Scottish Law Commission

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(DISCUSSION PAPER No.172)

Discussion Paper on the Mental Element in Homicide

discussion paper

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May 2021

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This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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The Commission would be grateful if comments on this Discussion Paper were submitted by 27 August 2021.

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Glossary

Accused: A person charged with committing a crime or offence. (See also: 'panel'; 'defendant').

Acquittal: The outcome of a trial whereby the accused is cleared of criminal wrongdoing. (See also: 'conviction'; 'verdict').

***Actus reus*:** A Latin phrase meaning the 'guilty act', ie the physical act or conduct constituting a crime. This is one of the two main elements of an offence which must be proved for a conviction. (See also: 'dole'; '*mens rea*').

Admonition: A disposal where the convicted person is reprimanded, but no further punishment is imposed.

Advocate depute: An advocate or solicitor advocate who prosecutes in the name of the Lord Advocate in criminal proceedings.

Advocate: A member of the Scottish Bar. (See also: 'solicitor advocate').

Aggravation: A circumstance which, if proved, increases the seriousness of a criminal offence. For example, an assault might be aggravated by being "to severe injury, permanent disfigurement, and permanent impairment". (See also: 'mitigation').

Appeal: A court procedure where a higher court reconsiders the previous decision of a lower court. Appeals are presided over by judges without a jury. In Scotland, appeals against conviction are heard by a bench of three judges. Subsequent appeals, or appeals on contentious points of law, may be heard by a bench of five or more judges.

Art and part: Where a crime is committed in the capacity of an accessory or accomplice. (See also: 'concert').

Automatism: Where, as a result of illness or other reasons, an individual acts without being conscious of his or her acts and is not therefore legally responsible for those acts.

Causation: For criminal liability to be established in a homicide case, an accused must *in fact* have caused the victim's death.' The accused's actions must be a material cause of the victim's death, and if the chain of causation between the accused's act and the victim's death is broken, the accused is not liable. (See also: '*novus actus interveniens*').

Charge: (i) The formal accusation of a crime initiating a prosecution. (See also: 'libel') (ii) The address given by a trial judge to a jury. (See also: 'jury directions').

Civilian system: A legal system (found, for example, in Italy) whereby legal principles are codified in a referable system rather than being created by judges. (See also: 'common law').

Coercion: A defence where the accused claims to have broken the law solely in order to avoid imminent death or serious injury threatened by a third party.

Common law: The rules of law derived not from statute, but from other sources such as judicial decisions, authoritative writings, or custom.

Competence: (i) The authority of a court to entertain a particular type of case or procedure (ii) The authority of a devolved parliament to legislate on certain matters.

Complainer: The Scottish term for the victim of a crime.

Complete defence: A defence which, if successful, results in the acquittal of the accused.

Concert: Where a crime is committed in the capacity of an accessory or accomplice. (See also: 'art and part').

Constructive malice: A doctrine which attributes criminal liability for murder where the killing occurs in the course of a lesser crime such as robbery.

Conviction: The outcome of criminal proceedings where the accused is found guilty of criminal wrongdoing. (See also: 'acquittal'; 'verdict').

Corroboration: The requirement in Scots criminal law for two sources of evidence confirming the crucial facts, namely (i) that a crime was committed, and (ii) that the accused committed it. (See also: 'Moorov doctrine'; 'strict liability'; 'sufficiency').

Counsel: In Scotland a member of the Faculty of Advocates practising at the Bar.

Criminal code: A statute specifying all (or most of) a particular jurisdiction's criminal law; found in the USA, Canada, Australia and other jurisdictions. (See also: 'common law').

Crown Agent: The most senior official on the staff of the Crown Office, primarily concerned with the criminal process, but also acting as the government solicitor if the Crown Office or Lord Advocate's Department become involved in a civil action.

Crown Office and Procurator Fiscal Service: Sometimes abbreviated to "COPFS". A department led by the Lord Advocate responsible for the public prosecution of crime within Scotland. Crown counsel in the High Court of Justiciary are assisted by Crown Office officials, who also administer the procurator fiscal service.

Culpable homicide: In Scots law**,** all unlawful killings in circumstances which do not amount to murder. Charges of murder are reduced to culpable homicide following the successful defences of diminished responsibility and provocation. Killings which result from assaults which would not normally cause death, or from criminally negligent acts, may be prosecuted as culpable homicide. Sentences for culpable homicide range from admonition to life imprisonment, depending on the circumstances. (See also: 'manslaughter').

Customary law: Legal obligations that arise between states following a consistent course of past conduct.

Defence agent: The lawyer representing the interests of the accused in a criminal case.

Defence: A legally recognised condition or circumstance which negates or reduces criminal liability on the part of an accused.

Defendant: The English term for a person charged with a crime or offence. (See also: 'accused'; 'panel').

Diminished responsibility: A defence where the accused's ability to control their conduct at the time of the offence was substantially impaired by reason of an abnormality of mind. Diminished responsibility is a partial defence pled in relation to a charge of murder, and if successful, reduces what would otherwise be murder to culpable homicide. In the context of attempted murder, the plea may reduce the offence to one of assault (with or without aggravations such as "to severe injury and permanent disfigurement").

Dole: Described by the institutional writer Hume as 'that corrupt and evil intention, which is essential (so the light of nature teaches, and so all the authorities have said) to the guilt of any crime'. (See also: '*mens rea*').

Duress: The English equivalent of the Scottish defence of coercion.

Extra Division: The Inner House of the Court of Session (the highest civil court in Scotland) has two permanent divisions, chaired by the two most senior judges. Where the two most senior judges are unavailable, an Extra Division is set up and is chaired by the next most senior judge.

Fair labelling: The principle in criminal law that offences should be clearly identified and defined so as accurately to reflect the nature of the criminal conduct.

Federal: A system of government in which several states form a unity but remain independent in their internal affairs.

Felony: A term used in the USA and other jurisdictions (but not in the United Kingdom) for a more serious crime. (See also: 'misdemeanour'; 'solemn procedure').

First instance: A court of first instance hears a case initially, as contrasted with a court of appeal.

General defence: A defence which can be pled in relation to any offence: for example, the defences of alibi, incrimination, error (of fact and of law), entrapment, superior orders, automatism and accident. (See also: 'specific defence').

Grievous bodily harm: An English term for what has been described as 'really serious harm'. This does not have to be life-threatening or permanent, and includes broken bones, injuries which require lengthy treatment, and the transmission of sexually transmitted infections which carry significant effects.

Gross negligence: Very grave negligence, which some legal academics argue is synonymous with recklessness.

High Court of Justiciary: The superior criminal court in Scotland, comprising the judges of the Court of Session in their capacity as Lords Commissioners of Justiciary, presided over by the Lord Justice General. The court has both original and appellate jurisdiction. At **first instance** the High Court tries the most serious crimes such as murder, culpable homicide, armed robbery, drug trafficking and sexual offences. Cases are tried by a judge and a jury of

fifteen men and women. Appeals against conviction are heard by a bench of at least three judges. Appeals against sentence may be heard by a bench of two judges.

Honour killing: The killing of a family member by other family members on the ground that the deceased allegedly brought dishonour upon the family.

House of Lords: (i) The second legislative chamber of the United Kingdom (ii) The Appellate Committee of the House of Lords (which used to be the highest appeal court in the United Kingdom until it was replaced by the Supreme Court in October 2009).

Inchoate liability: Criminal liability for steps taken in preparation for the commission of an offence (for example, conspiracy).

Indictment: A written accusation of serious crime in the name of the Lord Advocate. Procedure on indictment takes place in the High Court of Justiciary or the sheriff court. (See also: 'solemn procedure').

Institutional writers: Writers who first brought together the principles of Scots law in legal texts during the 17th to 19th centuries. These works are still considered to be an important and authoritative source of Scots law.

Jurisdiction: The power of a court to hear particular cases based on geographical location or the type or value of the case.

Jurisprudence: (i) The theory or philosophy of law. (ii) Also used to denote a body of legal doctrine (for example "contract jurisprudence") or a body of judicial decisions (for example "Strasbourg jurisprudence").

Jury directions: The address by the presiding judge to a jury at the end of a criminal trial, explaining the law which the jury must apply to the facts based on evidence which they accept. (See also: 'charge').

Jury: A group of lay persons who determine the verdict in a criminal trial. In Scotland, a jury comprises 15 men and women, and is required in solemn proceedings only. The verdict is reached by simple majority. (See also: 'verdict'; 'solemn proceedings').

Legislation: Laws enacted by a parliament, for example the United Kingdom Parliament or the Scottish Parliament. (See also: 'statute').

Legislative competence: The parameters within which a parliament may lawfully enact statutes. The United Kingdom Parliament has unlimited legislative competence, but the Scottish Parliament may only enact laws on those matters granted or devolved to it by the provisions of the Scotland Act 1998.

Libel: A statement of a charge detailing an alleged criminal offence(s). (See also: 'charge').

Lord Advocate: The senior law officer of the Crown in Scotland. The Lord Advocate is in charge of the prosecution of crime and the investigation of deaths. Prior to devolution, he/she was a member of the United Kingdom Government advising it on legal matters affecting Scotland; post-devolution he/she is a member of the Scottish Government. The Scotland Act

1998 protects the independent position and role of the Lord Advocate in connection with criminal prosecutions.

Lord Advocate's Reference: An appeal on a point of law by the Crown against a decision of the High Court of Justiciary. If the appeal is successful, the law is clarified or changed, but an acquittal of the accused remains unchanged.

Mandatory life sentence: The life sentence which must be imposed following a conviction for murder; no lesser sentence is available to the judge.

Manslaughter: The English equivalent of the Scots law offence of culpable homicide. This offence, broadly speaking, involves killings where there is insufficient fault to label the killer a murderer, but sufficient fault for the imposition of criminal liability.

***Mens rea*:** A Latin phrase meaning the 'guilty mind', one of the two main elements of an offence required to be proved for a conviction. (See also: '*actus reus*'; 'dole').

Misdemeanour: A term used in the USA and other jurisdictions (but not in the United Kingdom) for a less serious crime. (See also: 'felony'; summary procedure').

Mitigation: A circumstance which reduces the seriousness of an offence. A defence plea in mitigation may require the leading of evidence. (See also: 'aggravation').

Moorov doctrine: A rule in Scots law by which two or more instances of alleged criminal conduct which are similar in time, character and circumstance can mutually corroborate each other, in the absence of corroborating evidence for each individual instance of alleged criminal conduct. (See also: 'corroboration'; 'no case to answer'; 'sufficiency').

Necessity: A defence to a criminal charge by which the accused claims to have broken the law solely because it was the least harmful of two or more alternative courses of action.

No case to answer (also known as a "section 97 submission"): A submission by the accused at the close of the Crown case that the prosecution has failed to prove that he or she has committed an offence; if successful, the accused is acquitted of that offence. (See also: 'sufficiency').

***Novus actus interveniens*:** A Latin phrase meaning an event which breaks the chain of causation.

***Obiter dictum*:** A Latin phrase meaning "by the way". Used in the legal context to describe a remark in a judgment that is "said in the passing" and is not essential to the decision. (See also: '*ratio decidendi*').

Order for lifelong restriction (OLR): An indeterminate sentence which can be imposed by a judge in the High Court of Justiciary on violent or sexual offenders. Orders for lifelong restriction subject the person to imprisonment and electronic monitoring for the rest of their lives, and cannot be revoked.

Panel or pannel: A Scottish term for a person charged with committing a crime or offence. (See also: 'accused'; 'defendant').

Partial defence: In Scots law there are two partial defences, namely provocation and diminished responsibility. Those pleas, if successful, reduce what would otherwise be murder to culpable homicide. Where the charge is attempted murder, the pleas may reduce the crime to one of assault (with or without aggravations such as "to severe injury and permanent disfigurement").

Penal Code: See: 'Criminal code'.

Plea bargaining: A negotiation between the prosecutor and the accused, resulting in a plea of guilty to an offence (or offences) and a saving in time and resources.

Plea in bar of trial: A plea giving reasons why the accused ought not to have to stand trial (for example lack of jurisdiction, time bar, insanity, non-age).

Prosecutor: A lawyer appointed by the state to conduct criminal proceedings against alleged offenders; known as a 'procurator fiscal' in Scotland.

Prosecutorial discretion: The entitlement of a prosecutor to decide whether or not to prosecute an alleged instance of criminal conduct, what charge(s) to bring, what charges to abandon, and whether or not to move for sentence.

Provocation: One of two partial defences to murder involving (i) provocative conduct by the victim (limited to physical violence or sexual infidelity) (ii) resulting in immediate loss of self-control on the part of the accused, and causing (iii) proportionate answering violence (or in the case of sexual infidelity, a reaction which might be expected from an ordinary person in the circumstances). If the partial defence is successful, what would otherwise be murder is reduced to culpable homicide. Where the charge is attempted murder, the plea may reduce the crime to one of assault (with or without aggravations such as "to severe injury and permanent disfigurement").

***Ratio decidendi*:** A Latin phrase meaning (i) the rule or principle of law on which the decision of the court is based or (ii) the ground on which a case is decided; the *ratio* may be used as a precedent in subsequent cases.

Recklessness: Awareness (or a state of affairs in which a reasonable person ought to have been aware) of an obvious and serious risk , but nonetheless proceeding where no reasonable person would do so.

Reserved matters: Areas of the law where only the United Kingdom Parliament (and not devolved legislatures such as the Scottish Parliament) can legislate.

Rider: An addendum or qualification added by a jury to its verdict (thus a verdict of guilty of a charge of assault might be qualified by a rider of "under provocation", indicating the jury's view that the accused was provoked into carrying out the criminal act, and any sentence should reflect that fact).

Self-defence: A complete defence to a charge of homicide (and to any lesser charge such as assault). A person is entitled to use reasonable force to ward off an attack made upon him or her (or a third party) if there is no other way of escaping the immediate or threatened violence. The effect of the defence, if successful, is acquittal. It is also a "special defence" because procedural rules require prior intimation of the defence before trial.

Sheriff court: A Scottish court which is presided over by a sheriff and has wide jurisdiction, including both summary and solemn criminal cases and various civil cases. There are currently 49 sheriff courts in Scotland.

Sheriff: A Scottish judge who sits in the sheriff court.

Solemn procedure: The procedure involving a judge and jury who try the most serious crimes such as murder, rape and robbery. In Scotland, solemn crimes are prosecuted in the High Court of Justiciary and the sheriff court. (See also: 'indictment'; 'jurisdiction'; 'summary procedure').

Solicitor: A lawyer who is employed to conduct legal proceedings, to give advice on legal matters, to draw up legal papers, and to appear before the lower courts. The vast majority of members of the Scots legal profession are solicitors, as distinct from advocates. All practising solicitors in Scotland are required to be members of the Law Society of Scotland; sometimes known as a law agent, a writer, a procurator or (in Aberdeen) an advocate. (See too 'advocate'; 'solicitor advocate').

