The Rt Hon Harriet Harman QC MP
Solicitor General

Provocation as a partial defence to murder in Domestic Homicide
The Women's Library, 13th October 2003

The Legal Secretariat to the Law Officers
Attorney General's Chambers
9 Buckingham Gate
London
SW1E 6JP
Tel: 020 7271 2400
E-mail: lslo@gtnet.gov.uk
Thank you for inviting me to speak at this seminar this evening. It gives me an opportunity to explore with you a subject which is currently under consideration by the Law Commission and that is the law of provocation as a partial defence to murder in domestic homicide.

Just to explain for those of you who don't know, the Solicitor General is one of the Law Officers, deputy to the Attorney General, and we have responsibility for superintending the CPS as well as a range of other functions.

So it is a particular pleasure to be invited to speak to you this evening by Barbara Mills – a former DPP – who I know has a keen interest in domestic violence victims' experience in the criminal justice system.

First, perhaps I can remind us of the shocking facts on domestic homicide. Every year around 120 women and 30 men are killed by a current or former partner.

Domestic homicide takes the life of the woman – but also always harms the children – either psychologically or physically.

This came home to me very clearly in 5 cases that came across my desk as soon as I took up my office of Solicitor General

- Wilkinson- a two year old girl lost her mother when her father killed her alleging that he was provoked by her threatening to marry someone else.
- Humes – four children aged between 14 and 2 saw their mother stabbed to death by their father,
• Faulkner – 14 year old son was stabbed to death as he tried to protect his mother from his father – she was also killed.
• Bluestone – Kent policeman killed two of his four children as well as his wife
• And in a case in Suffolk the 4 children will learn as they grow up that they were asleep in bed upstairs as their father malletted their mother to death in the sitting room.

Domestic homicide is only the most severe end of domestic violence which constitutes 25% of all violent crime. Day in and day out the Magistrates Courts and Crown Courts hear the toll of injury and terror.

The Government is determined to back the efforts of police, prosecutors and the voluntary sector to protect women, deter offenders and bring perpetrators to justice.

No single agency or Minister can tackle this – we all need to work together. We do this in Government through the Domestic Violence Ministerial committee. This is chaired by Patricia Scotland, who is a minister in the Home Office, and includes ministers from Education, Health, Cabinet Office as well as the Department of Constitutional Affairs and myself. And at local level, the Criminal Justice Agencies are now working together through the new Local Criminal Justice Boards and also with the voluntary sector through local domestic violence fora. All this work is greatly assisted by the strong backing of the Prime Minister and the Home Secretary.

The Government's position is that there is no excuse for domestic violence. It used to be acceptable and perfectly lawful for a man to beat his wife. Indeed it was considered part of his husbandly duty to keep her
in order – by violence if necessary. It is no longer lawful and is totally unacceptable.

We’ve issued a consultation paper – Safety and Justice – which looks ahead to further improvement in the way we deal with domestic violence and to changes in the substantive law.

Our proposals in Safety and Justice aim to protect her and punish him. We are well aware of the enormous amount of hard work that goes on on the front line and we are consulting extensively with those who have that important practical experience. And I would welcome your views.

I would like to mention just four of the many measures for consultation in Safety and Justice before going on to say more about the issue of provocation.

Safety and Justice proposes:

- Making breach of a Non Molestation Order a criminal offence – this would bring the criminal justice system in at an earlier stage. This is the case in Northern Ireland
- Allowing the court to make a Restraining Order on conviction – or even where there is an acquittal. This would give the court powers to protect her – as well as punish him.
- Allow prosecutors to apply to the court for her to be anonymous in the proceedings – as is the case in family proceedings. Though it is clearly not the case for everyone – there must be some women for whom publicity of the intimate details of their private life in the local papers is just one more reason not to support a prosecution.
- And establishing multi agency domestic homicide reviews. This would allow local agencies to sit down together and look at the
background to each case and learn lessons at local level and also to better identify risk.

To tackle domestic violence we must challenge old attitudes.

- Challenge the old attitude that his violence is her fault – that she’s to blame, to challenge the attitude that if she’s beaten she must have “brought it on herself”
- Challenge the old attitude that he has an excuse. Whatever has gone on in the relationship – and relationships can be very painful and people can engage in very hurtful behaviour – nothing can justify the resort to violence
- Challenge his right to control her behaviour – but particularly by violence.
- Challenge his right to ownership of her sexuality – eg rape in marriage now crime
- And challenge the notion that there should be cultural sensitivity to perpetrators of so-called “honour killings”. We must have cultural sensitivity to victims but when it comes to perpetrators the law must be blind to colour and class.

One of the characteristics which is prevalent in domestic violence perpetrators and which is regarded by those in the Prison and Probation Service who are involved with perpetrator programmes as a high risk factor is an inability to accept responsibility for their actions and a propensity to blame the victim for their own actions.

Throughout the CJS and the voluntary sector great effort is directed to pressing home the message that his violence is his responsibility, not hers. Yet paradoxically, in the case of the most serious level of violence,
when a life has been taken, the law allows him, encourages him to say that it was not his fault – it was hers.

A man who kills his wife is usually found not guilty of murder, but instead guilty of manslaughter by reason of the partial defence of provocation.

As part of our wider domestic violence consultation in Safety and Justice we are consulting in particular – through a reference to the Law Commission – on the question of the provocation defence.

