negligible.

**Impact of addressing the fundamental difference rule and the new manslaughter offence**

The Government’s second proposal is to reform the common law fundamental difference rule, which the Law Commission identified as too rigid, resulting in verdicts which can be both too harsh and too generous.

At present the fundamental difference rule allows defendants to argue that, although they were involved in a joint criminal enterprise with someone who committed murder, the acts leading to the death were fundamentally different from the acts that the defendant had foreseen. The Government believes that this rule can be applied too rigidly and wants the jury to be able to consider more broadly whether what the main perpetrator did was within the scope of the joint criminal venture. The Government’s proposal would seek to make the law more flexible so that juries had greater discretion to find liability for murder in cases where violence had escalated.

Under the current law, if the jury accepts that the fundamental difference rule applies in a particular case, the defendant will not be guilty of murder or manslaughter. Instead, the defendant may only be found guilty of other offences, for example conspiracy to do serious
harm. The Government’s third proposal would ensure that the defendant would be convicted of manslaughter in these circumstances. We think the result of these proposals would be that some convictions for murder would become manslaughter and some convictions for non-homicide offences would become homicides (murder or manslaughter).

We have considered whether this would affect the way that these offences were charged or the way that defendants would plead in homicides where there is more than one offender involved. Although some individual defendants might be charged or plead differently, we think that the complexity of these cases means that most will still result in a trial and that there is unlikely to be a significant change as a result of our proposals.

In terms of outcomes in the trials, our analysis of the 2005 cases suggested that the majority would be unaffected by the reforms. In a small number of cases, defendants who have successfully relied on the fundamental difference rule and been convicted of, say, conspiracy to do serious harm, would in future be convicted of manslaughter. The difference in sentence lengths might be a 5-year sentence compared to a 2½-year one.

Overall, therefore, we think that any impact arising from the changes to complicity to homicide would be low.

**Cost benefit analysis summary**

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

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

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

<table>
<thead>
<tr>
<th>Type of testing undertaken</th>
<th>Results in Evidence Base?</th>
<th>Results annexed?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Competition Assessment</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Small Firms Impact Test</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Legal Aid</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Sustainable Development</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Carbon Assessment</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Other Environment</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Health Impact Assessment</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Race Equality</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Disability Equality</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Gender Equality</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Human Rights</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Rural Proofing</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>
HUMAN RIGHTS IMPACT ASSESSMENT

The Department is content that the proposals set out in the Consultation Paper are compatible with the Convention Rights.

The proposals which reform the existing law in respect of partial defences, complicity and infanticide could potentially engage rights under Article 2 (right to life) and Article 6 (right to a fair trial) of the European Convention of Human Rights.

In particular, Article 2 requires states to make effective criminal law sanctions to safeguard life. While Strasbourg case law is primarily concerned with killings by law enforcement officers who are agents of the state, it is clear that the state also has a positive obligation to ensure that the law protects the lives of citizens from unjustifiable deprivation by other individuals. The Department considers that its proposals constitute appropriate steps to deter the commission of offences of homicide, and that these will be backed up by law enforcement machinery for the prevention and punishment of such offences.

The proposals relating to diminished responsibility would not alter the current position under which the burden of proof lies on the defendant to make out the defence on a balance of probabilities. The Department has considered whether this reverse burden is compatible with Article 6(2), which requires that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. It is satisfied that this burden is indeed compatible, because it is imposed in pursuance of a legitimate aim – namely to ensure that a person who kills another person should face a sentence of appropriate severity unless his mental state at the time was such that it reduces his culpability – and is proportionate to the achievement of that aim.
Introduction

Concern about the differential impact on men and women of the law on homicide has been a key driver for this review. In June 2003 the then Home Secretary asked the Law Commission to consider the partial defences to murder of diminished responsibility and provocation and to have particular regard to their impact in the context of domestic violence. The Law Commission published their report, 'Partial Defences to Murder', in 2004 ("the Partial Defences Report")². The Government then asked them to review the law of homicide more generally, and their further report, 'Murder, Manslaughter and Infanticide' ("the Murder Report")³ was published in November 2006.

