

27 May 2021



Our ref: A/5/7/55A

Dear Consultee

**DISCUSSION PAPER ON THE MENTAL ELEMENT IN HOMICIDE
(DISCUSSION PAPER No 172)**

We invite comments on the above mentioned Discussion Paper which has been published today. The paper is available on our website at <https://scotlawcom.gov.uk/law-reform/consultations/>.

In addition to the Discussion Paper, we have 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. Each of these papers can be found on our website at the above link.

The Discussion Paper examines the Scots law of the mental element in homicide to consider whether, and, if so, how any necessary proposals for modernising the law in this important and sensitive area should be made.

By way of context we note that in the case of *Petto v HM Advocate*¹ the Criminal Appeal Court 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 Discussion Paper considers whether and, if so, how the law might be improved in relation to these, and other, concerns.

We ask 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;

¹ 2011 SCCR 519.



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

Consultation is critical in all our law reform projects to ensure that the final recommendations contained in our report would, if implemented, result in law which is just, principled, responsive and easy to understand.

We would therefore be grateful to receive your views on any or all of the questions in this Discussion Paper. All views will be fully considered and analysed in the course of reaching our final conclusions. The consultation period ends on **27 August 2021**.

Where possible, we would prefer the electronic submission of comments. You can use the electronic response form for this Discussion Paper on our website at: <https://www.scotlawcom.gov.uk/publications/archive/discussion-papers-and-consultative-memoranda/>.

The form has a questionnaire format which allows you to comment (briefly or at length) on any of the paper's questions which interest you. The form can be downloaded and emailed to us at info@scotlawcom.gsi.gov.uk, as can comments in other electronic formats.

Alternatively, you may prefer to send your comments on the Discussion Paper by using the general comments form to be found on the website "Contact us" page (<http://www.scotlawcom.gov.uk/contact-us/>). As noted above, the consultation process concludes on 27 August 2021, accordingly, we would be grateful if comments were submitted by then.

Please note that information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may also (i) publish responses on our website (either in full or in some other way such as reformatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

More information on the work of the Commission can be found on our website at <https://www.scotlawcom.gov.uk/>. Finally, should you wish to offer any comments on the way in which we conduct our consultation exercises, we would be pleased to hear from you.

Yours faithfully

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