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## **Reforming Provocation: Perspectives from the Law Commission and the Government**

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### Summary

This comment provides a critical analysis of the recent law reform proposals regarding the partial defence of provocation. More specifically, the comment examines how and why the proposals forwarded by the Government differ to those presented by the Law Commission.

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## Introduction

This comment provides a critical analysis of the Government's recent proposals in relation to the defence of provocation. (Ministry of Justice CP/19/08) With particular reference to women who kill their abusive partners, the comment will critically analyse how and why the Government's proposals differ from those produced by the Law Commission. (Law Com No 290). It will be argued that the approach adopted by the Government is disappointing as they reject some of the more radical proposals suggested by the Law Commission, proposals which were primarily motivated by circumstances in which a person kills due to fear and desperation after suffering years of abuse. Commencing with a brief overview of the existing law of provocation, the comment will then proceed to examine some of the key proposals produced by the Law Commission and the Government.

## Provocation: The Existing Law

Provocation, along with diminished responsibility, operates as a partial defence to murder and thus a successful plea leads to a conviction for the lesser offence of manslaughter. This in turn restores judicial discretion in sentencing, as murder carries a mandatory life sentence. Provocation is currently outlined in the Homicide Act 1957 S3, which states:

“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.”

One of the main criticisms of provocation is that it is problematically biased in favour of men and tends to exclude the experiences of women, particularly abused women. (see for example: Bandalli, 1995; Horder, 1993; O'Donovan, 1991, 1993; McColgan, 2000, Young, 1991) Whereas men tend to fall quite easily within the contours of the defence and achieve, at times, lenient sentences, abused women who kill have struggled to have their circumstances recognised by the courts. (McColgan, 2000)

In order for provocation to be successful the defendant must satisfy two requirements. Firstly the defendant must be provoked into suffering a 'sudden and temporary loss of self control' due to the conduct of the deceased. (*R v Duffy* [1949] 1 All ER 932) Commentators have argued that this subjective test is based upon male reactions as men tend to respond immediately and angrily to provocative conduct, whereas women tend to have a 'slow burn anger'. (See for example Nicholson & Sanghvi, 1993; Young, 1991) Moreover, the difficulties caused by the different modes of reaction are exacerbated due to the fact that a situation in which an abused woman finds herself does not fall into the circumstances presupposed by the partial defence. The defence is more concerned with a one-off angry encounter as opposed to an ongoing abusive relationship. The focus tends to be on the moments immediately preceding the fatal attack and evidence of cumulative provocation was initially considered to be irrelevant. (*R v Duffy* [1949] 1 All ER 932) The contours of the defence were not

developed with battered women in mind who may not respond until sometime after the provocative conduct and act out of fear and despair, as opposed to anger.

Secondly, the defendant must satisfy the objective test that a reasonable person would react in a similar manner. The major problem with this aspect of the defence is the extent to which the characteristics of the defendant should be attributed to the reasonable person. Who is the reasonable person? And to what extent should the sex of the defendant and/or expert evidence such as the battered woman syndrome (Walker, 1979) be relevant? In *R v Camplin* [1978] 2 All ER 168 the House of Lords held that the reasonable person is of the same age and sex as the defendant when assessing the level of self control expected; any other peculiar characteristics of the defendant would only bear upon how grave the provocation was deemed to be; they would not alter the level of self control. This objective test caused the courts significant difficulties and the House of Lords adopted a much more subjective test in *R v Smith* [2001] 1 A.C. 146. In this case the Law Lords abandoned the distinction between self control and gravity. Hence we had a situation in which the level of self control could alter from case to case. The Privy Council decided to part ways with the House of Lords in *Attorney General for Jersey v Holley* [2005] 2 A.C. 580, choosing instead to apply the more conservative reading of *R v Camplin* [1978] 2 All ER 168. This latter approach was followed by the Court of Appeal in *R v James; R v Karimi* [2006] Q.B. 588 where the Court considered it was obliged to follow the Privy Council in *Holley* in preference to the House of Lords in *Smith*.

Due to the campaign work on behalf of women who kill, especially the group Justice for Women, ([www.justiceforwomen.org.uk](http://www.justiceforwomen.org.uk)) gradually the law has developed to accommodate cases of women who kill their abusive partners. Nevertheless, many difficulties still exist and the underlying principles of provocation remain firmly in place. The law needs to be reformed. The next section of the commentary analyses the reform proposals, comparing and contrasting the approaches adopted by the Law Commission and the Government.