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

The Government has decided, because of the scale of the reforms proposed and the importance of this area of law, that a step-by-step approach is appropriate, with the review being conducted in two phases. This step-by-step approach will enable some evaluation of the impact of the first set of changes before implementing any further one. This first phase, announced in December 2007⁴, focuses on:

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

Detailed legal and policy considerations are set out in the Consultation Paper ‘Murder, Manslaughter and Infanticide: Proposal for Reform of the Law’ ("the Consultation Paper")⁵ which is being published alongside this Equality Impact Assessment.

This Equality Impact Assessment examines the extent to which the current law of murder, in the four areas listed above, has a differential impact on any particular groups of people. It then considers the likely impact of the proposals set out in the consultation paper.

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² Partial Defences to Murder, (2004), Law Com No290.
⁴ Written Ministerial Statement, Homicide, 12 December 2007, Hansard: Column 43WS.
Methodology

In order to make an assessment of the way that the law is currently working and the possible impact of the reforms, a number of sources of information were used: the Law Commission’s two reports\(^6\), the homicide statistics collected by the Home Office\(^7\) and the sentencing remarks in murder and manslaughter cases in 2005.

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

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

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

Consultation and Involvement:

Both of the Law Commission’s reports followed extensive consultation (for a full list of consultees see Appendix H of the Partial Defences Report and Appendix G of the Murder Report). We began this stage of the review by contacting a wide range of individuals and organisations from the criminal justice system, academia, the medical professions and non-governmental organisations. We invited them to a series of seminars and a list of those who attended, or whom we saw separately is attached at Annex A. This Equality Impact Assessment accompanies the further formal Consultation Paper and we welcome views on the equality issues raised herein.

Provocation

Equality concerns

Gender

There are long-standing concerns about whether the current partial defence of provocation impacts differently on men and women and it was partly these concerns which triggered the

\(^6\) The Partial Defences Report and the Murder Report.

current review. When in June 2003 the then Home Secretary requested the Law Commission
to consider the partial defences to murder, he specified that the Commission should have
particular regard to the impact of the partial defences in the context of domestic violence.

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

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

How provocation is currently used

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

19 of the 20 defendants in these cases were men, but none involved men killing female
defendants. The victim in the case involving a female defendant was also female, and this
killing occurred in the context of a dispute between two families.

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

<table>
<thead>
<tr>
<th>Nature of relationship</th>
<th>Total no</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feuds (between families, neighbours etc)</td>
<td>7</td>
</tr>
<tr>
<td>Relative (son/father/stepfather/brother etc)</td>
<td>5</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>20</strong></td>
</tr>
</tbody>
</table>

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

Males who kill females

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

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

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

What do we conclude from this?

This evidence supports the view put forward by the Law Commission in their report, “Partial Defences to Murder”, that “juries are less prone than is sometimes thought to return verdicts of manslaughter on grounds of provocation where the provocation alleged is simple separation or infidelity”8. It also suggests that courts are less prone than is sometimes thought to convict of murder women who kill abusive partners.

However, problems remain. If the courts are producing broadly the right outcomes, they have to do so at times by pushing the current law to its limits. First, there is a tension between a continuing requirement for “a sudden loss of self-control” and an accommodation of the “slow-burn” responses associated with domestic abuse cases. Second, and linked to this, there is the difficulty of applying an emotional response founded primarily on anger to situations where the predominant emotion is fear. This risks creating practical problems when defendants are deciding how to run their defences since it is hard to run the two in parallel. The Law Commission claim that defendants sometimes plead guilty to manslaughter for fear that a plea of self-defence might fail and leave them with a murder conviction9.

It was also clear from our discussions with stakeholders that concerns remain about the operation of this partial defence and its appropriateness for cases involving domestic violence.

