



Scottish Law Commission

promoting law reform

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION
NOT FOR PUBLICATION OR BROADCAST
BEFORE 0001 HOURS 27 MAY 2021

Discussion Paper on the Mental Element in Homicide

The Scottish Law Commission today publishes a Discussion Paper on the Mental Element in Homicide.

The crimes of murder and culpable homicide are generally regarded as the most serious of all crimes in Scots law, in terms of gravity and impact on victims and their families.

Both of these are common law crimes whose principles have been discussed by institutional writers and developed incrementally by judicial decisions over many centuries.

More recently, in the case of *Petto v HM Advocate*¹ the Criminal Appeal Court in Scotland stated that a comprehensive re-examination of the mental element in homicide was overdue. The Court observed that the definitional structure in Scots law was antiquated and said that: “we remain burdened by legal principles that were shaped largely in the days of the death penalty, that are inconsistent and confused and are not yet wholly free of doctrines of constructive malice”.

The Commission announced in our [Tenth Programme of Law Reform](#) (February 2018) that we would examine the Scots law of the mental element in homicide to consider whether, and if so how, any necessary proposals for improving and modernising the law in this important and sensitive area should be made.

The Discussion Paper therefore considers and asks for views on a wide range of issues including:

- The current bipartite nature of Scots homicide law, which comprises the offences of murder and culpable homicide;
- The language of Scots homicide law and whether the offences of murder and culpable homicide might benefit from statutory redefinition;
- The applicability of and options for reform in relation to defences to a charge of homicide, including self-defence, necessity, coercion, provocation and diminished responsibility;

¹ 2011 SCCR 519

- Whether a new partial defence should be created for people who kill following prolonged domestic abuse.

The Scottish Law Commission invites comments from everyone with an interest. Responses to the Discussion Paper can be made until 27 August 2021.

Following consultation, the Commission will assess consultees' views and commence work towards publication of a Report.

Lady Paton, Chair of the Scottish Law Commission and lead Commissioner on this project, said:

“The common law crimes of murder and culpable homicide are generally regarded as the most serious of all crimes in Scots law. This Discussion Paper examines a wide range of issues in relation to the mental element in homicide in order to ascertain whether the law in this area is fit for purpose in today's society.

We are keen to hear from anyone interested in the law of homicide ranging from legal practitioners, criminal law academics, interest groups, victims and their families, through to the wider general public. The responses we receive now will help us to shape policy and make any necessary proposals for future reform of the law.”

In addition to the Discussion Paper, we have also published an Executive Summary of the Paper and several standalone papers intended to complement the Discussion Paper. The first, entitled “Homicide Laws in Other Jurisdictions”, provides consultees with information further to the comparative material which is noted throughout the Discussion Paper. The second is a paper on culpable homicide authored by Professor Claire McDiarmid, Head of the School of Law at the University of Strathclyde. Lastly, we have also published a paper looking at statistics for homicide appeals in Scotland between 2010 and 2019. All of these papers can be found on the Homicide project page on the Scottish Law Commission website.

FURTHER INFORMATION SECTION

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chair is the Rt Hon Lady Paton, a Court of Session judge. The other Commissioners are David Bartos, Professor Gillian Black, Kate Dowdalls QC and Professor Frankie McCarthy. The Chief Executive is Malcolm McMillan.

2. Further information can be obtained by contacting Graham McGlashan, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131; email info@scotlawcom.gov.uk).

3. The paper will be available on our website at <https://www.scotlawcom.gov.uk> as early as possible on Thursday 27 May 2021.