## Reform Proposals: Law Commission versus the Government

The Law Commission argues that the partial defence of provocation is “inherently contradictory” (Law Com CP No 173, para 1.23) and considers that there “has never been a time when the doctrine was fully coherent, logical or consistent.” (Law Com CP No 173, para 4.162) The reform process of provocation commenced in 2003 when the Law Commission were asked to consider the partial defences to murder and pay particular attention to cases involving domestic violence. Subsequent to their proposals in relation to the partial defences, the Law Commission also considered and made radical suggestions with regards to the structure of the law of homicide in general. (Law Com No 304) In July 2008 the Government published a consultation paper containing their reform proposals in relation to the law of murder, which focuses on issues of complicity along with the partial defences. (Ministry of Justice CP/19/08)

In relation to provocation the Law Commission and the Government agree on the following: creating a partial defence for those who kill due to a fear of serious violence; restricting the defence in other situations so it only applies if the defendant feels justifiably and seriously wronged; retaining the objective test but dispensing

with the notion of the 'reasonable person'; and reorganising the role of the judge and the jury. There are, however, some very major differences between the two. Whereas the Law Commission state that they are reforming the defence of provocation, the Government stress that their proposals abolish provocation and replace it with two new partial defences; the Law Commission radically propose abolishing the subjective requirement that the defendant kills whilst suffering a loss of self control, but the Government retains this requirement. The Government proposals state that sexual infidelity should never amount to mitigation and also explicitly recognise the relevance of the defendant's sex with regards to the objective test, but these suggestions are not advanced by the Law Commission.

Space does not permit a detailed analysis of all aspects of these proposals, so the commentary will focus upon a) the circumstances in which the partial defence will apply b) the loss of self control and c) the construction of the objective test.

### A Partial Defence on What Basis? Fear of Serious Violence and a Justifiable Sense of Being Seriously Wronged

Both the Government and the Law Commission state that a partial defence should apply to those people who kill in response to a fear of serious violence, which is undoubtedly to deal with cases involving on-going domestic abuse. The defence is considered to operate in those situations which fall outside the scope of the complete defence of self-defence, i.e. because the level of force used was excessive or the threat posed was not sufficiently imminent. Despite taking on the appearance of 'imperfect self-defence' both the Law Commission and the Government decided to bring this defence into the remit of reforming the provocation defence. (Law Com No 290, para 4.17) The Law Commission's discussion explicitly acknowledges the plight of an abused woman who, due to fear and desperation, uses violence in a non-confrontational situation in the belief that such an approach is the only means of escape. Prior experience may have warned her that reacting immediately to violence would be "futile and dangerous." (Law Com No 290, para 4.18) Hence, it appears that the defence may apply to women such as Kiranjit Ahluwalia, who waited until her abusive husband was asleep before using fatal force. (*R v Ahluwalia* (1993) 96 Cr App R 134) The Law Commission also suggest that the defence would apply to the householder who reacted spontaneously but with unreasonable force when confronted by an intruder. (Law Com No 290, para 4.18)

Whilst there was some debate as to whether the partial defence should be restricted to cases involving a fear of serious violence, both the Law Commission and the Government acknowledge that there may be certain situations in which a person feels justifiably seriously wronged by the words and/or conduct of the deceased that reduction from murder to manslaughter is warranted. (Law Com No 290, para 1.13; Ministry of Justice CP/19/08, para 24) However, the proposals significantly restrict the scope of the partial defence. At present, in principle, any conduct however trivial, lawful or unblameworthy, may form the basis of a provocation plea (see *R v Doughty* (1986) 83 Cr App R 319). In contrast by requiring the defendant's sense of being seriously wronged to be justified the proposals require an objective judgment to be made. Was the defendant justified in feeling the way he/she did? When assessing whether the defendant was so justified the Law Commission state that the jury are able to take into account the circumstances in which the defendant found him/herself

and any characteristics which they consider to be relevant. (Law Com No 290, para 3.70) This should not be taken to suggest, however, that merely because the defendant felt seriously wronged the jury will conclude that it was justifiable. The jury may still believe that there was insufficient reason to feel justifiably and seriously wronged, or consider that the “defendant’s attitude ... demonstrated an outlook offensive to the standards of civilised society.” (Law Com No 290, para 3.70) Hence, whilst on the one hand the jury can take into account any of the defendant’s characteristics they may also engage in a normative judgement of such characteristics and exclude those which they consider to be inappropriate in modern day society. Furthermore, the judge also operates as a defence against ‘inappropriate’ perspectives as they would have the power to withdraw the defence from the jury. (Law Com No 290, para 3.71)