How are we responding to this?

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

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

8 The Partial Defences Report, para 3.145.
9 The Partial Defences Report, para 4.22.
We are also proposing to amend the current case law requirement for a loss of self-control to be sudden, a requirement which sits uncomfortably with the “slow-burn” responses found in some domestic violence cases.

**Other aspects of equality**

The analysis of provocation focuses on gender as this is the area which gives rise to the greatest concern. We do not think that significant issues arise in relation to other aspects of equality, though three points are perhaps worth mentioning.

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

A general concern has also been raised about so-called “honour” killings which are particularly relevant to issues of ethnicity and religion. We are not aware of provocation having been used successfully in “honour” killings. This is at it should be and we do not want either of the two new partial defences to increase the likelihood of such cases resulting in manslaughter in future. This view was strongly supported by stakeholders. In the Murder Report\(^{10}\), the Law Commission proposed abolishing altogether the requirement for a loss of self-control in provocation cases and considered the impact that this might have on “honour” killings. They concluded that the bar on revenge killings which they also proposed would provide an adequate safeguard. We are less confident and that is one reason why we are proposing retaining a requirement for a loss of self-control, but amended to make it more gender-neutral. The requirement for the “words and conduct” partial defence to apply only in exceptional circumstances, and the exclusion of sexual infidelity should all also assist here.

It is proposed that the partial defence should apply to all ages as it does now. However, it is proposed that account should be taken of the defendant’s age in considering whether an ordinary person might have reacted in the same way. This may be particularly relevant to very young and very old defendants.

**Diminished Responsibility**

**Equality Concerns**

**Disability**

Convictions for manslaughter on the grounds of diminished responsibility (section 2 manslaughter) are recorded separately from manslaughter in general. Home Office statistics show 19 convictions in 2005/06.\(^{11}\) This may be an under-recording as our analysis of sentencing remarks for the calendar year 2005 included 39 cases (involving 39 defendants and 43 victims) where diminished responsibility appeared to be the basis of the manslaughter conviction.

\(^{10}\) The Murder Report, para 5.25.

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

<table>
<thead>
<tr>
<th>Diagnosis</th>
<th>Total no of defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paranoid schizophrenia</td>
<td>11</td>
</tr>
<tr>
<td>Unspecified mental health problems</td>
<td>10</td>
</tr>
<tr>
<td>Personality disorder</td>
<td>4</td>
</tr>
<tr>
<td>Depression</td>
<td>4</td>
</tr>
<tr>
<td>PTSD and stress</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>39</strong></td>
</tr>
</tbody>
</table>

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

This partial defence enables those convicted of manslaughter on these grounds to be sentenced not only on the basis of their culpability but also on the basis of their medical needs. This does not necessarily mean shorter or more lenient sentences. Our analysis confirms the Law Commission’s conclusion that: “In a majority of cases where diminished responsibility has been successfully pleaded, the result will be one or other of a hospital order without limit on time, or a sentence of life imprisonment….There will be some cases that will rightly be met with a determinate sentence of imprisonment. An example might be a case in which the effects of the abnormality of mind are much less severe, or non-existent, by the time the trial has been concluded”\(^\text{12}\). The sentencing remarks in our sample of cases make clear that some defendants convicted on the grounds of diminished responsibility are unlikely ever to be released.

We have considered whether such a partial defence should be retained. We agree with the Law Commission that it should be; this was also the view of most stakeholders. If a defendant’s mental responsibility for a killing is impaired by an abnormality of mind, it is in the interests of justice and fairness that that “diminished responsibility” be taken into account by the law; a murder conviction and mandatory life sentence is not an appropriate response to such a situation. Research commissioned by the Law Commission suggests that public opinion also supports a different response to such offenders\(^\text{13}\).

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

\(^{12}\) The Murder Report, p 96, footnote 67.