Solicitor advocate: A solicitor who has obtained the right to appear in person before either or both of the higher courts, viz the High Court of Justiciary, and the Court of Session.

Special defence: A defence (eg alibi, insanity, incrimination or self-defence) notice of which must be given to the prosecutor before the beginning of a criminal trial. It is a purely procedural requirement.

Specific defence: A defence which can be pled only in relation to certain specific crimes. For example, diminished responsibility operates solely as a partial defence to a charge of murder; by contrast, insanity may be pled as a defence to any charge. (See also: 'general defence').

Statute: Laws enacted by a parliament, for example the United Kingdom Parliament or the Scottish Parliament. (See also: 'legislation').

Strict liability: Some statutory offences do not require proof of a guilty mind (*mens rea*). Examples include certain health and safety legislation, traffic regulations, and fishing regulations.

Sufficiency: The question whether the prosecution has adduced sufficient evidence of the alleged crime. In certain circumstances where a burden of proof rests on the accused, sufficiency also applies to defence evidence. (See also: 'corroboration'; 'Moorov doctrine'; 'no case to answer').

Summary procedure: Less serious crimes, such as more minor breaches of the peace and assaults, are prosecuted in summary trials in sheriff courts and justice of the peace courts. Summary trials are presided over by a judge without a jury. (See also: 'indictment'; 'jurisdiction'; 'solemn procedure').

Supreme Court: The highest appeal court in the United Kingdom. (See also: House of Lords).

***Travaux preparatoires*:** Drafts and other documents drawn up in the course of preparing the final text of a legal instrument, and reflecting the substance of the discussions and views leading to the final version.

Trial: A court procedure which examines the evidence against an accused who pleads 'not guilty' and which reaches a verdict on that issue. (See also: 'verdict').

Verdict: The determination of the outcome of criminal proceedings. Scots criminal law has three possible verdicts: guilty, not guilty and not proven. A 'guilty' verdict results in the conviction of the accused; a 'not guilty' or 'not proven' verdict results in the acquittal of the accused.

Wicked recklessness: The second limb (after 'wicked intention to kill') of the Scots law definition of the *mens rea* of murder. Usually understood to be a state of mind by which the accused does not care whether the victim lives or dies.

The Scottish Law Commission is indebted to the authors of the following texts which have informed this glossary:

E Clive, PR Ferguson, C Gane, and A McCall Smith, *Draft Criminal Code for Scotland* (2003);

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Chapter 1 Introduction

Terms of reference

1.1 As noted in our Tenth Programme,[1] there has been criticism of the Scots law of homicide, particularly in relation to the mental element.

1.2 Homicide has been defined as "the act which, either directly, or by natural consequence, takes away the life of another".[2] The mental element in homicide is often referred to as the "*mens rea",* a Latin phrase meaning "the guilty mind". "*Actus reus*" is the guilty act, i.e. the physical element of the crime of homicide.[3] In general, both *actus reus* and *mens rea* are required before a person can be found liable for an offence.[4]

1.3 The Scots law of homicide has a bipartite structure, comprising two offences, namely "murder" and the lesser crime of "culpable homicide".[5] In Scots law, it is the *mens rea* which categorises the offence, with significant consequences for both the accused and society's attitude to the offence. Murder is regarded as the most heinous crime,[6] which attracts a mandatory sentence of life imprisonment.[7] Culpable homicide covers a wide range of offences, from a "single punch" assault unexpectedly resulting in a death to a killing which falls just short of murder.[8]

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[1] Scottish Law Commission, *Tenth Programme of Law Reform*, Scot Law Com No 250 (2018) para 2.17 and following paragraphs.

[2] Alison, *Principles,* i, 1; cf the classic definition of murder in Macdonald, *Criminal Law* p 89: "Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences … In a case of death by poisoning where suicide and accident have been excluded by the evidence, there must nevertheless be positive evidence connecting the accused with the crime". Thus suicide is not a crime.

[3] On one view (a broad view), the *actus reus* of murder and culpable homicide might be thought to be the same, namely the unlawful taking of another's life. However another approach to homicide, adopted by many legal systems and commentators, categorises the gravity of some unlawful killings on the basis of the objective factual circumstances of the death – in other words, on the basis of the *actus reus* – with less emphasis being placed on the *mens rea*: see, for example, the discussion in ch 2, The structure of Scots homicide law, paras 2.26 to 2.31, and ch 5, Culpable homicide, paras 5.29 to 5.54. This approach results in a much greater emphasis on the particular features of the *actus reus* when assessing the category or gradation of the gravity of the killing, and relies more heavily upon the objective facts of the killing when drawing a distinction between murder and culpable homicide (or its approximate equivalent of "manslaughter").

[4] But in contexts other than homicide, there are "strict liability" offences requiring no *mens rea*. Examples include certain health and safety legislation, traffic regulations, and fishing regulations: see "Elements of a Crime: Strict Liability", *The Laws of Scotland (Stair Memorial Encyclopaedia) Criminal Law 2nd Reissue* para 97. Even in the context of homicide, it is arguable that the doctrine of "constructive malice" is an attempt to introduce strict liability for a death caused in the course of another crime such as robbery: see para 4.36 and following paragraphs below.

[5] See the discussion and definitions in ch 2, The structure of Scots homicide law.

[6] See, for example, G Maher, "'The Most Heinous of All Crimes': Reflections on the Structure of Homicide in Scots Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010).

[7] See generally ch 4, Murder.

[8] Either because the offence lacked the "wicked intent" or "wicked recklessness" of murder, or because what would otherwise amount to murder is palliated by a partial defence (provocation or diminished responsibility). See ch 5, Culpable homicide, ch 10, Provocation, and ch 11, Diminished responsibility.

Sentences for culpable homicide can range from an order for lifelong restriction[9] to a simple admonition.[10] Lower on the scale of offending is the crime of assault, which again covers a wide range of culpability, and in certain cases may be the verdict brought back by the jury in a murder trial.[11] It can be seen, therefore, that (i) the definition of the mental element in homicide, and (ii) the assessment of that mental element, are of critical importance. Assessment is usually carried out by juries of lay people.[12] Some commentators have suggested that there might be more emphasis on the *actus reus* in order to provide the defining parameters for the categorisation of an offence as either "murder" or "culpable homicide".[13]

1.4 The criticism referred to in paragraph 1.1 above included comments by Lord Gill[14] in *Petto v HM Advocate*,[15] in the following terms:

> "[21] … I have the impression that other English-speaking jurisdictions may have attained greater maturity in their jurisprudence on this topic [ie "the mental element in murder and culpable homicide in contemporary Scots law"] than Scotland has. In Scotland, we have a definitional structure in which the mental element in homicide is defined with the use of terms such as wicked, evil, felonious, depraved and so on, which may impede rather than conduce to analytical accuracy. In recent years, the authors of the Draft Criminal Code for Scotland (2003)[16] have greatly assisted our thinking on the matter; but we remain burdened by legal principles that were shaped largely in the days of the death penalty,[17] that are inconsistent and confused and are not yet wholly free of doctrines of constructive malice.[18]
>
> [22] My own view is that a comprehensive re-examination of the mental element in homicide is long overdue. That is not the sort of exercise that should be done by ad hoc decisions of this court in fact-specific appeals. It is pre-eminently an exercise to be carried out by the normal processes of law reform."

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[9] Formerly a discretionary life sentence.
[10] See *Gordon v HM Advocate* 2018 SCCR 79 where an otherwise blameless man in his fifties smothered his terminally ill wife to end her suffering: a plea to culpable homicide was accepted only because the accused was shown to be suffering from an abnormality of mind caused by a depressive disorder, and therefore was of diminished responsibility. The sentencing judge imposed a custodial sentence of three years, which was quashed on appeal and an admonition substituted in recognition of the lesser moral culpability of the killing.
[11] See, for example, *Burnett or Grant v International Insurance Company of Hanover Ltd* 2019 SC 379, where a customer at licensed premises was placed in a chokehold by a door steward, and died of mechanical asphyxiation. The steward was charged with murder. At the trial, there was a conflict of medical evidence as to the cause of the deceased's death, which the jury ultimately decided in favour of the accused, convicting him of assault.
[12] Who may, or may not, be assisted by expert evidence such as psychiatric or psychological evidence.
[13] See, for example, Professor L Farmer, "Structuring Homicide: A Broad Perspective" (Joint SLC, University of Strathclyde and University of Glasgow Seminar, 26 October 2018) available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/, referred to in ch 2, para 2.27. See also doctrines of "constructive malice", with its emphasis on the physical act or acts (the *actus reus*) of the crime: ch 4, Murder, para 4.36 and following paragraphs.
[14] Then the Lord Justice Clerk.
[15] 2011 SCCR 519.
[16] A group of respected Scots law academics published a Draft Criminal Code for Scotland under the auspices of the Scottish Law Commission. The Code was not restricted to homicide, and proposed three states of mind to establish criminal liability (intention, recklessness and knowledge). Although the Code generated considerable interest (see E Clive, "Codification of the Criminal Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010)), there has been no attempt to enact it.
[17] Abolished in the UK by the Murder (Abolition of the Death Penalty) Act 1965, although the death penalty remained for a limited group of crimes including treason, with abolition in respect of those crimes being effected by the Crime and Disorder Act 1998, s 36.
[18] The doctrine of constructive malice (arguably a type of strict liability) is discussed in ch 4, Murder.

Those comments were instrumental in bringing about this law reform project entitled "The Mental Element in Homicide".[19]

Background

1.5 The Scots law of homicide is largely common law.[20] It has a bipartite structure, comprising two offences, namely "murder" and the lesser crime of "culpable homicide".[21] Defences to a charge of murder may be partial[22] or complete.[23] The defences are inextricably linked to the concept of *mens rea,* as the nature and extent of the mental element of the crime of murder or culpable homicide is often delineated by the defence advanced by the accused, and the evidence supporting that defence. For example, where a death is caused by a genuine accident, there is no *mens rea;* where the perpetrator has a severe mental disorder, there is no *mens rea;* where a homicide is committed in self-defence, there is no *mens rea;* where lawful armed combat results in a death, there is no *mens rea;* and where either provocation or diminished responsibility is established, the gravity of the *mens rea* is lesser than would otherwise be the case.[24]

1.6 In the latter part of the 20th century, there was little criticism of this bipartite structure. On the contrary, judges and jurists commended it. In 1983, the Scottish Law Commission in a report entitled "*The Mental Element in Crime*"[25] decided not to adopt certain reform proposals made by the Law Commission of England and Wales which would have affected homicide law, and observed that there were few problems arising from Scots homicide law. In 1987, Lord Goff of Chievely gave a lecture entitled "The mental element in the crime of murder",[26] in which he outlined certain problems which were troubling the courts in England and Wales. He commended the structure of Scots homicide law as offering a solution to those problems.[27] In 1989, the Scottish Law Commission submitted a memorandum to a select committee[28] in which they concluded that Scots homicide law was working well in practice, and provoked little criticism from either the legal profession or the general public. In 2000, Sir Gerald Gordon in the 3rd edition of his textbook on criminal law[29] observed:

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[19] Announced in February 2018 as a medium-term project.

[20] With the exception of the defences of mental disorder (Criminal Procedure (Scotland) Act 1995, s 51A), and diminished responsibility (Criminal Procedure (Scotland) Act 1995, s 51B): see generally ch 11, Diminished responsibility.

[21] See the discussion and definitions in ch 2, The structure of Scots homicide law.

[22] Provocation and diminished responsibility are partial defences which, if established, may reduce a crime of murder to one of culpable homicide: see ch 10, Provocation, and ch 11, Diminished responsibility.

[23] Complete defences include self-defence, accident, and justifiable homicide: see ch 6, Defences: an introduction.

[24] And reduces what is *prima facie* murder to the lesser offence of culpable homicide.

[25] Scottish Law Commission, *The Mental Element in* Crime, Scot Law Com No 80 (1983).

[26] The Lionel Cohen Lecture, delivered on 19 May 1987 and published in (1988) 104 LQR 30.

[27] In particular, Lord Goff gave examples illustrating how the concept of "wicked recklessness" (the second branch of the Scots law definition of murder), worked well in practice, appearing to produce appropriate results, and avoiding both complicated dissertations to juries about foresight of consequences and artificial concepts such as "oblique intention" (a person has "oblique intention" when an event is a natural consequence of their voluntary act, and they foresee it as such. A person is held to intend a consequence (obliquely) when that consequence is a virtually certain consequence of their action, and they knew it to be a virtually certain consequence: *R v Woollin* [1999] 1 AC 82).

[28] Select Committee, Report on Murder and Life Imprisonment in England and Wales and Scotland (The Nathan Committee) Vol III – Oral Evidence, pt 2, and Written Evidence, 24 July 1989 (HL Paper 78-III), p 385 and following pages.

[29] G Gordon (MGA Christie (ed)), *Criminal Law* (3rd edn, 2001), para 23.21.

> "The absence of an academically satisfactory definition of murder is … perhaps but a small price to pay for the practical advantages of flexibility."

1.7 However in the early 21st century, three High Court decisions cast doubt on the acceptability and coherence of Scots homicide law. Those cases were *Drury v HM Advocate* (2001),[30] *HM Advocate v Purcell* (2007),[31] and *Petto v HM Advocate* (2011).[32] They are discussed in Chapters 2 to 5 below.

Statistics

Overview

1.8 In the last decade, the homicide rate in Scotland has been in gradual decline. In the period between 2010-11 and 2019-20, the number of homicide cases in Scotland fell by more than a third from 98 to 64.[33] From 2012-13 until present the rate has remained relatively stable, with there being between 59 and 64 recorded incidents in each of these years.[34]

1.9 It can be argued that the sharp decline of knife crime in Scotland - being the most common method of killing - is behind the overall drop in homicide rates. Scotland has tackled the issue of knife crime by framing it as a public health issue, as advocated by the World Health Organisation, by treating violence as a disease whilst focusing more on preventative measures such as early intervention and education, rather than law enforcement.