The Government’s consultation is in some ways silent on this issue. There is no indication as to whether or not the defendant’s characteristics will be taken into account; however they do state that the ‘seriously wronged’ defence will only apply in ‘exceptional circumstances’. (Ministry of Justice CP/19/08, para 24) The consultation fails to provide a detailed analysis of what will amount to ‘exceptional circumstances’, apart from to state that “an act of sexual infidelity is not, of itself, an exceptional circumstance”. (Ministry of Justice CP/19/08, p. 33) This is a radical delimiting of the law by the Government, one which significantly alters the terrain of partial defences. For many years adultery was considered to be a prime example of provocation. (Horder, 1992)

Thus whilst under the Law Commission proposals it could still be potentially possible for a defendant to argue that an act of sexual infidelity led to a justifiable sense of being seriously wronged, this is not possible under the Government’s proposals. The Government’s proposals send out a normative message that killing in response to sexual infidelity will not be tolerated in today’s society, a position which reflects the opinion of Lord Hoffman in *R v Smith* [2001] 1 A.C. 146.

The Government’s exclusion has, nevertheless, come under fire from Lord Phillips. (See Gibb, 2008) However, if we consider the furore that has been expressed in relation to honour killings committed by Asian men in particular, we have to question Lord Phillips’ perspective. Mitigation due to an act of adultery is historically based on the notion of male honour (Horder, 1992) and thus retaining the defence in circumstances of sexual infidelity is to permit certain forms of ‘honour killings’. Undoubtedly one can argue that there is a major difference between those cases in which the killing was premeditated (a fact that exists in many of the ‘honour killing cases’) and those in which a defendant responds suddenly in a state of anger and outrage. However, if as a society we are critical of certain (minority sectors of) ethnic groups who state they have been seriously wronged because a woman contravened cultural scripts of appropriate female behaviour/sexuality it is important to be consistent and recognise that angry outbursts due to sexual infidelity should also not lead to a feeling of being justifiably and seriously wronged. (On honour crimes generally see Welchman & Hossain, 2005)

One could perhaps argue that the exclusion is not necessary, as the jury might well consider that, despite any personal opinions of the defendant, the sense of being seriously wronged in cases involving sexual infidelity is not justifiable. Nevertheless, considering juries have frequently allowed a plea of provocation in many cases

involving female adultery, (see for example Bandalli, 1995; Burton, 2003, Horder. 1992) despite the operation of the, albeit flawed, 'reasonable person test', this suggests that many people are willing to mitigate a homicide committed in response to sexual infidelity.

Alternatively, some may argue that it is wrong to open the defence to circumstances in which women tend to kill their partners whilst simultaneously excluding paradigmatic male cases. Nevertheless, there is a significant qualitative difference between suffering years of abuse and feeling trapped, despairing and in a constant state of fear and finding out your partner has been unfaithful. Whilst some may argue that in both situations the aggrieved can and should walk away from the situation, such an argument fails to appreciate the complexities of an abusive relationship. Moreover leaving an abusive relationship does not necessarily end the abuse and at times can have fatal consequences. (Mahoney, 1991) Overall, it is considered that the exclusion of sexual fidelity as an exceptional circumstance sends out an important message that male violence against women will not be condoned.

## Triggering a Loss of Self Control

Perhaps the most significant difference between the Law Commission and the Government is their approach to the subjective loss of self control. Whereas the Law Commission proposes the abolition of any such requirement, the Government propose to retain it. Under the Government's proposals, the partial defence would apply if the defendant acted under a loss of self control which was triggered by either a fear of serious violence and/or a justifiable sense of being seriously wronged. The approach adopted by the Government is confusing. Their proposals state they are abolishing the partial defence of provocation, due to its negative connotations, and introducing two new partial defences. (Ministry of Justice CP/19/08, para 34) However, their reforms read more like one defence: that of a loss of self control triggered by certain factors. Moreover, to claim that they are abolishing provocation but then retain its most fundamental and controversial element – a subjective loss of self control – is disingenuous and will operate to exclude those who most need the defence.

To a significant extent, the Law Commission's decision to reformulate the partial defence without reference to the loss of self control was generated by their consideration of domestic violence cases. The Commission explicitly outline a scenario in which an abused woman after suffering "a grave attack or threat of a grave attack" waits until her tormentor is asleep before she strikes. Her actions are motivated by fear and despair believing that that is the only way in which she can escape the abuse. (Law Com No 290, para 391) The Law Commission consider that "it would be wrong to rule out her plea simply because there was no evidence of a loss of self control." (Law Com No 304, para 5.29) Under the current law she would be unjustly convicted for murder, unless she fell within the parameters of diminished responsibility. The Law Commission also emphasise that "women's reactions are less likely to involve a 'loss of self control', but more likely comprise a combination of anger, fear, frustration and a sense of desperation." (Law Com No 304, para 5.18)

Hence, the Law Commission clearly consider that removing the requirement of a loss of self control is essential if the defence is to apply to those defendants who kill in fear of serious violence. The essence of the defence is fear and thus the law should not

also require the defendant to suffer a loss of self control. Furthermore, psychiatrists also argue that generally people will only vent their anger by losing their self control with another when person when they “can afford to do so”. (Law Com No 290, para 3.28) This reinforces the gender imbalance perpetuated by the defence, as it is unlikely that a victim of domestic violence would feel as though she could lose self control without placing herself in a significantly more vulnerable position.