\(^{13}\) The Murder Report, para 5.84.
Gender

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

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

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

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

> It is recognised that abused women may suffer from mental health difficulties, such as depression, anxiety and post traumatic stress disorder. However from our research to date there appears to be no generally accepted medical position on “battered woman syndrome”. It is not a diagnosis but an explanation of how some women are affected by being in an abusive relationship. We do not see that it is a concept that would satisfactorily form the basis of a specific defence. Furthermore, defences to murder ought to be based on principles of general application.¹⁴

We propose to adopt the Law Commission’s recommendation of basing the definition of diminished responsibility on the concept of a “recognised medical condition”. This does not specify which conditions should and should not be included – this would be an impossible task and any such list would become quickly outdated. But it does encourage diagnoses to be more firmly rooted in the international classificatory systems and enables the partial defence to evolve with those over time. Where a woman has suffered mental health difficulties as a result of domestic abuse, this definition will enable them to be taken into account.

Age

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

As indicated in the main consultation paper, this provoked mixed reactions amongst stakeholders with whom we discussed this – more mixed, perhaps, than the level of support expressed to the Law Commission’s consultation¹⁵.

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¹⁵ The Murder Report, para 5.127.
The criminal justice system already makes special provision generally for defendants aged under 18 – in how they are tried, in the sentences for which they are liable and how and where those sentences are served. In this context, the challenge is to ensure that defendants aged under 18 are able to benefit from the same partial defences as adults, whilst also ensuring that the victims of offenders aged under 18 receive justice and that the public is appropriately protected.

We have the following concerns about the recommendation:

- We are not convinced that the absence of a provision along these lines is causing significant difficulties in practice
- We think there is a real risk of such a provision opening up the defence too widely and catching inappropriate cases. Even if it were to succeed only rarely, we think it likely that far more defendants would at least try to run it, so diverting attention in too many trials from the key issue.

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

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

Complicity

The law of complicity governs the circumstances in which defendants may be found guilty of murder or manslaughter for their role in participating in a fatal crime where they did not necessarily inflict the fatal injuries. In practice this means that it covers gang related homicides and any other homicides committed by two or more people.

While we do not consider that the law itself discriminates against any particular groups in society, there are disproportionate representations of certain groups among those found guilty of participating in a homicide with one or more other people.

Gender and Ethnicity

In general, in homicide cases, more men are convicted than women and there is a higher representation of black minority ethnic (BME) offenders than in the population as a whole.

Our analysis of the 2005 murder cases found that the disproportionate representation of BME offenders was more pronounced in the complicity cases. We also found there was a higher representation of young offenders than in the sample as a whole. There did not seem to be a significant gender difference. See table below:

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16 The World Health Organisation’s International Classification of Diseases (ICD-10); and the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).
<table>
<thead>
<tr>
<th>Offenders convicted of</th>
<th>In complicity cases</th>
<th>In sample as a whole</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Murder:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>aged 21 and under</td>
<td>35%</td>
<td>21%</td>
</tr>
<tr>
<td>male</td>
<td>80%</td>
<td>81%</td>
</tr>
<tr>
<td>BME</td>
<td>43%</td>
<td>33%</td>
</tr>
<tr>
<td><strong>Manslaughter:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>aged 21 and under</td>
<td>43%</td>
<td>23%</td>
</tr>
<tr>
<td>male</td>
<td>92%</td>
<td>86%</td>
</tr>
<tr>
<td>BME</td>
<td>34%</td>
<td>22%</td>
</tr>
</tbody>
</table>

Our analysis also showed that the rate of BME offenders having murdered BME victims was higher in complicity cases than in the whole sample (31% compared to 23%). This echoes other data sources, which suggest that victims of homicide are often of the same ethnicity as the killer\(^{19}\). Our analysis suggests that this is even more true in cases of joint killings.

The reforms to the law of complicity are relatively minor and aim to increase the justice in a small number of cases, where in particular circumstances defendants can escape liability for homicide despite being involved in violent criminal ventures which result in death.