1.10 The Scottish Violence Reduction Unit has been at the forefront of the fight against knife crime.35 The Unit was set up at a time when Glasgow was labelled Europe's 'murder capital', having more than double the national average of homicide cases in 2004/05. In 2019-20 Glasgow had the highest number of homicide cases (12), representing 19% of the Scottish total.36 However, Glasgow has also witnessed a relatively larger fall in homicides of 54% since 2010-11, accounting for over two-fifths (41%) of the overall national decrease.37

Trends

1.11 According to the Scottish Government statistics on Homicide in Scotland 2019-20, 70% of victims in homicide cases (45 of the 64 in total) were male, with 92% of all accused (70 of the 76 in total) also being male.[38] The victim and main accused were known to each other in a majority of cases, representing 60% of homicide cases solved in 2019-20.[39] However, in 2019-20, whilst male victims were most likely to be killed by an acquaintance

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[30] 2001 SCCR 583.
[31] 2007 SCCR 520.
[32] 2011 SCCR 519: see the passage quoted in para 1.4 above.
[33] *Homicide in Scotland 2019-20* (Scottish Government, 2020), p 2, available at: https://www.gov.scot/publications/homicide-scotland-2019-2020/.
[34] *Ibid*.
[35] This was initially formed in 2005 by Strathclyde Police, and expanded into a national unit in 2006. Since 2008 it has been directly funded by the Scottish Government.
[36] *Homicide in Scotland 2019-20* (Scottish Government, 2020), p7, available at: https://www.gov.scot/publications/homicide-scotland-2019-2020/.
[37] *Ibid*.
[38] *Ibid*, pp 1 and 2.
[39] *Ibid*, p 12.

(43%), female victims were deemed more likely to be killed by a partner or ex-partner, with 37% of female victims being killed by either of the two.[40]

1.12 The circumstances in which homicides have occurred have varied greatly in the period between 2010-11 and 2019-20 depending on the gender of the victim. Where a female victim is concerned, the most common set of circumstances surrounding the killing are a rage or fight with a partner or ex-partner in a dwelling (accounting for 17% of female victims). [41] The most common set of circumstances associated with a male victim are a rage or fight with an acquaintance in a dwelling (accounting for 18% of male victims).[42]

1.13 The most common method of killing in each year in the period between 2010-11 and 2019-20 has been with a sharp instrument. This includes 55% (35) of homicide victims in 2019-20, of which all but three involved a knife. The next most common main method was hitting and kicking, accounting for 22% (14) of homicide victims in 2019-20.[43]

1.14 Whilst clear from the figures that the overall homicide rate has gone down, the question remains whether the decline has been uniform across different types of homicides. Dr Sara Skott, senior lecturer in criminology at Mid Sweden University, conducted research seeking to identify underlying trends in this decline.[44] This research revealed hidden counter trends within the general decrease in homicide rates in Scotland:

> "[a] key finding from this study is that the general decrease in both homicide and violence was driven by a reduction in the same type of violence, namely violence committed by young men in public places and involving the use of sharp instruments. However, this general decrease in violence masks a hidden relative increase in both lethal and non-lethal forms of domestic violence over time."[45]

Homicide appeals in Scotland

1.15 Our own research examined statistics in relation to reported homicide appeals in Scotland in order to ascertain whether there are any visible patterns in the legal issues and grounds which have arisen in the last decade.

1.16 The research focused solely on High Court of Justiciary appeals concerning cases of murder and culpable homicide which had been reported and were publicly accessible. The time period selected ran from 1 January 2010 until 31 December 2019, with each statistical year running from 1 January to 31 December.[46]

1.17 In the ten years examined, there were a total of 111 appeals, 70 of which were appeals against conviction and were the focus of the research. As with the homicide rate, the rate of

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[40] *Ibid*, p 12.
[41] *Ibid*, p 15.
[42] *Ibid*, p 14.
[43] *Ibid*, p11.
[44] Dr S Skott, "Homicide in Scotland: Context and Prevalence" (Joint SLC, University of Strathclyde and University of Glasgow Seminar, 26 October 2018) available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/. For further reading see S Skott, "Changing Types of Homicide in Scotland and their Relationship to Types of Wider Violence" (PhD thesis, University of Edinburgh 2018) available at: https://www.era.lib.ed.ac.uk/handle/1842/29642.
[45] S Skott, "Changing Types of Homicide in Scotland and their Relationship to Types of Wider Violence" (PhD thesis, University of Edinburgh 2018) p 10, available at: https://www.era.lib.ed.ac.uk/handle/1842/29642.
[46] Each case was categorised according to the date of its judgment.

reported appeals against conviction and appeals against sentence have been in gradual decline over this period. Our full methodology and findings can be found on our website.[47]

1.18 The grounds of appeal which have arisen in case law over the past ten years do not display any significant trend in criminal appeals focusing upon the mental element in murder.[48]

Scope

1.19 In this paper on "The Mental Element in Homicide" we examine:

> " … the principles underlying and the boundaries between the crimes of murder and culpable homicide; and the mental element required for the commission of each of these offences … We also … examine the nature, scope and definitions of the main defences that arise in cases of homicide; these include self-defence; provocation; and diminished responsibility."[49]

1.20 However there are limits to the scope of this paper. The following are topics (listed in alphabetical order) which we have had to exclude.

1.21 *Abortion and related matters:* A special statutory scheme covers the law of abortion.[50] We consider that any questions relating to abortion are policy matters for the decision of the Scottish Parliament[51] and we do not therefore include that area of the law in our project.

1.22 *Infanticide and homicide of an unborn child:* We note that some jurisdictions have offences such as "homicide of an unborn child"[52] and "infanticide".[53] Creation of such offences[54] would require policy decisions taken by Parliament.

1.23 *Age of criminal responsibility:* In Scots law, a child under a certain age is deemed not to have the necessary maturity or understanding to have the requisite *mens rea* for the crime of homicide.[55]. That is a policy issue, outwith our remit.

1.24 *Assisted suicide and assisted dying:*[56] The issue of assisted suicide and assisted dying is highly controversial, and involves matters of social policy which must be for Parliament to

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[47] See: Scottish Law Commission, "Homicide appeals in Scotland: 2010 – 2019", available at https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[48] The one exception being *Petto v HM Advocate* 2011 SCCR 519.
[49] Scottish Law Commission, *Tenth Programme of Law Reform,* Scot Law Com No 250 (2018), paras 2.20 and 2.22.
[50] Abortion Act 1967.
[51] Abortion is now a matter within the legislative competence of the Scottish Parliament: Scotland Act 2016, ss 53 and 72(7).
[52] For example, England and Wales (the Infant Life Preservation Act 1929); and certain states in the USA (see AS Murphy, "A Survey of State Fetal Homicide Laws" (2014) 89(2) Ind LJ (art 8) 847, at p 864 and Table 1).
[53] For example, the Infanticide Act 1938, s 1, applying in England and Wales, which defines the offence as the killing of a child under 12 months by the mother in a situation where "the balance of her mind [was] disturbed by reason of her not having fully recovered from the effect of giving birth to the child". Other jurisdictions with similar legislation include Ireland, South Africa, New Zealand, and states in Australia.
[54] Unknown in Scots law.
[55] The age of criminal responsibility is currently 8 years (Criminal Procedure (Scotland) Act 1995, s 41) but is to be changed to 12 years in terms of the Age of Criminal Responsibility (Scotland) Act 2019, ss 1 and 84. It should be noted that the UN Committee on the Rights of the Child considers that the age of criminal responsibility should be increased to 14 years.
[56] Sometimes referred to as "mercy killings".

decide. To date, two bills in the Scottish Parliament have failed to become legislation.[57] We fully acknowledge that this area of the law continues to produce difficult and delicate decisions, where similar facts may result in either a prosecution for murder[58] or no prosecution at all.[59] While it might be thought that the five-judge decision in *Drury v HM Advocate*[60] (*inter alia* defining intention to kill as "wicked") might have been an attempt to give the prosecution a greater degree of discretion when assessing whether or not to prosecute in those cases, it would appear that even a very sympathetic case may result in a prosecution for murder.[61] However as noted, this is very much a policy issue, for Parliament to decide.

1.25 *Causation:* Certain types of case involving homicide relate more to causation (and in turn, to the *actus reus* of homicide) than to the mental element, and are not the main focus of this paper. Such cases include deaths following the intentional transmission of a disease, and stalking and harassment apparently leading to suicide.

1.26 *Concert (or "art and part"):* Although the law of concert[62] continues to give rise to issues, the doctrine extends to many crimes beyond that of homicide. Any review of that area of the law would require a separate research project.

1.27 *Corporate homicide:* As the law relating to corporate homicide[63] extends to the UK as a whole, a joint review with England and Wales might be appropriate before the relevant legislation could be altered or enacted.[64] A recent Scottish private member's bill concerning corporate liability for death[65] was the subject of a statement by the Presiding Officer that it was not within the legislative competence of the Scottish Parliament.[66]

1.28 *Inchoate liability:* As the focus of this paper is the mental element in homicide, we do not discuss inchoate forms of homicide such as attempts, conspiracy, and incitement. While these types of liability raise important issues, any alterations to the law might have wider implications in the context of other offences.

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[57] The End of Life Assistance (Scotland) Bill, defeated in 2010 by 85 votes to 16, and the Assisted Suicide (Scotland) Bill, defeated in 2015 by 82 votes to 36.
[58] With a mandatory life sentence in the event of conviction.
[59] The papers would be marked "no pro" (ie no proceedings) in the Crown Office. A useful outline of the difficult issues arising can be found in *Ross v Lord Advocate* 2016 SC 502.
[60] 2001 SCCR 583.
[61] See *Gordon v HM Advocate* 2018 SCCR 79, where an otherwise blameless man in his fifties smothered his terminally ill wife to end her suffering.
[62] The law applicable where there appears to be more than one perpetrator involved in the commission of an offence.
[63] Contained in the Corporate Manslaughter and Corporate Homicide Act 2007.
[64] The Law Commission of England and Wales commenced a project on corporate criminal liability in November 2020, available at https://www.lawcom.gov.uk/project/corporate-criminal-liability/.
[65] Culpable Homicide (Scotland) Bill, promoted by MSP Claire Baker and seeking to have corporate wrongdoers treated with the same level of gravity and moral opprobrium as an accused in a homicide trial. (The bill, which fell at Stage 1, is referred to briefly in ch 5, Culpable homicide, fn 24).
[66] On the basis that the provisions of the Bill relate to the reserved matters of (a) the operation and regulation of business associations (Section C1 (Business associations) of Schedule 5 to the Scotland Act 1998) and (b) the subject-matter of Part I of the Health and Safety at Work etc. Act 1974 (Section H2 (Health and safety) of Sch 5 to the Scotland Act 1998). A letter dated 12 January 2021 from the Cabinet Secretary for Justice, Humza Yousaf MSP, to the Justice Committee of the Scottish Parliament confirms that the Scottish Government is also of the view that the provisions in the bill which give effect to the policy intention behind it are outwith the legislative competence of the Scottish Parliament.

1.29 *Road traffic offences:* Road traffic offences are part of a unified UK statutory scheme of road traffic law.[67] The scheme is subject to particular policy considerations, including the safety of roads and road users throughout the UK. In addition, the statutory regime is not within the legislative competence of the Scottish Parliament.[68] In the context of the mental element in homicide, it is worth noting that juries have been consistently reluctant to return a verdict of homicide in relation to any death arising from a road traffic incident.[69] This reluctance may assist in understanding the sequence of events (including the decision in *HM Advocate v Purcell,*[70] the repercussions from that decision, and the tension between the cases of *Purcell* and *Petto*) provoking Lord Gill's comments noted in para 1.4 above.[71]

1.30 *Sentencing:* There is only one sentence for the crime of murder, and that is the mandatory life sentence.[72] By contrast, the lesser crime of culpable homicide may attract a wide range of sentences, from admonition[73] to an order for lifelong restriction.[74] Currently sentencing is the subject of review by the Scottish Sentencing Council.[75] Guidelines are being produced. Thus sentencing does not form part of our remit.

Structure of the paper

1.31 In this paper, we adopt the following structure. Chapter 2 sets out the bipartite structure of Scots homicide law, and discusses the concept of "fair labelling". Chapter 3 discusses the language and terminology of Scots homicide law compared with other English-speaking jurisdictions. Chapter 4 concerns the offence of murder, and the doctrine of constructive malice. Chapter 5 deals with culpable homicide. Chapter 6 is a short introduction to defences. Chapters 7 and 8 focus on self-defence and specific issues in relation to that defence and homicide. Chapter 9 discusses the defences of necessity and coercion in the context of homicide. Chapters 10 and 11 focus on the partial defences of provocation and diminished responsibility. Chapter 12 discusses the effect of domestic abuse in the context of homicide. Chapter 13 is a brief "overview" which seeks consultees' views on whether statutory reform of Scots homicide law would be desirable. Chapter 14 lists the questions posed in this paper.

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[67] Road Traffic Act 1988 and Road Traffic Offenders Act 1988.
[68] Scotland Act 1998, s 29(2)(b), Sch 5, E1 (Road transport).
[69] See P Ferguson, "Wicked Recklessness" (2008) Jur Rev 1, at p 12; *R v Seymour* [1983] 2 AC 493 at 495 (Lord Roskill) noting "the extreme reluctance of juries to convict motorists of manslaughter" with most prosecutions being based on breaches of road traffic legislation; G Gordon in his commentary on *HM Advocate v Purcell* 2007 SCCR 520 questioning "why the Crown decided to abandon their longstanding practice [of prosecuting on the basis of road traffic legislation] and bring a murder charge …[when] until not all that long ago the Crown had great difficulty in persuading juries to convict of culpable homicide in road traffic cases …".
[70] 2007 SCCR 520.
[71] See the further discussion in chs 2 and 3 below.
[72] Criminal Procedure (Scotland) Act 1995, s 205. The court must also fix a "punishment part" reflecting the aims of retribution and deterrence, but not risk to the public. The convicted person cannot apply for parole until the punishment part has expired. Thus if the punishment part is, say, 18 years, the convicted person must serve 18 years before applying for parole. If the Parole Board (with the issue of "risk to the public" foremost in their deliberations) consider that the application should not be granted, the period in custody continues. To date, the longest punishment part in Scotland has been 37 years (the notorious World's End murderer, Angus Sinclair: see *Sinclair v HM Advocate* [2016] HCJAC 24).
[73] *Gordon v HM Advocate* 2018 SCCR 79 (an otherwise blameless man in his fifties who smothered his terminally ill wife to end her suffering).
[74] Formerly a discretionary life sentence.
[75] Chaired by the Lord Justice Clerk, Lady Dorrian.

1.32 Depending upon the responses to this paper, we may undertake further more detailed research into particular areas as part of this project.[76]

1.33 Against that background, we ask the following 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?

2. If so, which aspects, and why?

Reform by legislation

1.34 As noted in paragraph 1.5, the law of homicide in Scotland is largely common law, developed and refined over centuries on the basis of institutional works[77] and case law.

1.35 Any reform of the law relating to the mental element in homicide would require legislation to implement recommended changes. That would effectively mean putting what were previously common law offences on a statutory footing. There may be a number of potential advantages and disadvantages arising from legislating to reform the law in this area.