We are also looking at sentencing in domestic homicide.

In December last year I referred 3 sentences to the Court of Appeal involving domestic homicide where the offender was guilty of manslaughter by reason of provocation

- Wilkinson was sentenced to 4 years,
- Humes was sentenced to 7 years, and
- Suratan was sentenced to 3 1/2 years.

I later referred the case of Faulkner where he killed the son as well as his wife for which he was sentenced to 4 years.

In declining to intervene in any of these sentences, the Court of Appeal said that it would not be sensible to lay down guidelines in this notoriously difficult area without first the Sentencing Advisory Panel having been involved. So we have now asked the Sentencing Advisory Panel to look at sentencing guidelines addressing circumstances where provocation is argued in cases of homicide with particular reference to cases of domestic violence.
But clearly the problem is not just in sentencing. Sentencing is a reflection of how the substantive law deals with domestic homicide.

Perhaps I can say a few words about the background to the development of the current law of provocation. The Common Law doctrine of provocation began to emerge in the 17th and 18th centuries. Provocation was developed at a time when murder was a capital offence, as a concession to human frailty which would excuse a man for his loss of self-control. In the 19th century, the law developed an objective standard by which to measure the degree of provocation and the accused’s reaction to it. By 1869, at a time when the accused could not give evidence in his own defence, the objective standard had taken on the form of the ‘reasonable’ or ‘ordinary man’.

In 1957, the Homicide Act was passed. By section 3, it modified the common law defence of provocation. Following a recommendation of the Royal Commission on Capital Punishment (1953), section 3 removed the old categories of conduct which could amount to provocation, which were:

- Grossly insulting assault
- Seeing a friend or relative attacked
- Seeing a citizen being unlawfully deprived of his liberty and
- Seeing a man committing adultery with one’s wife

and instead left the issue open, allowing, for the first time, words to constitute provocation. The allowance of words as provocation meant that insults which focused on a particular feature or disability could constitute provocation and it was inevitable that the accused’s personal characteristics should be considered by the Court when considering the gravity of the provocation.
In *R v. Smith (Morgan)* [2001] 1 AC 146, it was decided by a majority of the House of Lords that in determining under section 3 of the Homicide Act 1957 whether the provocation was enough to make a reasonable man do what the defendant did, the jury was required to ask whether the degree of self-control exercised by the defendant was that which reasonable people with his characteristics would have exercised. In deciding whether the defendant was in fact provoked and whether the objective element of provocation was satisfied, all the particular characteristics of the defendant were to be taken into account. So the provocation test became more subjective to the particular defendant rather than objective and based on the reasonable man.

Section 2 of the Homicide Act 1957 sets out the criteria for the other main partial defence to murder - diminished responsibility - not guilty of murder if at the time of killing suffering from an abnormality of mind which substantially impaired mental responsibility for the killing.

The largest single category of provocation cases are domestic homicides. But they are not the only cause for concern. In particular there are two particularly disturbing developments in the use of the provocation defence. Firstly where the defendant pleads provocation by way of the victim having made a homosexual advance to him. (Green v The Queen 1997 148 ALR 659 - a case in Melbourne Australia) And secondly where the defendant pleads the provocation defence by way of the victim having racially taunted him.

The Law Commission is reviewing this issue, led by Judge Alan Wilkie. The Law Commission, which is of course independent of government, is reviewing the partial defences to murder with particular reference to
cases of domestic violence. They are reviewing diminished responsibility and provocation and in particular are considering whether:

- They should continue to be partial defences to murder
- If so whether they should remain separate or be combined
- If separate what reforms are needed
- And if combined, how the defence should be formulated.

The Law Commission will publish a Consultation Paper in November following which there will be a 3 month consultation and their final report will be in the Spring. To contribute to the Law Commission review and to government thinking, the CPS is conducting empirical research. They have supplied details of domestic and other homicides where the question of provocation was at issue. This means the examination of over 300 cases spanning July 2000 to June 2003.

The Law Commission will also consider whether there should be a new partial defence where a person kills in circumstances where the current defence of self-defence is not available as the force was excessive. This would reflect the long-held view of the women’s movement that women who kill their husbands after suffering long years of violence should have a new partial defence to murder of “self-preservation”. Currently they either get life for murder or squeeze within the provocation defence.

Women who kill violent husbands to not fit neatly into “provocation” which is a defence of anger. They are acting out of fear rather than anger. And they do not necessarily fit neatly into diminished responsibility either. They do not fit into self defence – which would result in an acquittal – because the force they have used is excessive or the threat that they were responding to was not immediate. But a partial
defence to murder of 'self preservation' would be appropriate for women who kill their husband after suffering domestic violence.

There will be much debate over the next few months about provocation. My contribution to the debate at this stage – and this is my own view, not government policy – is that we should find a better alternative to provocation. My concern is that the effect of the provocation defence is that:

- The victim is blamed for own death
- Responsibility for the offence falls not on him but on her
- Her relatives are left distraught – as they suffer not only the loss of their daughter or sister but also the denigration of her reputation which is a necessary part of a provocation defence.
- And although manslaughter carries a maximum of life imprisonment sentences for domestic homicide generally do not reflect the seriousness of taking another's life in a violent act.

I look forward to hearing your views in this evening’s discussion and as the debate on provocation develops.