

RESPONSE FORM

DISCUSSION PAPER ON THE MENTAL ELEMENT IN HOMICIDE

We hope that by using this form it will be easier for you to respond to the questions set out in the Discussion Paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are responding to / commenting on only a few of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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Summary of Questions

1. Are there other aspects of the law relating to the mental element in homicide which you think should be included as part of the project?

(Paragraph 1.33)

Comments on Question 1

«InsertTextHere»

2. If so, which aspects, and why?

(Paragraph 1.33)

Comments on Question 2

«InsertTextHere»

3.
 - (a) Are there valid criticisms and calls for change in relation to the bipartite structure of Scots homicide law?
 - (b) If so, are they of sufficient weight to justify reforming Scots homicide law by replacing all or some of the existing common law of homicide with new statutory provisions?
 - (c) Would those new statutory provisions have the effect of improving Scots homicide law?
 - (d) If so, what changes would you propose, and why?

(Paragraph 2.73)

Comments on Question 3

«InsertTextHere»

4.
 - (a) Do you agree with our provisional view that we are not minded to propose any change to the overarching structure of Scots homicide law?
 - (b) If not, why not, and what would you propose instead?
 - (c) Do you favour the statutory definition of certain specific offences as falling within the “murder” branch of Scots homicide law’s current bipartite structure, depending on the *actus reus*?

- (d) If so, which specific offences, and what should the essential elements be?

(Paragraph 2.74)

Comments on Question 4

«InsertTextHere»

5. (a) Are there valid criticisms and calls for change in relation to the language of Scots homicide law?
- (b) If so, are they of sufficient weight to justify reforming Scots homicide law by replacing all or some of the existing common law of homicide with new statutory provisions?
- (c) Would those new statutory provisions have the effect of improving Scots homicide law?
- (d) If so, what changes would you propose, and why?
- (e) What language do you consider should be (i) used, or (ii) avoided, in any statutory reform, and why?

(Paragraph 3.52)

Comments on Question 5

«InsertTextHere»

6. The case of *Drury v HM Advocate* introduced the word “wickedly” before “intended” in the first limb of the classic definition of murder (ie “wickedly intended to kill”).
- (a) Do you consider that statutory reform of this limb of the definition of murder is necessary?
- (b) If so, should the qualification of “wickedly” be removed, or do you propose some other reform?

(Paragraph 4.15)

Comments on Question 6

«InsertTextHere»

7. (a) Should the “wicked recklessness” second limb of the crime of murder include the element of “intention to injure” as explained in *HM Advocate v Purcell*?

- (b) If not, how should “wicked recklessness” be defined? Options might include the following:
- demonstrating complete indifference to human life¹
 - acting “in such a way as to show that you don’t care whether a person lives or dies”²
 - being “totally regardless of the consequences, whether the victim lived or died”³
 - showing “such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences”⁴
 - being recklessly or intentionally engaged in criminal conduct where it was objectively foreseeable that such conduct carried the risk of life being taken⁵
 - exposing someone to the risk of serious harm⁶
 - demonstrating willingness to run the risk of causing death (or serious injury), or creating an obvious and serious risk of death (or serious injury)⁷
- (c) Another approach might be to redefine “intention to injure” as “intention to cause any criminal harm or damage”. Would you favour this approach?
- (d) Yet another approach might be to provide by statute that “intention to injure” is not a necessary element of the wicked recklessness which constitutes the crime of murder. Would you favour this approach?

(Paragraph 4.35)

Comments on Question 7

«InsertTextHere»

8. Should the doctrine of constructive malice in relation to murder be explicitly abolished?

(Paragraph 4.56)

¹ The phrase used in question 5 of the issues for consideration in our informal consultations.

² *HM Advocate v Hartley* 1989 SLT 135 at 136.

³ *HM Advocate v Byfield*, quoted by Lord Goff in (1988) 104 LQR 30 at p 54.

⁴ *Cawthorne v HM Advocate* 1968 JC 32.

⁵ A formulation suggested by a member of our Advisory Group.

⁶ Again, a formulation suggested by a member of our Advisory Group.

⁷ The submission made by the Crown in *HM Advocate v Purcell* 2007 SCCR 520.

Comments on Question 8

«InsertTextHere»

9. (a) Do you consider that the law of homicide in Scotland would benefit from adopting all or some of the reforms proposed in the Draft Criminal Code for Scotland?
- (b) If so, which reforms, and why?