1.36 Potential advantages of replacing common law offences with statutory offences might include opportunities to define a clear dividing line between murder and culpable homicide;[78] to state what culpable and reckless conduct constitutes culpable homicide;[79] to clarify the law relating to gross negligence in the context of homicide;[80] to define criminal liability in the context of omissions or failures in duty;[81] and to define certain offences as "murder" no matter what state of mind the perpetrator had at the relevant time.[82] More generally, the opportunities to legislate on some of the issues outlined above might arguably increase the accessibility of the law and legal certainty in these areas. Legislating might also reduce what Professor Clive called "bad flexibility" in the common law (ie where there are unnoticed conflicts in the common law or where there are insufficiently precise definitions of crimes in common law).[83]

1.37 Potential disadvantages of legislating might include reduced flexibility in the law to respond to different situations;[84] an increased number of appeals challenging either the terms of an indictment,[85] or a refusal of a "no case to answer" submission,[86] or a jury decision;[87] more

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[76] Resulting in further individual Discussion Papers.
[77] Such as Alison, Hume and Macdonald.
[78] See para 5.17.
[79] See para 5.18.
[80] See para 5.19.
[81] See para 5.22.
[82] For example, one-punch killings, or killings in the course of escaping from the police, which could be statutorily defined as "murder" on the basis of the *actus reus* alone (ie on the basis of the objective facts alone) without the need for the prosecution to prove the *mens rea* (either wicked intent, or wicked recklessness not caring whether the victim lived or died).
[83] See E Clive, "Codification of the Criminal Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010), pp 57 - 63. Further advantages of replacing common law offences with statutory offences are outlined in the Draft Criminal Code for Scotland in the section entitled "About the draft code", pp 1 to 8.
[84] For example, a court may be able to respond to a perceived problem with the law more quickly than a legislature, if the right case arises.
[85] See para 3.51.
[86] *Ibid*.
[87] See para 2.58, penultimate bullet point.

complex directions for juries;[88] difficult and sensitive issues when defining offences;[89] more limited scope for the exercise of judgment by the Crown Office, the Lord Advocate, the judge and the jury;[90] and the introduction of new forms of strict liability.[91]

1.38 Were any reform of the law relating to the mental element in homicide to be considered in the areas covered by this Discussion Paper, it would be necessary to weigh the potential advantages against the potential disadvantages of such a course, and to assess the advisability and feasibility of such a reform.

1.39 It is worth noting here that reference is made throughout this Discussion Paper to the Draft Criminal Code for Scotland.[92] The Draft Code, which was published in 2003 under the auspices of the Scottish Law Commission and authored by four leading academics, could be regarded as a prototype attempt at placing Scots criminal law (including the law of homicide) on a statutory footing. Although no part of the Draft Code has been enacted in legislation, its detailed provisions and accompanying commentary provide a valuable case study when considering how any statutory reform of Scots homicide law may be achieved. Relevant extracts and commentary from the Draft Code can be found in the Appendix at the end of this Discussion Paper.

Legislative competence

1.40 The area of law covered by this Discussion Paper relates to Scots criminal law. With the exception of certain "reserved" criminal offences, which we have excluded from the scope of the paper, this area of the law is not reserved to the Westminster Parliament. We are of the view that any proposals arising from the Discussion Paper would therefore be capable of being implemented by legislation of the Scottish Parliament.

1.41 A further aspect of the legislative competence of the Scottish Parliament is that an Act of the Scottish Parliament must be compatible with the rights set out in the European Convention on Human Rights.[93] We have considered Article 7 of the Convention (no punishment without law). Paragraph 1 of Article 7 states that:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

1.42 In our view, any proposals arising from this Discussion Paper would be capable of being enacted in a way that would be compatible with the Convention rights contained in Article 7 of the ECHR.

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[88] See para 4.61 and following paragraphs.
[89] See para 5.26.
[90] See para 5.27.
[91] See para 5.28.
[92] E Clive, P Ferguson, C Gane and A McCall Smith, "Draft Criminal Code for Scotland" (2003). See also fn 16 above.
[93] Which continues to bind the UK post-Brexit.

Case references

1.43 As previously mentioned, the Scots law of homicide is largely common law, having been primarily shaped by the precedent laid down in various cases. A list of cases frequently cited (including all law report citations) can be found at pages xiii to xiv. The order in which law report citations are given is (i) Scottish Criminal Case Reports (SCCR); (ii) Justiciary Cases (JC); (iii) Scots Law Times (SLT); (iv) Scottish Criminal Law (SCL); and finally (v) any other reports.[94] The citation practice adopted throughout the paper is to give one citation only in the text/footnotes for each of the frequently cited cases appearing in the list referred to above, as further citations can be found by referring to that list.

Engagement and appreciation

1.44 In the course of researching this Discussion Paper, we engaged with and sought assistance from, amongst others, legal practitioners, academics, Victim Support Scotland and Scottish Women's Aid. The resultant advice provided a useful form of informal consultation.[95] Some practitioners were invited to be interviewed;[96] other practitioners were members of our Advisory Group along with other stakeholders.[97] We thank all those who gave up their time to assist us in our work.

1.45 We are also greatly appreciative of the contribution made by Professor Claire McDiarmid when she worked with us at the Commission for a period of four months in late 2018. Professor McDiarmid's assistance on the project was invaluable. Her paper on culpable homicide is published on our website and is cross-referred to in this Discussion Paper.[98]

1.46 We met with the Scottish Sentencing Council on 31 May 2018 to discuss our project and their work.

1.47 On 5 October 2018 we held a seminar on the law of homicide at the University of Strathclyde in conjunction with Strathclyde and Glasgow University Law Schools. Links to the programme for the day, presenters' slides and videos of talks from the day can be found on our website.[99]

1.48 We also looked to the homicide laws of other jurisdictions to inform our work. Whilst we refer to the law in other jurisdictions in relation to particular issues throughout this

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[94] This order has been selected because the Scottish Criminal Case Reports include helpful commentaries by Sir Gerald Gordon, Sheriff Alastair N Brown and others, making the reports of particular importance to criminal practitioners and academics. Justiciary Cases and Scots Law Times come next, being two long-established and highly respected series of case reports. Finally, Scottish Criminal Law is a very welcome and informative but more recent arrival in the context of criminal law reporting.

[95] See G Gretton, "Of Law Commissioning" (2013) 17(2) Edin LR 119.

[96] Any view expressed is not attributable to any particular individual or branch of the profession. Interviews took place throughout 2019. Those involved were three High Court judges, two Advocate Deputes, and four defence QCs (one being a solicitor advocate QC). All were experienced in High Court homicide trials. Such informal consultation is of considerable assistance in the Commission's research work.

[97] Together with academics and representatives from Victim Support Scotland and Police Scotland. Our Advisory Group was set up in June 2018 and its membership can be found on our website at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[98] See Professor McDiarmid's paper at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[99] See: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

Discussion Paper, we have also published a separate paper on our website that sets out our comparative research in more detail.[100]

[100] See: Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

Chapter 2 The structure of Scots homicide law

2.1 In this chapter, we examine the structure of Scots homicide law and the concept of "fair labelling". We set out possible alternative structures, and ask whether the current structure requires reform.

Structure

2.2 Some jurisdictions have several categories of homicide offences, reflecting different levels of gravity.[1] Italy has five.[2] South Africa has three,[3] as do some Australian states.[4] States in the USA have first, second, and third degree murder, negligent homicide, manslaughter and involuntary manslaughter, with further internal sub-divisions in certain categories.[5] England and Wales currently have murder, manslaughter, and infanticide,[6] and their Law Commission (LCEW) has recommended changing to a multi-tier structure comprising first and second degree murder, manslaughter, and specific homicide offences such as assisting suicide and infanticide.[7] Ireland has murder, manslaughter, and infanticide,[8] with a recommendation for a new offence of assault causing death.[9]

2.3 The Scots law of homicide has a simple bipartite structure with two categories of offence: "murder" and "culpable homicide".[10] The *mens rea* of murder has two limbs or branches: (i) wicked intention to kill, or (ii) wicked recklessness. "Culpable homicide" has no formal subdivisions, and is a broad residual category, catching those unlawful killings which are culpable but not sufficiently blameworthy to constitute murder.[11] (However some academic

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[1] See: Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[2] *Ibid*: homicide; aggravated homicide; pre-intentional homicide; negligent homicide; and homicide as a consequence of another crime.

[3] *Ibid*: murder; culpable homicide; and infanticide.

[4] *Ibid*: murder; manslaughter (further subdivided into (i) unlawful and dangerous act manslaughter, and (ii) criminal negligence manslaughter); and an offence of assault causing death.

[5] *Ibid*.

[6] Infanticide being a statutory offence where a mother causes the death of her child (under 12 months old) at a time when "the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child": Infanticide Act 1938, s 1. Many other jurisdictions have an offence of "infanticide", although with differing definitions: see Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/, and see, for example New Zealand, where the child can be any age up to 10 years. Scotland has no such offence.

[7] See para 2.44 below.

[8] See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[9] Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008), paras 5.46 and 6.10.

[10] There is no crime defined as "infanticide" in Scots law: J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) at para 1.02.

[11] See the paper on culpable homicide prepared for the Commission by Professor C McDiarmid on the SLC Homicide web page.

writings analyse the offence further, defining categories known as "voluntary" and "involuntary" culpable homicide).[12]

2.4 When comparing the structure of Scots homicide law to that of another jurisdiction, it is important to bear in mind that the categories within the other jurisdiction's structure may differ from the categories in Scots law. "Murder" and "culpable homicide" (or manslaughter) may appear to have the same meaning, but in fact there may be significant differences in definition which affect the scope of the concepts, the structure, and the need for and direction of any reform. Four examples illustrate this point. First, in England and Wales, the mental element in murder is "intention to kill or to do serious harm"[13] whereas the equivalent mental element in Scotland is "wicked intention to kill or wicked recklessness, not caring whether the victim lives or dies".[14] The category of cases caught by the second branch of the Scots law of murder is wider and more varied than that caught by the second branch of the English law of murder.[15] A second example of a different definition of murder can be found in Ireland. In terms of section 4(1) of the Criminal Justice Act 1964, the definition of the mental element in murder is "where … the accused person intended to kill, or cause serious injury to, some person …" (a definition similar to that in England and Wales). Again, the second branch of the Irish law of murder is more restricted than that of Scotland.[16] A third example of a different definition of murder is that of South Africa, where unlike Scots law (with its element of wicked recklessness) the mental element in murder is solely "intent".[17] A final example is provided by New Zealand, where there is one all-embracing label namely "culpable homicide", which comprises murder, manslaughter, and infanticide.[18] Such differences are important when considering whether or not to replicate or adopt elements, definitions, or structures, from another jurisdiction.

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[12] This classification, while adopted by some academic writers, is not used by practitioners in homicide trials or appeals (subject to one or two exceptions, for example, *MacAngus and Kane v HM Advocate* 2009 SCCR 238 para [29], a case concerning the illegal supply of drugs causing death). In G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017), para 31.01, voluntary culpable homicide is defined as "encompass[ing] those cases which would be murder, but for a partial defence of provocation or diminished responsibility being made out". Involuntary culpable homicide is defined as "the causing of death unintentionally but either with a *mens rea* which is regarded as sufficient to make the homicide culpable but not murderous, or in circumstances in which the law regards the causing of death as criminal even in the absence of any *mens rea* in relation to the death". Gordon further distinguishes between different types of involuntary culpable homicide based on whether the homicide occurred in the course of a lawful act by the accused, or an unlawful act. He terms these "lawful act culpable homicide" and "unlawful act culpable homicide" (para 31.03). A similar classification is used in some jurisdictions, including Ireland: see Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008), para 4.04, and also Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/. For a criticism of Gordon's classification, see G Maher, "'The Most Heinous of All Crimes': Reflections on the Structure of Homicide in Scots Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010), p 235: "This terminology is confusing and should be avoided".

[13] Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) para 1.13.

[14] See paras 2.5 and 2.6 below.

[15] See illustrations in ch 4, Murder, paras 4.24 to 4.25.

[16] In 2008, the Law Reform Commission of Ireland (LRCI) recommended that the fault element for murder be broadened to embrace reckless killing manifesting an extreme indifference to human life (which would bring the second branch more in line with Scots homicide law): see para 2.50 below. The recommendation has not been implemented.

[17] With three forms of intent: *dolus directus, dolus indirectus, and dolus eventualis*: see Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[18] Crimes Act 1961, ss 160, 167, 171 and 178. See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/, and para 2.38 below.

The first category of homicide: murder

2.5 In Scots law, the accepted classic definition of murder was that given by the institutional writer, JHA Macdonald, in his *Practical Treatise on the Criminal Law of Scotland*:[19]

> "Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."

2.6 In the second half of the twentieth century, trial judges invariably based their charges to the jury on that wording. They avoided entering into any jurisprudential or philosophical dissertation on the meaning of "intention" or "wicked recklessness". Thus one possible style of a judge's charge[20] might proceed along the following lines:

> "**Murder** is constituted by any wilful act or acts causing the destruction of life, whether the attacker [wickedly][21] intended to kill, or whether the attacker displayed such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences. That may sound a little old-fashioned, but that particular definition is one which has been used for generations, and has stood the test of time. In more modern language, murder is the taking of human life by a person who has [a wicked] intention to kill, or whose act is shown to have been wickedly reckless to the consequences, not caring whether the victim lived or died.
>
> Proof of a motive for murder is not required. Motive is irrelevant, but – on the other hand – the state of the accused's mind at the time of the commission of the act is relevant. For the crime of murder, the Crown must satisfy you that the accused either had **[a wicked] intention** to kill, or that he acted with the **wicked recklessness** I have described. Let me say a word about each of these.
>
> **Intention** is a matter of the mind. Obviously you can't look inside a man's mind to see what he intended: what you *can* do is draw inferences from what the man is proved to have said and done.
>
> **Wicked recklessness** has to be assessed objectively. It is recklessness of such a gross type that it indicates a state of mind which falls to be treated as being as wicked and depraved as the state of mind of a deliberate killer.[22] It's not a case of whether the accused knew of the risk of death, and carried on regardless, but whether a reasonable person would have appreciated that those risks existed. So, it is a matter of inference from the whole circumstances (assessed objectively) including the nature of the attack on the deceased, and the severity of the injury inflicted. An accused person may be surprised by the results of his acts, and may even regret them, but if death results, it's still 'murder'. If you are satisfied that an accused acted in such a way

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[19] (5th edn, 1948) p 89 – a definition invariably used in practice: see *Drury v HM Advocate* 2001 SCCR 583, para [2] (Lord Nimmo Smith).

[20] Further styles, templates, and wordings can be found in the: Judicial Institute for Scotland, *Jury Manual,* a bench-book produced by a committee of judges and others in order to provide guidance for procedure at jury trials.

[21] A word inserted by a five-judge bench in 2001 in *Drury v HM Advocate* 2001 SCCR 583: see ch 4, Murder, for a discussion about the effect of that insertion.