Given the findings from our analysis of the cases, we would expect any changes in the law to have a disproportionate impact on younger and BME defendants, even if the impact will be very small. We believe that this is justifiable because of the gravity of the behaviour which is being addressed and because it reflects differences in the age and ethnicity of offenders who reach court accused of joint homicides. The law itself will apply equally to defendants of all ages and ethnicities.

However, we also believe that the changes will improve equality of justice for BME victims who are more likely to be killed in joint criminal attacks. At present the deficiencies identified in the current law of complicity to murder have a disproportionate impact in cases involving BME victims, therefore the changes will have a positive impact in this respect.

**Infanticide**

**Gender**

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

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

It is clear from the Law Commission’s consultation\textsuperscript{20} that there are differing views about the justification for taking a different approach with women in these circumstances:

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

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

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

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

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

\textit{Age}

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

Of the 49 cases convicted of infanticide between 1990 and 2003 there were 6 mothers aged 16 years or under and 10 mothers between 17 and 20 years of age. This illustrates that a significant proportion of infanticide cases involve mothers who are themselves children.\textsuperscript{21}

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


\textsuperscript{21} The Murder Report, p 194, D8, Table 1a: Age range of accused.
Recommendations/ mitigating the impact

1. We believe that the proposed changes to the law of provocation will improve the equality of the law by tailoring its response more closely to the situations it needs to deal with and by addressing the long-standing concerns about the differential impact of the current law on men and women.

2. We do not believe that the current law of diminished responsibility has adverse effects on any particular groups in society. However, we do believe that it ensures that those with mental health issues are not punished unfairly as a result of their health, and in that respect it has a positive role to play in ensuring equal treatment. We therefore propose to retain it but in an updated form.

3. The changes to the law of complicity could have a disproportionate, albeit very small, impact on BME victims and defendants, because they are disproportionately represented in the groups affected. The Government monitors action to address disproportionality in the criminal justice more through a Public Service Agreement Target.

4. As far as infanticide is concerned, we agree with the Law Commission that the law is working satisfactorily in practice and requires no amendment. The very specific childbirth-related circumstances which the offence covers justify the gender and age criteria on which the offence is based.
Annex A: Persons and organisations that participated in and contributed to the consultation process

Academics
Professor Ian Brockington, Professor Emeritus, Department of Psychiatry, University of Birmingham
Dr Kate Cook, Manchester Metropolitan University
Professor R D Mackay, De Montfort University
Professor Barry Mitchell, Coventry University
Professor Richard Taylor, University of Central Lancashire

Government Departments and Public Bodies
Attorney General’s Office
Criminal Cases Review Commission
Crown Prosecution Service
Department for Children, Schools and Families
Government Equalities Office
HM Prison Service
Home Office, Crime Strategy Unit
Home Office, Police Powers Protection Unit
Home Office, Public Order & Police Cooperation Unit
Home Office, Violent Crime Unit
The Law Commission
Ministry of Justice, Mental Health Unit
Ministry of Justice / Department for Children, Schools and Families, Youth Justice Children’s Unit
Office of Criminal Justice Reform, Better Trials Unit
Rotherham Metropolitan Borough Council
Standing Committee for Youth Justice
Victims’ Advisory Panel
Youth Justice Board for England and Wales

Non-Governmental Organisations
Children Rights Alliance for England
Dignity in Dying
Eaves Housing for Women, The Lilith Project
Homicide Review Advisory Group - Sir Louis Blom Cooper QC
Justice for Women
NSPCC
Refuge
Support After Murder and Manslaughter

Professional Organisations
The Association of Chief Police Officers
British Psychological Society
The Law Society
The Royal College of Paediatrics and Child Health
The Royal College of Psychiatrists
Voice UK - Learning Disabilities in the CJS
Women’s National Commission
Women’s Aid

Judiciary
We are also grateful to the individual members of the judiciary who gave us the benefit of their practical experience in some of the areas under consideration.