The Law Commission consider a loss of self control to be an ambiguous, “judicially invented concept” which lacks a “clear foundation in psychology” (Law Com No 290, para 3.30, para 3.28) and note that questioning whether a person could have exercised more self control is “an impossible moral question.” (Law Com No 290, para 3.28) Moreover, the extent to which a lapse in time will weaken a plea is unclear. (Law Com No 304, para 5.17) Hence, not only does the concept work to exclude cases of women who kill, but it is also deeply flawed and has caused the judiciary significant difficulties over the years.

When one reads the Law Commission’s critique there appears to be little to recommend retaining the concept. The Commission note that its main purpose was to prevent a partial defence being applied in cases involving revenge motives and to this end they state that the defence will not apply in those cases where the defendant has acted out of a considered desire for revenge. (Law Com No 290, para 3.30) In order, however, to ensure the defence applies to a domestic violence victim who plans and commits an homicide out of fear and desperation, as opposed to revenge they state: “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 which engendered that fear”. (Law Com No 304, para 5.17) The Law Commission are explicit in their acceptance of premeditation in some cases being justifiable provided it is motivated by fear and despair due by the behaviour of the deceased. (Law Com No 304, para 5.24) Although some argued that mitigating some premeditated homicides would open the flood gates, the Law Commission dismissed such concerns, noting that the application of a strict objective test would work to restrict the defence accordingly. (Law Com No 290, para 3.92)

Despite the arguments put forward by the Law Commission, the Government propose to retain the requirement that the defendant suffers a loss of self control. This is because of fears that it may be used in cases involving ‘honour killings’ or gang-related violence. (Ministry of Justice CP/19/08, para 36) Similar fears have also been expressed by Mitchell and Cunningham. (Law Com No 304, C9-C13) They argue that in absence of a loss of self control requirement honour killings may be reduced from murder to manslaughter, as juries will be permitted to take into account the defendant’s cultural and religious beliefs when assessing whether his sense of being seriously wronged was justifiable. Undoubtedly this is a concern; however the extent to which this requires imposing a loss of self control, especially in cases involving a fear of serious violence, can be queried.

First of all, it can be argued that this fear in relation to honour killings draws upon stereotypical assumptions with regards to ethnicity, culture and religion. Honour killings have been condemned by Muslim leaders and the Asian community and thus it is by no means accepted that ‘inappropriate behaviour’ of females is considered sufficiently grave so to justify a violent response – whether fatal or non-fatal. (See for

example Sugden, 2007) This is not to state that violence committed in the name of 'honour' does not take place, it undoubtedly does. However there is a distinction between recognising the existence of such activity and maintaining that it would fall within the parameters of the justifiably seriously wronged partial defence. To state that cultural evidence would support a contention that a defendant was justifiably seriously wronged is to assume that killing in such situations is acceptable within that culture – this is patently not the situation. Moreover, the exclusion with regards to sexual infidelity would clearly prevent the defence from being utilised in many cases.

Furthermore, even if it was deemed necessary to restrict the 'seriously wronged' defence further by including a requirement of a loss of self control, this does not mean that it should also apply to the fear of serious violence cases. If the Government are intending to introduce two new partial defences in order to replace provocation then this should be done more explicitly, rather than having what in substance appears to a single defence of a loss of self control. If the partial defences were more adequately distinguished then one could have different restricting factors specific to each offence. Although the Law Commission consider there are convincing reasons to retain a single offence, as many homicides involve the feeling of both anger and fear, (Law Com No 290, para 3.98-3.102) this author maintains that the two elements of the defence (or in the Government's language, the two partial defences) are concerned with very different issues.

In addition to the concerns regarding honour and gang-land killings, the Government also state that there is a "fundamental problem about providing a partial defence" when a person kills "while basically in full possession of his or her senses, even if he or she is frightened, other than in a situation which is complete self-defence." (Ministry of Justice CP/19/08, para 36) Nevertheless, the Law Commission consider it wrong to require an individual to be both frightened and to suffer a loss of self control. Why is it wrong to allow a partial defence when a killing occurs due to a well-founded fear of serious and potentially life threatening violence, when such a killing is motivated by pure desperation, but does not necessarily display what is a predominately stereotypical male response?