[22] A definition offered in G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017) para 30.19; in fn 93, the author explains that the definition was approved by Lord Justice Clerk Ross in *Scott v HM Advocate* 1995 SCCR 760, and adds: "To the philosopher, it may be that no state of mind which does not include an intention to kill can be equated with one which does include such an intention. But the law is concerned rather with an equivalence in the emotional attitude, the indignation, of the average man, judge or juryman, who regards the wickedly reckless man in the same way as he regards the intentional killer."

that he didn't really care whether the victim lived or died, that indicates the wicked recklessness required by the law."

2.7 Many commentators have commended this two-branch approach. In 1987, Lord Goff of Chievely[23] observed:

> " … with [wicked recklessness] as an alternative, intention to kill can be confined to its ordinary meaning – did the defendant mean to kill the victim? We do not have to try to expand intention by artificial concepts such as oblique intention.[24] Furthermore, in directing juries on intention to kill, judges should not have to embark on complicated dissertations about foresight of consequences and such like …"

2.8 In 1995, Professor RAA McCall Smith[25] was of a similar opinion:

> "Scots law has avoided the prolonged, and often perplexing, discussion of intention to kill which has plagued English law in cases such as *Hyam v Director of Public Prosecutions* [1975] AC 55, [1974] All ER 41, HL."[26]

2.9 In 2003, the authors of the Draft Criminal Code for Scotland[27] also recorded Scots law's successful avoidance of problems arising from the concept of "intention to kill":

> " … Providing a generally accepted definition of intention has proved to be problematic in other jurisdictions.[28] It has also been a fruitful source of academic dispute. Generally speaking, however, the Scottish courts have avoided detailed discussion of this term …"

2.10 Despite the general lack of criticism,[29] two changes to the classic definition of murder occurred in 2001 and 2007. In 2001, a five-judge bench in *Drury v HM Advocate*[30] altered the Macdonald definition of murder by inserting the word "wickedly" before the phrase "intended to kill". In 2007, a three-judge bench in *HM Advocate v Purcell*[31] ruled that the "wicked recklessness" second branch of the Macdonald definition of murder required an element of "intention to injure". Those two decisions affected the definition of "murder",[32] but did not change the structure of Scots homicide law.

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[23] In a lecture delivered on 19 May 1987 and published in (1988) 104 LQR 30.

[24] Unlike the courts in England and Wales, which became involved in complex and sophisticated discussions concerning the definition of intention. For example, a person has "oblique intention" when an event is a natural consequence of their voluntary act, and they foresee it as such. A person is held to intend a consequence (obliquely) when that consequence is a virtually certain consequence of their action, and they knew it to be a virtually certain consequence: *R v Woollin* [1999] 1 AC 82. Lord Goff refers to JE Stannard, "Mens Rea in the Melting Pot" (1986) 37 NILQ 61 at pp 70-71; RA Duff, "The Obscure Intentions of the House of Lords" [1986] Crim LR 771 at p 778; and AKW Halpin, "Intended Consequences and Unintentional Fallacies" (1987) 7 OJLS 104 at p 114.

[25] Then Professor of Law at the University of Edinburgh.

[26] RAA McCall Smith, "Homicide", 7 *Stair Memorial Encyclopaedia* (1995), para 267, fn 2. Professor McCall Smith refers to RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) for a discussion on intention to kill.

[27] E Clive, P Ferguson, C Gane, and A McCall Smith, in their Commentary to s 9, Intention. (For the background to the Code, see ch 1, Introduction, para 1.4, fn 16).

[28] The authors refer to the difficulties encountered by the English Courts in *R v Hancock and Shankland* [1986] AC 455; *R v Moloney* [1985] AC 905; and *R v Nedrick* [1986] 3 All ER 1.

[29] Although see some recent criticism in paras 2.26 to 2.31 below.

[30] 2001 SCCR 583.

[31] 2007 SCCR 520. The ruling was given in the course of a jury trial, and not in an appeal following upon conviction.

[32] See ch 4, Murder.

The second category of homicide: culpable homicide

2.11 Unlike murder, the common law crime of culpable homicide does not have a classic definition. It has been said that:

> " … the crime of culpable homicide covers the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills."[33]

> " … Depending upon the nature of the act, the crime of [homicide] may be murder or culpable homicide. Exactly where the line of causation falls to be drawn is a matter of fact and circumstance for determination in each individual case".[34]

2.12 It can be seen, therefore, that culpable homicide is a residual category. First, it covers those killings which are criminally culpable but not sufficiently blameworthy to constitute murder, and is a very broad category.[35] It is not a necessary prerequisite of culpable homicide that the accused foresaw the likelihood of death. As Lord Sutherland explained:[36]

> "Culpable homicide is simply the causing of death by any unlawful act. The unlawful act must be intentional, but it is quite immaterial whether death was the foreseeable result of that act. So, to take an example, if you are having an argument with somebody and give him a punch on the chin, not a very hard one, but a punch on the chin, and he is taken aback and stumbles backwards, catches his heel on the kerb of the pavement, falls over, cracks his skull and dies, you would be guilty of culpable homicide because you have committed an unlawful act, an assault by punching him, and as a direct consequence of that act he sustained injuries from which he died. So even though you had not the slightest intention of causing him any serious harm at all, you are responsible for his death; and the crime is not murder, because there was no question of wicked recklessness, the crime is one of culpable homicide."

2.13 Secondly, the partial defences of provocation and diminished responsibility[37] may reduce what would otherwise be a conviction for murder to a conviction for culpable homicide.[38]

A fine dividing line between murder and culpable homicide

2.14 The dividing line between murder and culpable homicide is often a fine one. The following are illustrative examples.

- *Ferguson v HM Advocate*:[39] A single stab wound delivered to the back, just below the right shoulder blade, was held not to entitle the trial judge to withdraw the option of culpable homicide from the jury.

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[33] *Drury,* para [13] (Lord Justice General Rodger).
[34] *Ross v Lord Advocate* 2016 SCCR 176, para [29] (Lord Carloway).
[35] See the paper prepared for the Commission by Professor C McDiarmid, on the SLC Homicide web page.
[36] In *HM Advocate v Hartley* 1989 SLT 135, at p 136.
[37] See ch 10, Provocation, and ch 11, Diminished responsibility.
[38] The category of "voluntary culpable homicide" referred to in G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017), para 31.01: see fn 12 above.
[39] 2009 SLT 67.

- *Anderson v HM Advocate*:[40] A single stab wound to the victim's abdomen, directed upwards towards the heart, entitled the trial judge to withdraw the option of culpable homicide from the jury.

- *Meikle v HM Advocate*:[41] The deceased was killed by multiple stab wounds to the neck, back and shoulder area, piercing two arteries (one part of the aorta) and the jugular vein: Lord Drummond Young observed:[42]

> " … any person who uses a knife against an especially vulnerable part of the victim's body must be at least wickedly reckless as to whether the victim lives or dies, and that is murder."

2.15 This fine dividing line was acknowledged by Lord Cooper in his evidence to the Royal Commission on Capital Punishment[43] when he emphasised that the decision (ie the choice between intent, wicked recklessness, and other culpable killings) was often a "jury question":

> " … That is the sort of point you leave to the jury, whether the circumstances on the evidence as a whole carry to your mind the conviction beyond reasonable doubt that the man, if he did not intend to kill, did not care whether he killed or not. That is not so much a legal question as a question for the jury, and dependent upon a narrow examination of the circumstances … If a man fires a revolver at another man's head and hits him, the law will infer that he intends to kill or does not care whether he kills or not. But I can figure types of assault in regard to which the law would make no assumption, and it would leave it to the jury to make a decision what the inference was."

2.16 Sir Gerald Gordon was of the same opinion. In his commentary on the case of *Elsherkisi v HM Advocate*[44] he observed:

> " … I stubbornly believe [this] to be a jury question: was the recklessness sufficiently wicked to make the killing murder?"

The same point is made in Gordon, *Criminal Law:*[45]

> " … when it comes to a choice between murder and culpable homicide, the result does not depend on mathematical assessments of probability measured against the standard of reasonable foreseeability, but depends on a moral judgment which, so far as capital murder was concerned, and the law grew up when all murders were capital, could be summed up in the question: 'Does A deserve hanging?' It may be quite fitting that a murder conviction should in the end of the day depend on this kind of moral consideration rather than on the application of a legal definition of mens rea. It makes for great flexibility and makes it possible for both the court and the Crown to substitute culpable homicide for murder in cases where the strict letter of the law would not allow this were murder to be defined without reference to wickedness. On the other hand, it makes the law vague and impossible to state in general terms. One cannot say that a

[40] 2010 SCCR 270.
[41] 2014 SLT 1062.
[42] At para [15].
[43] *Report of the Royal Commission on Capital Punishment 1949-1953*, Cmd 8932 (1953), quoted in G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017) para 30.18.
[44] 2011 SCCR 735.
[45] G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017) para 30.21.

> certain degree of carelessness in a fatal assault always makes it murder, one must look to all the circumstances of each particular case and ask whether they display such wickedness as to make a conviction for murder appropriate. The absence of an academically satisfactory definition of murder is, however, perhaps but a small price to pay for the practical advantages of flexibility."

2.17 Professor Claire McDiarmid also supports the concept of a degree of flexibility in the dividing line[46]:

> "The ways in which death may be brought about unlawfully are numerous and disparate, so that it is helpful if the law allows some flexibility in drawing the liability line between murder and culpable homicide."[47]

2.18 Of interest is the similar view expressed in the commentary accompanying the USA Model Penal Code,[48] namely that the concept of "recklessness so extreme that it shows an indifference to human life" cannot be further clarified, and that it is accordingly for the jury to assess whether the recklessness is so extreme as to be equivalent to "purpose" and "knowledge", and therefore to be treated as murder, or whether it is less extreme, warranting the label of "manslaughter".[49]

2.19 It should also be noted that a jury, depending upon the evidence they accept and the inferences they draw, may reject charges of murder and/or culpable homicide, and either acquit the accused of any crime, or alternatively convict the accused of some lesser offence such as assault.

Fair labelling

2.20 The bipartite structure of murder and culpable homicide, together with the recognised defences,[50] reflect a principle which was, for years, implicit in the structure of the Scots law of homicide, but which has, in recent times, been clearly articulated as "fair labelling". One leading study on the subject is J Chalmers and F Leverick, "Fair Labelling in Criminal Law".[51] The contention is that there is a need to ensure that an offender is not unfairly labelled, or the nature of his or her wrongdoing misrepresented.[52] Moreover a person's criminal record should accurately and clearly record the offence.[53]

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[46] Or, as it is sometimes known, "the liability line".
[47] Although the author suggests that there should be *some* constraint, "so that it is not left entirely to the intuition of individual jury members": C McDiarmid, "Something Wicked This Way Comes: The Mens Rea of Murder in Scots Law" (2012) 4 Jur Rev 283 at p 294.
[48] See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[49] American Law Institute, *Model Penal Code and Commentaries,* Part 1, Articles 210 to 213.6 at Art 210.2 cmt 4 p 22.
[50] See chs 6 to 11 below.
[51] (2008) 71(2) MLR 217.
[52] Particular concern may focus on media reporting, with possible gratuitous sensationalism.
[53] Thus enabling all who rely upon the record, including sentencing judges, potential employers, and statisticians, to make appropriately informed decisions: cf the observations of the authors of the Draft Criminal Code for Scotland (2003) at p 5: "The appropriate labelling of offences is important. It makes the law more transparent to the public, and also facilitates reference to previous convictions and the recording of statistics."

2.21 The concept underlying fair labelling is a simple one, namely, the accuracy of the label applied to the offender's wrongdoing.[54] As Professor Ashworth explains:

> " … Both out of fairness to the individual and in order to ensure accuracy in the penal system … the legal designation of an offence should fairly represent the nature of the offender's criminality."[55]

2.22 In the context of homicide, the offender label "murderer" carries a major stigma.[56] To be labelled a "killer" or "someone guilty of homicide" is bad enough, but those labels reflect a great range of circumstances, including killings viewed by the public with some degree of understanding or fellow-feeling.[57] But the label "murderer", applying as it does to killings attracting widespread horror, revulsion and moral opprobrium,[58] is a particularly powerful label expressing society's total condemnation.

2.23 Not only does a conviction of the crime of murder attract major stigma, but it also attracts a *mandatory* life sentence,[59] whereas the crime of culpable homicide does not.[60] As the law stands, therefore, the difference between murder and culpable homicide is (a) enormously important, (b) dependent upon an assessment of the mental element in homicide,[61] and (c) often illustrative of a fine dividing line.[62]

Key Questions

2.24 The following key questions arise:

- Are there criticisms and calls for change in relation to the bipartite structure of Scots homicide law?
- If so, what; and are they valid?
- If there are valid criticisms and calls for change:

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[54] A Ashworth, "The Elasticity of *Mens Rea*" in CFH Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981) at p 53; G Williams, "Convictions and Fair Labelling" (1983) 42 CLJ 85.
[55] *Op cit* p 56.
[56] Symbolising a strong degree of condemnation by society. The Law Reform Commission of Ireland concluded that the term should be reserved for the most heinous or culpable killings (Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) at paras 1.01 and 1.06).
[57] Juries' reluctance to convict an offender in a fatal road traffic incident as a "murderer" is perhaps an example of such public opinion.
[58] Examples might include the Alesha MacPhail murder (abduction of a 6-year-old girl when she was asleep in her grandparents' home in Bute, followed by abuse and murder); the Kriss Donald murder (abduction of a 14-year-old boy in Glasgow, with a prolonged period of abuse and torture before he was murdered); the Limbs in the Loch murder (a young man working as a supermarket shelf-stacker was befriended after a social event, taken to the perpetrator's home, murdered and hacked into pieces, his remains being found at various locations in Scotland including the head on Barassie Beach, and limbs in Loch Lomond); the World's End murders (the notorious serial killer who murdered two young women but escaped detection for over 30 years).
[59] See ch 1, para 1.30.
[60] Although an order for lifelong restriction (formerly a discretionary life sentence) may be imposed.
[61] An assessment carried out by a jury of lay persons, in some (but not all) cases assisted by expert psychiatric or psychological evidence.
[62] See para 2.14.

- 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?

- would those new statutory provisions have the effect of improving Scots homicide law?

2.25 These questions inform the discussion that follows. We ask the same questions of consultees at the end of this chapter.

Criticisms of the current structure

2.26 Recently, there have been some criticisms and calls for change in relation to the current structure of Scots homicide law.