(Paragraph 4.73)

Comments on Question 9

«InsertTextHere»

10. (a) Should there be a sub-division of the crime of culpable homicide into prescriptive gradations reflecting specific levels of gravity?
- (b) If so, what gradations would you suggest, and why?

(Paragraph 5.55)

Comments on Question 10

«InsertTextHere»

11. Would you favour a sub-division (of all or parts of the common law crime of culpable homicide) which is dependent upon the *actus reus* rather than the *mens rea*, with particular categories of culpable homicide being defined by reference to the particular circumstances of the killing?

(Paragraph 5.55)

Comments on Question 11

«InsertTextHere»

12. Would you support the creation of a “ladder” or “grid” of particular offences defined by reliance upon both the *mens rea* and the *actus reus*?

(Paragraph 5.55)

Comments on Question 12

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13. In a case indicted as “murder”, where a defence of provocation or diminished responsibility is advanced, should a jury be invited to add a rider of “under provocation” or “with diminished responsibility” (as the case may be) if returning a reduced verdict of culpable homicide?

(Paragraph 5.55)

Comments on Question 13

«InsertTextHere»

14. Would Scots law benefit from having a new crime of “assault causing death”? If so, why, and what should the essential elements be?

(Paragraph 5.55)

Comments on Question 14

«InsertTextHere»

15. Do you consider that there are other aspects of the law of defences to homicide in need of reform, and if so, what?

(Paragraph 6.11)

Comments on Question 15

«InsertTextHere»

16. (a) Is there any need to reform the three essential requirements for a successful plea of self-defence in the context of homicide?
- (b) If so, what do you suggest, and why?

(Paragraph 7.19)

Comments on Question 16

«InsertTextHere»

17. Do consultees consider that Scots law should recognise a new partial defence of “excessive force in self-defence”?

(Paragraph 8.14)

Comments on Question 17

«InsertTextHere»

18. Alternatively do consultees consider that the existing partial defence of “provocation” is sufficient?

(Paragraph 8.14)

Comments on Question 18

«InsertTextHere»

19. (a) In the context of defence of property, should Scots law continue to rely upon the plea of self-defence as it currently stands, or should there be some special recognition of the situation of a householder faced with an intruder in their home?
- (b) In the event of there being special recognition for such a householder, should Scots law adopt an approach similar to that set out in section 76 of the Criminal Justice and Immigration Act 2008?
- (c) If you do not advocate that approach, do you have an alternative approach to suggest? If so, what?

(Paragraph 8.25)

Comments on Question 19

«InsertTextHere»

20. (a) Should Scots law continue to recognise an exceptional plea of self-defence in the context of killing to prevent rape?
- (b) If so, should that plea be extended to any victim faced with that threat, regardless of the gender of the victim?

(Paragraph 8.58)

Comments on Question 20

«InsertTextHere»

21. Should the plea also extend to any third party who seeks to prevent someone being raped?

(Paragraph 8.58)

Comments on Question 21

«InsertTextHere»

22. Alternatively, should the exceptional plea of self-defence (killing to prevent rape) be abolished, and reliance placed upon:

- (a) a more general plea of self-defence in an approach similar to that adopted in the homicide law of England and Wales, South Africa and New Zealand; or
- (b) a more general plea of “excessive force in self-defence”, if such a plea were to be recognised?

(Paragraph 8.58)

Comments on Question 22

«InsertTextHere»

23. Should the plea of self-defence be extended to killings to prevent a “sexual assault by penetration” as defined in section 2 of the Sexual Offences (Scotland) Act 2009 (ie sexual assault with any part of the accused’s body or with any thing other than a penis)?

(Paragraph 8.58)

Comments on Question 23

«InsertTextHere»

24. Should necessity be recognised as a defence to murder in Scots law?

(Paragraph 9.50)

Comments on Question 24

«InsertTextHere»

25. If you are of the view that necessity should be recognised as a defence to murder:

- (a) should it operate as a complete or a partial defence?
- (b) what should the essential elements of the defence be?

(Paragraph 9.50)

Comments on Question 25

«InsertTextHere»

26. Should coercion be recognised as a defence to murder in Scots law?

(Paragraph 9.98)

Comments on Question 26

«InsertTextHere»

27. If you are of the view that coercion should be recognised as a defence to murder:

- (a) should it operate as a complete or a partial defence?
- (b) what should the essential elements of the defence be?

(Paragraph 9.98)

Comments on Question 27

«InsertTextHere»

28. (a) Should the existing Scots law partial defence of provocation be extended to include verbal provocation?

- (b) If so, what should the essential elements of the defence be?