Acting due to a fear of serious violence defence is not about a loss of self control but based upon a recognition that some domestic violence victims live in desperate situations in which extreme fatal action may seem to be the only means by which to survive, and the Government's proposals could make it significantly more difficult for abused women. As judges would only leave the defence to the jury if they think it is likely to succeed, if they consider that a woman killed because she was in fear of serious violence, but was not also suffering from a loss of self control, the defence will not be put to the jury. If the Government consider that it is important to abolish the word 'provocation' because of its negative connotations it is difficult to understand why the same does not also apply to the phrase loss of self control, which connotes anger as opposed to fear and desperation.

### **The Objective Test: Sexing Tolerance and Self-Restraint**

Both the Law Commission and the Government are in agreement that the objective test should be retained and reject the more subjective approach as adopted by the House of Lords in *R v Smith* [2001] 1 A.C. 146. The Law Commission state that the



objective test does not place ‘an undue limit’ on the defence and also acknowledges that “even a person of ordinary tolerance and self-restraint” may use lethal force in certain situations. (Law Com No 290, para 4.29) Neither refer to the reasonable person, but question whether a person of ordinary (Law Commission) or normal (Government) tolerance and self-restraint and in the circumstances of the defendant would act in a similar manner.

Whereas the Government state that they “agree with the Law Commission’s reasoning” there is a significant difference between the two – the relevance of the defendant’s sex. (Ministry of Justice CP/19/08, para 39) The Law Commission state that the only characteristics that should be taken into account in relation to the level of tolerance and self restraint a person is expected to possess is their age. (Law Com No 290, para 3.110) Although it could be argued that the defendant’s sex may be taken into account when the jury considers “the circumstances of the defendant” (Law Com No 290, para 3.109) the Law Commission’s proposals assume that men and women share the same standards of self restraint and tolerance.

Space does not permit a detailed analysis of the arguments for and against an objective test. Suffice it to state the Law Commission justify retaining the objective test because they removed the subjective requirement that the defendant suffers a loss of self control. (Law Com No 290, para 3.115) However, the omission of sex from the Law Commission’s analysis is interesting. Whilst the objective test is based on the assumption that the same standards of behaviour are expected from everyone in society, sex has always been considered to be relevant when assessing the standard of self control one is expected to possess. (*R v Camplin* [1978] 2 All ER 168)

An indication as to why the Law Commission chose to exclude sex can perhaps be gleaned from another section in their proposals. When discussing the possibility of introducing a specific domestic violence defence, they state “[a]s a matter of principle, the criminal law should be gender neutral unless it is absolutely necessary to depart from that principle. Our proposals do not depart from that principle.” (Law Com No 290, para 3.78) Hence, they adopt a gender neutral approach; the law assumes that men and women share the same standards of tolerance and self-restraint. However, a gender neutral approach tends to be problematic for women, especially in cases involving violence. As men and women are socialised differently with respect to fighting and men tend to kill significantly more than women, objective perspectives of tolerance and restraint are likely to be constructed from a male perspective. (Schneider, 1986)

Although sex specific tests can be used in a problematic manner, i.e. Williams has argued that women have a higher level of self control, (Williams, 1983, 539) the manner in which men and women kill show that there are significant differences that need to be taken into account in homicide cases. Thus, even if one adopts the position that sex or gender is constructed, as opposed to innate and natural, it is significant that sex is explicitly recognised when assessing issues of tolerance and self-restraint. Objective tests and conceptions of ‘man’ and ‘woman’ are undoubtedly difficult and one could question why sexual difference is favoured over and above other relevant axes of identity, such as race and class. Nevertheless, the historical gender bias of the partial defence of provocation requires an explicit acknowledgement of the gendered nature of domestic violence and domestic homicide. To ignore sex is to disregard the

historical structural bias of the law. Thus the Government's explicit recognition of sex is to be applauded.

## Conclusion

This comment has provided a critical analysis of the reform proposals in relation to the partial defence of provocation, examining the differences between those forwarded by the Law Commission and the Government. Specific attention has been given to abused women who kill, as such cases have caused the law difficulties over the years. It is argued that the approach adopted by the Government, specifically their retention of a subjective loss of self control, may unduly restrict the partial defence, particularly in situations where the defendant acts due to a fear of serious violence. Despite being motivated by a concern to provide justice for women who kill, the Government's proposals may cause more difficulties than they solve.

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