2.27 Professor Lindsay Farmer argues that the current structure of Scots homicide law classifies too many killings as "murder".[63] The crime of murder should be reserved for the most serious killings, with less grave killings being prosecuted as culpable homicide.[64] He suggests that one possible solution would be to move away from reliance solely on the mental element (*mens rea)* as the means of differentiating between murder and culpable homicide, and instead to use both *mens rea* and *actus reus* (the fatal act itself and the surrounding circumstances). Different types of act could be classified as, for example, killing for pleasure, for sexual gratification, for greed, killing cruelly or by stealth, killing in a way which posed a danger to the public, or killing in order to cover up another crime.[65] These types of killing would be the most serious, attracting a mandatory life sentence. Further useful contextual factors might include whether the killing was in public or in private; or in a domestic context or in the course of domestic abuse; or whether the killer was a serial killer; or whether there had been an alcohol- or drug-induced rage. The *actus reus* could offer an opportunity to differentiate between killings.[66]

2.28 An alternative solution would be to narrow the definition of the type of murder which would attract the mandatory life sentence. The Law Commission of England and Wales (LCEW) had recommended such an approach when proposing first and second degree murder, the latter of which permitted the court to impose such sentence as it saw fit, rather than being obliged to impose a mandatory life sentence.[67]

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[63] Professor L Farmer, "Structuring Homicide: A Broad Perspective" (Joint SLC, University of Strathclyde and University of Glasgow Seminar, 26 October 2018) available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/. Professor Farmer referred to statistics drawn from a selection of 6 European states demonstrating that Scotland has the highest percentage of life prisoners per head of population.

[64] Cf G Binder, "Homicide" in MD Dubber and T Hornle (eds), *The Oxford Handbook of Criminal Law* (2014) p 725: "Most homicide does not result from a conscious decision to kill … Moreover the fatal conduct we judge most antisocial is not necessarily the conduct committed with most deliberation."

[65] Illustrations based on the German Criminal Code, s 211.

[66] Gordon, however, states that, if the use of "lethal weapons" is itself sufficient to constitute the *mens rea* of murder, then in his view, they are "unsatisfactory". For one thing, he notes, the term "lethal weapon" is not helpful as murder can be committed by kicking or punching without the use of any weapons at all. Gordon submits that the correct question to ask is not "Did A use a lethal weapon?" but "Did A act with wicked recklessness?" in relation to the particular set of events charged: G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017) para 30.23.

[67] Law Commission, *Murder, Manslaughter and* Infanticide, Law Com No 304 (2006).

2.29 These suggested solutions might result in a "ladder" or "grid" of homicide offences of increasing gravity. Different categories could be defined not solely on the basis of *mens rea,* but with an overview of how serious the offence was.

2.30 Later in his address at the joint SLC, University of Strathclyde and University of Glasgow seminar, Professor Farmer noted further problems with the present structure of Scots homicide law as including the issue of constructive liability[68] and the concept of "voluntary culpable homicide".[69]

2.31 Addressing the same seminar, Professor Claire McDiarmid suggested that, as the single offence of culpable homicide covers a wide range of circumstances, one possible reform to be considered might be the creation of "degrees of culpable homicide". Inevitably, difficult questions would arise: whether the bipartite structure of murder and culpable homicide should be retained; whether the crime of culpable homicide should be re-structured into degrees based on seriousness or blameworthiness; if so re-structured, where on the scale would one place a death happening unexpectedly after an assault,[70] or a death following a risk recklessly taken, or a death where there was a partial defence of provocation or diminished responsibility, or a "mercy killing" where there had been clear intent to kill. There was also a concern that the current partial defences of provocation and diminished responsibility were not adequate in today's society.

What alternative structures are available?

2.32 In the light of these recent criticisms, and as this project seeks to review "the principles underlying and the boundaries between the crimes of murder and culpable homicide; and the mental element required for the commission of each of these offences",[71] it is necessary to consider whether the current bipartite structure in Scots homicide law is fit for purpose in today's society.

2.32 Possible alternatives to the current bipartite structure include:

- One single offence which might be termed "criminal homicide" or "unlawful homicide".
- A multi-tier structure similar to that found in some other jurisdictions[72] and to that recommended by the Law Commission of England and Wales (LCEW): for

[68] Professor Farmer explained that the standard view, taught to students, was that there were two categories of criminal homicide: murder and culpable homicide. The *actus reus* was always the same, namely "Any wilful act causing the destruction of life …" (Macdonald, *Practical Treatise*, p 89). The crimes were differentiated on the grounds of *mens rea,* with a categorisation of ascending seriousness from reckless killings (probability plus foresight) to more serious intentional killings (murder). However Professor Farmer stated that he had problems with such an approach, one reason being the "persistence of forms of constructive liability". He referred to *MacAngus and Kane v HM Advocate* 2009 SCCR 238.

[69] *Drury v HM Advocate* 2001 SCCR 583. He added that the partial defence of "provocation" caused difficulties, and questioned how an intentional killing could be treated as culpable homicide.

[70] For example, a "one-punch" homicide, where the deceased fell after being punched and suffered a fatal head injury.

[71] See ch 1, para 1.19.

[72] Such as the USA and Italy: see Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

example first degree murder, second degree murder, culpable homicide, negligent homicide, and assault causing death.

- Variants of each of the above.

A single offence of "criminal homicide" or "unlawful homicide"?

2.33 One notable jurist who was in favour of a single homicide offence (replacing the two offences of murder and culpable homicide) was Lord Kilbrandon, former Chair of the Scottish Law Commission.[73] In 1975, in an English homicide appeal, he made the following observations:[74]

> "My Lords, it is not so easy to feel satisfaction at the doubts and difficulties which seem to surround the crime of murder[75] and the distinguishing it from the crime of manslaughter. There is something wrong when crimes of such gravity, and I will say of such familiarity, call for the display of so formidable a degree of forensic and judicial learning as the present case has given rise to. I believe this to show that a more radical look at the problem is called for, and was called for immediately upon the passing of the [Homicide Act] 1967. Until that time the content of murder – and I am not talking about the definition of murder – was that form of homicide which is punishable with death … Since no homicides are now punishable with death, these many hours and days have been occupied in trying to adjust a definition of that which has no content. There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment. It is no longer true, if it was ever true, to say that murder as we now define it is necessarily the most heinous example of unlawful homicide …"

2.34 That proposal did not attract support, even from Lord Kilbrandon's colleagues on the bench in the same appeal. Lord Diplock specifically advised against such an approach:

> "I agree with my noble and learned friend, Lord Kilbrandon, that now that murder no longer attracts the death penalty, it would be logical to replace the two crimes of murder and manslaughter by a single offence of unlawful homicide; but there are considerations, in which logic plays little part, which tell against the making of such a change – and as long as one has the two separate crimes, one has to decide on which side of the line any given state of mind falls …"

2.35 Similarly, the authors of the Draft Criminal Code for Scotland[76] did not recommend a single offence of unlawful or criminal homicide. On the contrary, while redefining the crimes of "murder" and "culpable homicide" in sections 37 and 38, they retained the bipartite structure.

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[73] Lord Kilbrandon was Chair of the Scottish Law Commission from 1965 until his elevation to the House of Lords in 1971.

[74] *Hyam v DPP* [1975] AC 55 at 98, where a woman had set fire to the house of her former lover's new fiancée, causing the death of the fiancee's two children. The question was whether this was, in English homicide law (which differs in material respects from Scots homicide law) the crime of "murder", or the crime of "manslaughter".

[75] Importantly, this is a reference to the doubts and difficulties surrounding the crime of murder *as defined in English (not Scottish) homicide law.*

[76] E Clive, P Ferguson, C Gane and A McCall Smith: see fn 16 in ch 1, Introduction.

2.36 The Law Commission of England and Wales (LCEW) in their review of homicide in 2005-2006 did not support the concept of a single offence of "criminal homicide". In the Overview document accompanying their Consultation Paper "A New Homicide Act for England and Wales?",[77] the LCEW noted certain perceived advantages of the single offence structure (namely, the complex law relating to the partial defences of provocation and diminished responsibility might no longer be required, and the practice of "victim blaming"[78] might be reduced), but went on to explain their reasons for rejecting the single offence approach. Their reasons were, first and foremost, the continuing existence of the mandatory life sentence for murder[79] meant that their terms of reference did not permit the creation of a single offence of criminal homicide with a range of sentences. But in any event, the LCEW considered that a person who intentionally kills commits a wrong that is qualitatively different from a person who unintentionally but culpably kills another. They considered that different levels of culpability should be recognised in both labelling and sentencing. Moreover they were not convinced that "victim blaming" would be reduced, as the accused would, in any trial or sentence hearing, seek to demonstrate circumstances and factors which would lessen his own culpability.

2.37 Similarly, the Law Reform Commission of Ireland (LRCI) in their review of homicide in 2008 did not support changing their structure to a single offence of criminal homicide. In their Report "Homicide: Murder and Involuntary Manslaughter",[80] they explained:

> " 1.21 … the majority of submissions were broadly supportive of retention [of the murder/manslaughter distinction] because the labelling of offences is important and labelling is the basis of the distinction between murder and manslaughter. Most consultees believed that the creation of a composite crime would seriously devalue the gravity of murder in the criminal law calendar. Though the reverse could in rare circumstances be the case, the great majority of murders are on their facts substantially more grievous in nature than those relating to most manslaughters and many have a profoundly greater element of blameworthiness.
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> 1.22 Several submissions were also received expressing unease that the creation of a single crime of unlawful homicide would mean that the degree of culpability would henceforth be determined by the sentencing judge instead of by the jury as finders of fact. The result would be an emasculation of the defendant's right to a trial by jury. The Commission also received submissions which questioned whether having a single crime of homicide would in fact lead to shorter trials given that the evidential hearing may simply give way to a lengthy and complex sentencing stage.
>
> 1.23 The Commission is of the view that the murder/manslaughter distinction should be retained."

The LRCI duly made that recommendation.[81]

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[77] Law Commission, *A New Homicide Act for England and Wales? An Overview*, Law Com CP No 177 (2005) paras 1.40 to 1.47.
[78] Where the accused seeks to attribute all or some blame to the deceased, who for obvious reasons is unable to give his or her side of the story. This approach has caused great grief to family and friends of the deceased.
[79] Sentencing was outside the LCEW's remit.
[80] Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008), para 1.21.
[81] *Ibid*, para 1.24.

2.38 One English-speaking jurisdiction which might appear, on the face of it, to have adopted a type of "single offence" approach is New Zealand.[82] Section 160 of the Crimes Act 1961 gives an all-inclusive definition of *any* unlawful killing as "culpable homicide". However by section 167 it is provided that:

> "Culpable homicide is *murder* in each of the following cases [emphasis added]:
>
> (a) if the offender means to cause the death of the person killed;
>
> (b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not;
>
> (c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he or she does not mean to hurt the person killed;
>
> (d) if the offender for any unlawful object does an act that he or she knows to be likely to cause death, and thereby kills any person, though he or she may have desired that his or her object should be effected without hurting anyone."

2.39 In the following section[83] it is provided that culpable homicide is also murder in certain situations, amounting in effect to "constructive malice".[84] Then section 171 states:

> "Except as provided in section 178 [infanticide], culpable homicide not amounting to murder is *manslaughter* [85][emphasis added]."

2.41 Thus, New Zealand homicide law divides the broad term "culpable homicide" (which is not, in and of itself, an offence) into a general category which captures murder and manslaughter, and into a separate category which captures infanticide.

2.42 In effect therefore, New Zealand may be regarded as having retained the distinction between murder and manslaughter (culpable homicide).

2.43 Finally, the practitioners whom we consulted[86] did not suggest that the Scots law of homicide should be reformed by replacing the two crimes of "murder" and "culpable homicide" with a single offence of "unlawful homicide" or "criminal homicide".[87]

A multi-tier structure?

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[82] See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[83] Crimes Act 1961, s 168.
[84] See the discussion concerning murder and constructive malice in ch 4, Murder.
[85] Essentially making manslaughter a residual offence, as is its equivalent in Scotland (namely culpable homicide).
[86] Ie the limited number of practitioners who participated in our informal consultations and the members of our Advisory Group.
[87] Although it should be noted that they were not asked that specific question.

2.44 In 2005, the Law Commission of England and Wales (LCEW) was requested by the UK Government[88] to review the law of murder. The terms of reference were as follows:

> "To review the various elements of murder, including the defences and partial defences to it, and the relationship between the law of murder and the law relating to homicide (in particular manslaughter). The review will make recommendations that:
>
> - take account of the continuing existence of the mandatory life sentence for murder;
> - provide coherent and clear offences which protect individuals and society;
> - enable those convicted to be appropriately punished; and
> - be fair and non-discriminatory in accordance with the European Convention on Human Rights and the Human Rights Act 1998."

2.45 On 29 November 2006, the LCEW published its Report entitled "Murder, Manslaughter and Infanticide".[89] The Report recommended replacing the existing homicide law structure[90] with a multi-tier structure as follows:

1. First degree murder (where the court would have no option but to impose a mandatory life sentence), to encompass:
    - intentional killings, and
    - killings with the intent to do serious injury where the killer was aware that his or her conduct involved a serious risk of causing death.[91]
2. Second degree murder (where the court could impose a range of sentences, the maximum sentence being a discretionary life sentence), to encompass:
    - killings intended to cause serious injury; or
    - killings intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death; or
    - killings intended to kill or to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death but successfully pleads provocation, diminished responsibility or that he or she killed pursuant to a suicide pact.[92]

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[88] The Home Office Minister, Fiona MacTaggart. See Law Commission, *A New Homicide Act for England and Wales? An Overview*, Law Com CP No 177 (2005) para 1.2.
[89] See Law Commission, *Murder, Manslaughter and* Infanticide, Law Com No 304 (2006).
[90] Murder; manslaughter; infanticide; and certain specific offences such as assisting suicide and causing death by dangerous driving: see Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006), para 1.12.
[91] *Ibid*, para 2.50.
[92] *Ibid*, para 2.70.