(Paragraph 10.11)

Comments on Question 28

«InsertTextHere»

29. (a) Should a partial defence of third party provocation be recognised?
(b) If so, what should the essential elements of the defence be?

(Paragraph 10.17)

Comments on Question 29

«InsertTextHere»

30. (a) We are minded to recommend abolition of the partial defence of sexual infidelity provocation in homicide cases. Do consultees agree?
(b) If not, what defence, if any, should be available for a homicide on discovery of an intimate partner's sexual infidelity?

(Paragraph 10.30)

Comments on Question 30

«InsertTextHere»

31. (a) Should the partial defence of provocation to a charge of murder be abolished entirely?
(b) If so, should it be replaced by a statutory defence?

(Paragraph 10.47)

Comments on Question 31

«InsertTextHere»

32. (a) Should that statutory defence be similar to the "loss of control" defence in English law, defined in sections 54-55 of the Coroners and Justice Act 2009?
(b) If not, what should the essential elements of the defence be?

(Paragraph 10.47)

Comments on Question 32

«InsertTextHere»

33. (a) Is more clarity required as to what constitutes an “abnormality of mind” in terms of section 51B of the Criminal Procedure (Scotland) Act 1995? For example, should there be a requirement that the abnormality should be a *recognised* abnormality?
- (b) If so, how should a “recognised abnormality” be defined? For example, should the definition be confined to those abnormalities contained in established texts on psychiatry or psychology?⁸
- (Paragraph 11.37)

Comments on Question 33

«InsertTextHere»

34. Should the admissibility and sufficiency of evidence concerning the mental state of an accused pleading diminished responsibility be matters to be decided by each individual trial judge, using eg the the guidance in *Kennedy v Cordia*?⁹
- (Paragraph 11.37)

Comments on Question 34

«InsertTextHere»

35. Are the questions raised by Lord Carloway in *Graham v HM Advocate*¹⁰ so fundamental that some guidance (whether by statute or practice note) is required to assist trial judges?
- (Paragraph 11.37)

Comments on Question 35

«InsertTextHere»

⁸ Established texts include ICD-11 (World Health Organisation, *International Classification of Diseases* (11th Revision)), and DSM-5 (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edn)).

⁹ 2016 SC (UKSC) 59; 2016 SLT 209; 2016 SCLR 203. For a summary of the guidance in this case, see para 11.17 above.

¹⁰ For questions see 2018 SCCR 347, at para [114], quoted at paras 11.20 and 11.21 above.

36. Should the partial defence of diminished responsibility be redefined to reflect the need for medical evidence?

(Paragraph 11.37)

Comments on Question 36

«InsertTextHere»

37. Are you aware of any problems which have arisen in the context of “mental disorder” as defined in section 51A of the Criminal Procedure (Scotland) Act 1995?

(Paragraph 11.42)

Comments on Question 37

«InsertTextHere»

38. If so, what problems, and what reform do you consider necessary?

(Paragraph 11.42)

Comments on Question 38

«InsertTextHere»

39. Are you aware of any problems which have arisen in the context of automatism?

(Paragraph 11.46)

Comments on Question 39

«InsertTextHere»

40. If so, what problems, and what reform do you consider necessary?

(Paragraph 11.46)

Comments on Question 40

«InsertTextHere»

41. (a) Do you think that there should be a separate defence to a charge of homicide for domestic abuse victims?
- (b) If so, should the defence be complete or partial?
- (c) What evidence would be required?
- (d) What safeguards would be required to avoid the misuse of such a defence?
- (e) As an alternative or an addition to such a defence, should a judge give specific directions to the jury, outlining the possible effects of domestic abuse on an abused partner?

(Paragraph 12.80)

Comments on Question 41

«InsertTextHere»

42. Do you think that statute should expressly state that “rough sex” (or an equivalent expression) is not a valid defence to homicide in Scots law?

(Paragraph 12.88)

Comments on Question 42

«InsertTextHere»

43. Would Scots law relating to the mental element in homicide be improved by placing it (or parts of it) on a statutory footing?

(Paragraph 13.2)

Comments on Question 43

«InsertTextHere»

44. If so, do you envisage that the whole of Scots law relating to the mental element in homicide should be placed on a statutory footing, or parts only; and, if parts only, which parts?

(Paragraph 13.2)

Comments on Question 44

«InsertTextHere»

45. If you consider that Scots law relating to the mental element in homicide would not be improved by placing it (or parts of it) on a statutory footing, could you give your reasons?

(Paragraph 13.2)

Comments on Question 45

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General Comments

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Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.