3. Manslaughter (where the court could impose a range of sentences, but any custodial sentence would be a determinate one i.e. a fixed number of years, rather than an indeterminate sentence such as life imprisonment), to encompass:

    - killing another person through gross negligence ("gross negligence manslaughter"); or

    - killing another person through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury ("criminal act manslaughter").[93]

4. Specific homicide offences, such as assisting suicide and infanticide (where again the court could impose a range of sentences, but any custodial sentence would be a determinate one i.e. a fixed number of years, rather than an indeterminate sentence such as life imprisonment).[94]

2.46 In the Overview document which accompanied their earlier Consultation Paper "A New Homicide Act for England and Wales?"[95], the LCEW explained an important policy decision underlying their recommendations in their subsequent Report, as follows:

> "5.9 … As will become apparent, we are provisionally proposing that other forms of killing [ie ultimately,[96] killings *other than* (i) those where the offender *intended to kill* and (ii) unlawful killings committed with an *intent to do serious injury where the killer was aware that his or her conduct involved a serious risk of causing death*] that are currently classified as murder should be classified as 'second degree murder' …"

2.47 The reasons underlying the recommendations are set out in the Overview document and the Report.[97] Those reasons include: difficulties experienced with the concept of "malice aforethought" in the English definition of murder;[98] the intention of Parliament (when enacting the Homicide Act 1957) failing to be reflected in current homicide law;[99] a "higgledy-piggledy" development of the law;[100] uncertainty as to the meaning of both "intention" and "serious" harm;[101] judicial and Parliamentary reluctance to create new defences where they were needed[102] with the result that the existing defences reflected some odd values;[103] and the

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[93] *Ibid*, para 2.163.
[94] *Ibid*, paras 7.42 and 8.23.
[95] Law Commission, *A New Homicide Act for England and Wales? An Overview*, Law Com CP No 177 (2005).
[96] Initially the LCEW designated as first degree murder those cases where there was (i) intention to kill; ultimately in their Report they included as first degree murder those killings in category (ii), ie "unlawful killings committed with an intent to do serious injury where the killer was aware that his or her conduct involved a serious risk of causing death."
[97] Law Commission, *Murder, Manslaughter and* Infanticide, Law Com No 304 (2006): see fns 67 and 79 above.
[98] Law Commission, *A New Homicide Act for England and Wales? An* Overview, Law Com CP No 177 (2005) paras 1.13 to 1.14.
[99] *Ibid*, paras 1.15 to 1.18.
[100] As a product of judge-made law supplemented by Parliament's sporadic interventions, resulting in a lack of clarity and coherence: *ibid*, para 1.19.
[101] *Ibid*, paras 1.21 to 1.22.
[102] *Ibid*, paras 1.24 to 1.26.
[103] *Ibid,* para 1.26: "For example, the partial defence of provocation may enable a person to be convicted of manslaughter rather than murder if he or she kills as a result of losing his or her temper when insulted. By contrast, a person who kills in response to a threat of serious unlawful violence is guilty of murder if he or she uses what is

concept of more flexible sentencing for murder.[104] The overall problem was summarised[105] as follows:

> "1.28 The law of England and Wales categorises homicide offences in a very blunt rudimentary fashion. There are only two general homicide offences: murder and manslaughter. The majority of unlawful homicides have to be slotted into one or the other offence. As a result, each offence has much work to do, accommodating a wide range of behaviour displaying very different levels of criminality …
>
> 1.30 Manslaughter is of even wider scope than murder. In 1992 Lord Chief Justice Geoffrey Lane said of the offence, 'it ranges in gravity from the borders of murder right down to those of accidental death' …"

2.48 It was pointed out, in effect, that homicide offences involving very different levels of culpability resulted in the same conviction label.[106] It was hoped to provide a new homicide law structure in which:

- homicide offences were graded in a way that accurately reflected different levels of criminality;
- each offence was clearly defined;
- once graded, different offences were properly and fairly labelled;[107]
- there were clearly defined defences of the right kind and the right scope; and
- sentences appropriate for the different levels of criminality were available (including sentences for murder which were not necessarily the mandatory life sentence).

2.49 The recommendations made by the LCEW have not been taken forward in legislation.

2.50 In 2008, the Law Reform Commission of Ireland (LRCI) published a report on the law of homicide, *Homicide: Murder and Involuntary Manslaughter.*[108] As in England and Wales, the existing homicide structure comprised murder and manslaughter.[109] One main concern was a view that the definition of "murder" as set out in the relevant Irish statute[110] was too

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considered to be unreasonable force. No partial defence is available": cf a similar problem in Scots homicide law, discussed in ch 8, Specific issues in relation to self-defence.

[104] In other words, an ability to impose a sentence other than a life sentence.

[105] Law Commission, *A New Homicide Act for England and Wales? An Overview*, Law Com CP No 177 (2005) para 1.28 and following paragraphs.

[106] This is a paraphrase of the relevant passages in the Overview document; see too *ibid*, para 5.1: "In Part 1 we said that the fundamental weakness of the law of homicide is that its structure is not designed to ensure that different levels of criminality are accurately graded and labelled. In this Part we set out and explain the framework that we are provisionally proposing for grading and labelling homicide offences."

[107] Nevertheless, as pointed out in para 1.33: "… the grading and labelling of offences is not a science. People of reasonable opinions can and do take a different view as to whether one form of killing should be placed in the same or a different category from other forms of killing. Where the lines are to be drawn between the different categories is only in part a matter of legal reasoning. Ultimately, it is a matter of political judgment informed by public debate."

[108] Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008), preceded by two consultation papers published in 2001 and 2007.

[109] Although again, as in England and Wales, there is an additional homicide offence of "infanticide".

[110] The Criminal Justice Act 1964, s 4.

narrow. It was thought that there were morally culpable killings which ought to be punished as murder, but which fell outside the Irish statutory definition. One option considered was the widening of the definition of murder.[111] Another option considered was the creation of a multi-tier structure along the lines recommended by the Law Commission of England and Wales.[112] However the LRCI rejected a multi-tier option, commenting as follows:

> "3.37 On the possibility of introducing a new homicide structure based on degrees of culpability which was raised by numerous consultees, the Commission notes that the Law Commission of England and Wales recommended a fundamental restructuring of the law of homicide in 2006. The Law Commission envisioned a ladder-like configuration of homicide with first degree murder at the top of the ladder attracting a mandatory life penalty. [The LRCI then set out the recommended definitions of first degree murder and second degree murder.[113]]
>
> 3.38 The Commission [ie the LRCI] is of the view that it would be too radical a move to restructure homicide along the lines of the proposals of the Law Commission of England and Wales. The Commission believes in taking the law and the system that we have and working with it, refining aspects of it where necessary. It would be unwise to jettison the current configuration of homicide for something entirely new and unknown such as a degree structure.
>
> 3.39 Nonetheless, the Commission wishes to ensure that the most heinous killings fall within the category of murder, whether they are committed intentionally or with reckless indifference to the value of human life. The Commission therefore remains of the view that the fault element for murder should be broadened to embrace reckless killing manifesting an extreme indifference to human life.
>
> **(g) Report Recommendation**
>
> 3.40 *The Commission recommends that the fault element for murder be broadened to embrace reckless killing manifesting an extreme indifference to human life.*"

2.51 Thus Ireland did not adopt the restructuring outlined in the proposals of the Law Commission of England and Wales.

2.52 Similarly the authors of the Draft Criminal Code for Scotland did not advocate such a structural change.[114] While defining intention, recklessness, knowledge, murder and culpable homicide[115] the Draft Code does not seek to alter or replace the essential bipartite structure of Scots homicide law. The authors do not criticise that bipartite structure, or suggest that there might be benefit in replacing it with either (i) a single offence of "criminal homicide", or (ii) a multi-tier structure such as that found in Italy, the USA and Australia, or as proposed by the recommendations of the Law Commission of England and Wales.

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[111] To include, for example, the formulation of "extreme indifference to the value of human life": see Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008), Introduction, para 4.
[112] *Ibid,* para 5, referring to Law Commission, *Murder, Manslaughter and* Infanticide, Law Com No 304 (2006).
[113] See para 2.45 above.
[114] E Clive, P Ferguson, C Gane and A McCall Smith (see fn 16 in ch 1, Introduction).
[115] The Draft Code definitions are discussed in ch 4, Murder, and ch 5, Culpable homicide.

2.53 Finally, the practitioners whom we consulted[116] did not suggest that Scots homicide law would benefit from replacing the bipartite structure with a multi-tier structure.[117] In practice, the bipartite structure has given rise to few difficulties. Juries rarely request repeat instructions from the judge about the division into two categories of offence, namely murder and culpable homicide.[118] The majority of practitioners did not favour the introduction of further prescriptive grades of homicide, the only change suggested being in the context of cases where a partial defence had been advanced[119] and the jury ultimately opted for culpable homicide rather than murder: there, it might be helpful to have the verdict returned with a rider[120] such as "by reason of provocation".[121] Practitioners enumerated possible disadvantages of more detailed and prescriptive gradations of homicide as follows:

- Difficulty in obtaining the appropriate majority verdict if too many options were available to the jury. A prescriptive "ladder" of grades of homicide might result in an inability to achieve agreement of eight out of fifteen members of the jury.[122]
- Reduced scope in the jury's exercise of judgment and discretion in reaching a verdict.
- Difficulties for the prosecutor if offered a lesser plea (say "second degree murder") when, arguably, the evidence might, but might not, establish first degree murder. For example, there could be serious problems when explaining the acceptance of such a reduced plea to the deceased's bereaved family.

2.54 As noted in paragraph 2.2 above, and in our paper "Homicide Laws in Other Jurisdictions",[123] several jurisdictions currently have a multi-tier structure giving precise definitions of different levels of gravity in the crime of homicide. Examples include Italy, the USA, and Australia.

2.55 In the context of Italy[124] and the USA,[125] two particular features should be noted. First, in Italy, where the law of homicide is entirely codified, containing five specific categories of

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[116] Ie the practitioners participating in our informal consultations and our Advisory Group.
[117] One interviewee pointed out that Scots homicide law in effect already has a five-category structure, namely intentional murder, wicked reckless murder, culpable homicide where the *mens rea* fell short of murder, culpable homicide by provocation, and culpable homicide by diminished responsibility. The interviewee pointed out that further fine tuning of culpability and mitigation could be acknowledged and reflected in sentencing.
[118] Juries cannot be asked about their verdicts (Contempt of Court Act 1981, s 8 as amended by the Criminal Justice and Courts Act 2015), but practitioners explained that they inferred understanding from (i) the lack of questions from the jury about the concepts of "murder" and "culpable homicide", in contrast with the more frequent questions concerning "concert", "the Moorov doctrine:, and "corroboration"; and (ii) the generally sensible and apparently evidence-based jury verdicts in homicide cases. There were few successful appeals in terms of the Criminal Procedure (Scotland) Act 1995, s 106(3)(b) on the ground that the verdict was one which "no reasonable jury, properly directed, could have returned".
[119] Ie provocation or diminished responsibility: see chs 10 and 11.
[120] Ie additional words added to the charge in the indictment.
[121] Which would provide a useful insight into the jury's mind in any subsequent sentencing or appeal procedure.
[122] The necessary number for a majority verdict.
[123] Available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[124] Which has five categories, namely homicide, aggravated homicide, pre-intentional homicide, negligent homicide, and homicide as a consequence of another crime.
[125] See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/: there may be first, second, and third degree murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, and other levels of homicide crime.

homicide with matching penalties, the court judging the case[126] comprises two professional judges and six lay jurors. The judges and jurors deliberate together when deciding both guilt and sentence, and must give written reasons for their decisions.[127] Thus the lay persons in the jury have professional guidance throughout proceedings.[128] Secondly, in the context of the multi-tier homicide law of states in the USA, Professor Horder has suggested that plea-bargaining is such a regular occurrence in homicide trials in the USA that the more complex structure of homicide law rarely reaches a jury for their decision.[129]

2.56 In the context of Australia, some Australian states have a three-tier structure, comprising murder, manslaughter and an offence known as "assault causing death", the latter being a "single-punch" type killing where specific legislation has discarded elements of intention and foreseeability, and simply described the act as "an offence" or "a crime".[130]

2.57 If a multi-tier structure were to be considered for Scotland, possible templates might include murder, culpable homicide, negligent homicide, and assault causing death; or first degree murder, second degree murder, culpable homicide, negligent homicide, and assault causing death; or other variations.

2.58 However we consider that when contemplating the creation of a multi-tier structure in Scots homicide law, several caveats should be borne in mind.

- *The possible devaluation of the heinous crime of murder*: A new multi-tier structure would require to be defined by statute. If a "first degree murder, second degree murder" approach was adopted, definitions of first degree and second degree murder would be required. Such statutory definition might be perceived as diluting and devaluing the most heinous crime of murder. Likewise, if a new category of offence called "assault causing death" were to be created by statute, that also might be perceived as resulting in a dilution and devaluing of murder.

- *Additional difficulties for trial judges charging juries*: Clarity, brevity and simplicity should be the goals of any trial judge's oral charge to the jury. In Lord Hope's words, directions should be "both clear and simple, [and] should be expressed in as few words as possible. That is essential if it is to be intelligible."[131] Lord Goff agreed, commenting that "in directing juries on intention to kill, judges should not have to embark on complicated dissertations about foresight of consequences and such like."[132] A multi-tier structure requiring explanations concerning first degree

[126] The Corte d'Assise.
[127] These are features very different from the Scots trial system, where the 15 jurors are intentionally isolated from the judge, receiving guidance only from counsel's speeches (both prosecution and defence), and directions in law from the judge. A Scots jury does not have to give reasons for the verdict, an aspect of the Scottish jury system which was challenged (unsuccessfully) in Strasbourg as being a breach of the European Convention on Human Rights, Art 6: see *Judge v UK Application No 35863/10,* 2011 SCCR 241.
[128] The professional judges should, it is hoped, be better placed than lay persons to understand and apply a more complex multi-tier structure. The influence exerted on members of the jury by a legally trained professional judge might be thought to be considerable.
[129] Professor J Horder, "Issues in Reforming Homicide Law: The English Experience" (Joint SLC, University of Strathclyde and University of Glasgow Seminar, 26 October 2018) available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[130] See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[131] *R v Woollin* [1999] 1 AC 82, at p 97.
[132] Lord Goff, "The Mental Element in the Crime of Murder" (1988) 104 LQR 30, at p 57.

murder, second degree murder, and culpable homicide, and the necessary majority required before the jury could return a verdict, would add to the length and detail of a judge's charge, and might compromise its intelligibility. There is also a risk that any additional complexity might give rise to greater scope for error in a judge's charge, possibly leading to an increase in the number of appeals based on judicial misdirection (which, if successful, might lead to re-trials with the disadvantages of additional expense and, perhaps more importantly, stress and anxiety for victims and witnesses who have to give their evidence again, and for the accused).

- *Increased complexity in juries' deliberations*: As the LCEW recognised in its Report,[133] in a section headed "The three-tier structure and 'split' juries", members of a jury might be "irreconcilably split over the question whether [the accused] had the fault element for first degree murder or only the fault element for second degree murder". In the Report, there is acknowledgement that such circumstances might lead to procedures involving discharging the jury from the obligation to give a verdict of first degree (and/or second degree) murder, asking the jury to consider an alternative verdict such as second degree murder or manslaughter, or ultimately (when such measures prove unsuccessful for one reason or another) holding re-trials with all that this would entail, such as delay; distress and trauma for witnesses, families of victims, and the accused; and additional burdens and costs for the justice system.

- *Limitations on the jury's decision-making power:* Many would argue that delegating the judging of a homicide to a panel of fellow-citizens (rather than to a bench of professional lawyers) is one of the essential features of an advanced and civilised society.[134] Juries are widely considered to have a sure feel for what is "right" and what is "wrong" in contemporary society. To dictate prescriptive categories such as first degree murder and second degree murder might be thought to fetter a jury's powers inappropriately. An important margin of flexibility might be lost.[135]

- *Increased number of appeals challenging a jury decision:* If a statute were to define first and second degree murder, and culpable homicide,[136] it is possible that there might be an increase in the number of appeals challenging a jury's decision, on the basis that the evidence did not support the new legal definition in the statute. Such a development might have a prejudicial effect on the resources and costs of the justice system.

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[133] Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) paras 2.117 to 2.121.

[134] See, for example, R Kage, *Who Judges? Designing Jury Systems in Japan, East Asia, and Europe* (2017); R Renucci QC, the then President of the Scottish Criminal Bar Association, responding to a government proposal to have trials without juries during the Coronavirus crisis in 2020, and reported in the Scottish Legal News, Tuesday 31 March 2020 where he referred to Scotland as "a modern and forward thinking democratic country which values its traditions and its citizens' fundamental human rights", and deprecated any temporary departure from the 600 years of "the fundamental principle of the right of … citizens charged with serious offences to a trial by a jury of their peers within a reasonable time".

[135] See G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017) para 30.21; Lord Goff, "The Mental Element in the Crime of Murder" (1988) 104 LQR 30; C McDiarmid, "Something Wicked This Way Comes: The Mens Rea of Murder in Scots Law" (2012) 4 Jur Rev 283.

[136] Adopting the same degree of specification as that demonstrated in the recommendations made by the LCEW, set out in para 2.45 above.

- *No tradition of negligent homicide:* Scotland has no precedent or tradition of prosecuting "negligent homicide" as a crime which can be committed by a natural person,[137] in contrast with the homicide laws of, for example, Australia and the USA. Australia has the offence of "criminal negligence manslaughter", defined as involving "such a great failing of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow, that the doing of the act merited criminal punishment".[138] In the USA, the California Penal Code (CPC), Model Penal Code (MPC) and New York Penal Code (NYPC) each have a negligent homicide offence.[139]

Discussion

One single offence of "unlawful homicide"

2.59 As noted in paragraph 2.33 above, in *Hyam v DPP,* following upon the abolition of the death penalty, Lord Kilbrandon pointed out that the crimes of murder and manslaughter could be abolished, and a single crime of "unlawful homicide" substituted.[140] He accepted that cases would vary in gravity, but that could be taken care of by a variety of sentences from life imprisonment downwards. He observed that some manslaughter offences are more heinous than some murder offences.

2.60 As the Scots law of homicide has an equivalent bipartite structure (murder and culpable homicide), Lord Kilbrandon's comments apply with equal force in Scotland.

2.61 However, in the same case of *Hyam,* Lord Diplock advised against such a course, citing "considerations, in which logic plays little part, which tell against the making of such a change".[141]

2.62 Moreover the Law Commission of England and Wales (LCEW) did not recommend reforming homicide to a single homicide offence, for several reasons noted in paragraph 2.36 above. Those reasons are equally valid in this reform project. First, as noted in Chapter 1, Introduction, paragraph 1.30, sentencing does not form part of our remit. The mandatory life sentence for murder continues. We are unable therefore to recommend a single offence of

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[137] A UK statute, The Corporate Manslaughter and Corporate Homicide Act 2007, created the offence of "corporate homicide".That is an offence arising from a form of negligence, namely "gross breach of a relevant duty of care owed … to the deceased"; but the Act applies only to corporate entities (such as limited companies, government departments, police forces, partnerships, trade unions and employers' associations that are employers: s 1 and sch 1). The Act does not apply to natural persons. There appear to have been no prosecutions in Scotland under the 2007 Act, although there have been prosecutions in England and Wales: see S Field, "Ten Years On: The Corporate Manslaughter and Corporate Homicide Act 2007: Plus Ca Change?" (2018) 29(8) ICCLR 511, Table 1. There are thought to be considerable problems in enforcing the Act. In Scotland, private members' bills have sought to address those problems by re-defining culpable homicide: a Bill in 2014 proposed by Richard Baker MSP was unsuccessful. The Culpable Homicide (Scotland) Bill, proposed by Claire Baker MSP, sought to have corporate wrongdoers treated with the same level of gravity and moral opprobrium as an accused in a homicide trial. The bill fell at Stage 1 on 21 January 2021: for more detail see ch 5, Culpable homicide, fn 24.

[138] *Nyadam v The Queen* [1977] VR 430 at 444-445. See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[139] Defined in the CPC as "the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The MPC and the NYPC have lengthier definitions: see Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[140] *Hyam v DPP* [1975] AC 55.

[141] *Ibid,* at p 96.

criminal homicide with a range of sentences. In any event, we agree with the LCEW that different levels of culpability should be recognised in both labelling and sentencing. We do not accept, for example, that a vicious killing involving abduction and torture should attract the same label as a "single punch with unfortunate consequences" killing. We endorse the view that a person who intentionally kills commits a wrong that is qualitatively different from a person who unintentionally but culpably kills another. As for "victim blaming", we are not persuaded that this would be reduced by the creation of a single offence of criminal homicide and the disappearance of partial defences of provocation and diminished responsibility. On the contrary, it seems to us that during both trial and sentencing, the accused would seek to place before the court any feature of the event which would assist in reducing his culpability, including blaming the deceased.

2.63 Accordingly we do not propose one single offence of "unlawful homicide".

A multi-tier structure

2.64 We accept that some other jurisdictions have a more detailed and prescriptive classification of homicide offences than Scots homicide law.[142] However we consider that any attempt to reclassify the Scots homicide law bipartite structure into a more prescriptive and sophisticated structure (for example, emulating the five-tier structure in Italy, or adopting a "first degree murder, second degree murder, and manslaughter" approach),[143] would have serious disadvantages for Scotland, as set out below.

2.65 First, there would be a very real possibility that a jury of fifteen lay people would be unable to reach the requisite majority for a verdict. The current bipartite structure of murder/culpable homicide, combined with the current choice of three verdicts[144] and the law concerning the necessary majority,[145] is workable. But a prescriptive multi-tiered definition of homicide in such a context would raise the real possibility that the jury might be unable to achieve the necessary consensus and thus unable to reach a verdict.[146] The Law Commission of England and Wales (LCEW) considered this problem in its Report *Murder, Manslaughter and Infanticide*,[147] commenting that:

> " … it is important that the introduction of a three-tier structure to the general law of homicide does not lead to more trials in which juries cannot reach a verdict. More 'split' juries will inevitably entail more re-trials ordered in the hope of finding a jury that can agree."

[142] See para 2.2 above, and Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[143] Such as was recommended in: Law Commission, *Murder, Manslaughter and* Infanticide, Law Com No 304 (2006).
[144] Guilty, not guilty, or not proven.
[145] At least eight must be in favour of guilty of a verdict of "murder" or "culpable homicide".
[146] Thus if the bipartite structure of homicide were to be changed, one possible consequence might be a change in the structure of the bench trying the homicide – possibly to a professional lawyer jury, or at least a mixed jury: cf the bench for homicide trials in Italy, para 2.55 above.
[147] Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) paras 2.117 to 2.121.

2.66 The LCEW pointed out that such a result would increase costs and result in defendants, witnesses and families having to go through the trauma of the trial once again, with no guarantee of a resolution.[148]

2.67 Secondly, a more sophisticated multi-tiered definition of homicide could lead to the judge's oral charge to the jury developing into a complex jurisprudential lecture which would present considerable challenges to lawyers and teachers of law sitting in the jury box, but all the more so for random members of the public cited for jury service. Resort could be had, of course, to written directions, illustrations of routes to verdict, and the use of PowerPoint or other technical assistance;[149] but the content of the charge would remain more complex, despite these aids.

2.68 Thirdly, the dangers of "cherry-picking" certain elements from another jurisdiction should not be underestimated.[150] The Scottish criminal common law system is the distillation of a collective wisdom which has accrued over centuries. Simple principle-based approaches have often been preferred to more complex or prescriptive elaborations. Any attempted adoption of one particular element from another jurisdiction may fail to take into account the other elements in that jurisdiction's homicide law structure.

2.69 Fourthly, the Draft Criminal Code for Scotland, produced in 2003, could be regarded as a "testing of the water" for any drive to reform the law of homicide including the mental element in homicide. But the proposed provisions[151] (a) did not suggest replacing the bipartite structure with any other structure (whether more monolithic, or more multi-tiered); and (b) while attracting considerable interest, have not been taken forward in legislation.[152]

2.70 We also consider that there are positive arguments in favour of retention of the current bipartite structure. In the pure jury context which exists in Scotland, we consider that clarity, simplicity, and flexibility are desirable.[153] It is arguable that the bipartite structure of Scots homicide law achieves those goals. It is a structure understood by lawyers, juries, witnesses, and the public. Importantly, it allows for an appropriate exercise of judgment at several stages. The Lord Advocate and the Crown Office have the task of deciding whether and if so, how, to

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[148] A suggested solution was as follows:

> "2.120 … under a three-tier structure, on a charge of first degree murder, it would be perfectly acceptable in an appropriate case to discharge a jury that cannot agree on a verdict of first degree murder from giving a verdict on that charge. The jury can instead be invited to consider a new count of second degree murder. A similar procedure can be followed in any case where a jury is split on the question whether D [the defendant] had one of the fault elements for second degree murder or only one of the fault elements for manslaughter."

[149] See for example J Chalmers and F Leverick, "Methods of Conveying Information to Jurors: An Evidence Review" (Scottish Government, 2018).

[150] See para 2.4 above.

[151] Referred to in paras 2.35 and 2.52 above, and chs 4 and 5 below.

[152] See E Clive, "Codification of the Criminal Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in honour of Sir Gerald Gordon* (2010) p 54.

[153] Cf the observations in *R v Woollin* [1999] 1 AC 82 (Lord Hope): "I attach great importance to the search for a direction which is both clear and simple. It should be expressed in as few words as possible. That is essential if it is to be intelligible. A jury cannot be expected to absorb and apply a direction which attempts to deal with every situation which might conceivably arise …."

prosecute a homicide. Defence lawyers test the fairness and legal accuracy of the proceedings and safeguard the accused's interests. The trial judge oversees the trial and its procedure, and explains the applicable law to the jury. The jury have the core role of deciding what facts have been established and applying the law as explained by the trial judge. The trial judge has a final important role when sentencing an accused convicted by the jury, and in particular, in the context of culpable homicide, is able to exercise considerable judgment in the sentence imposed, to reflect the degree of culpability.[154] The system of checks and balances enables judgments to be taken at appropriate stages, reflecting as closely as possible the views, values, and conventions of society.

2.71 For all the reasons noted above, we are not currently persuaded that the bipartite structure of Scots homicide law should be changed.

2.72 However, in view of the suggestion noted above[155] that there should be a move away from reliance upon the mental element in homicide and a greater emphasis on the *actus reus,* a question arises whether certain specific homicide offences in Scotland should be classified and defined as murder by statute. For example, in New Zealand killings are automatically "murder" if death occurs in the course of treason, espionage, sabotage, piracy, piratical acts, escape or rescue from prison/lawful custody/detention, sexual violation, abduction, kidnapping, burglary, robbery, and arson.[156] In Canada,[157] killings are automatically "first degree murder" where the victim is "a police officer … or other person employed for the preservation and maintenance of the public peace [or a prison employee] acting in the course of his duties";[158] or where death is caused in the course of an aircraft hijacking, a simple or aggravated sexual assault, threats to a third party or bodily harm, a kidnapping or forcible confinement, or hostage taking.[159] Further examples of such an approach can be found in the German Criminal Code[160] and in certain states in the USA.[161]

2.73 We ask the following questions:

3. (a) Are there valid criticisms and calls for change in relation to the bipartite structure of Scots homicide law?

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[154] Thus the sentence imposed for a "one-punch" homicide may be very different from the sentence imposed for a death caused by a brutal and sustained kicking; and the sentence imposed in respect of a mercy killing involving a hitherto blameless spouse suffering from diminished responsibility (*Gordon v HM Advocate* 2018 SLT 278) may be very different from that imposed where no plea of diminished responsibility could be made.

[155] See para 2.26 and following paragraphs.

[156] Crimes Act 1961, s 168(2). See also Chapter 5, Culpable homicide, para 5.31.

[157] See also Chapter 5, Culpable homicide, para 5.46.

[158] Criminal Code, s 231(4). Framing the offence in this way would enable a murder conviction in cases such as the recent English case of *R v Long, Bowers and Cole* (the PC Harper case) where three people were convicted of manslaughter after a policeman became entangled in a tow rope and was dragged behind a car to his death.

[159] Criminal Code, s 231(5).

[160] German Criminal Code, ss 211 – 216, referred to in the presentation by Professor L Farmer, "Structuring Homicide: A Broad Perspective" (Joint SLC, University of Strathclyde and University of Glasgow Seminar, 26 October 2018) available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[161] For example, in the state of Georgia, a homicide is "first degree homicide by vehicle" if the driver "unlawfully met or overtook a school bus; unlawfully failed to stop after a collision; was driving recklessly; was driving while under the influence of alcohol or drugs; failed to stop for, or otherwise was attempting to flee from, a law enforcement officer; or had previously been declared a habitual violator": AM Trapp, *Vehicular Homicide Laws* (2004). See also Chapter 5, Culpable homicide, paras 5.33 to 5.37.

(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?

2.74 On the basis of our research to date, we have formed a provisional view on the above questions, and are not currently minded to propose any change to the overarching bipartite structure of Scots homicide law (ie the offences of murder and culpable homicide). However in the light of the questions which we ask above, we invite views on this issue, as follows:

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?

Chapter 3 The language of Scots homicide law

Introduction

3.1 The language of Scots homicide law has been criticised. Certain words have been described as old-fashioned, moralistic, emotive, and vague, leading to ill-defined concepts and difficulty and confusion in analysis and application. This chapter sets out the importance of language in the context of the law of homicide; the terminology that has been questioned; the criticisms made; certain changes proposed by the authors of the Draft Criminal Code for Scotland;[1] a brief comparative survey of the language and terminology used in other English-speaking jurisdictions;[2] and finally views expressed by some practitioners involved in homicide trials. We then give some preliminary thoughts, and finally ask consultees whether current homicide law terminology requires reform.

The importance of language in the context of homicide

3.2 As noted in Chapter 2, clear terminology and fair labelling are widely accepted to be necessary in homicide law.[3] As the authors of the Draft Criminal Code for Scotland explain:

> "The appropriate labelling of offences is important. It makes the law more transparent to the public, and also facilitates reference to previous convictions and the recording of statistics."[4]

3.3 Not only is fair labelling important for both offences and offenders, but the language of homicide law should be sufficiently clear to enable concepts to be clearly defined, understood, analysed, and applied.

Key questions

3.4 The following key questions arise:

- Are there criticisms and calls for change in relation to the language of Scots homicide law?
- If so, what; and are they valid?
- If there are valid criticisms and calls for change:

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[1] With a view to achieving both plain English and fair labelling: E Clive, P Ferguson, C Gane, and A McCall Smith, "Draft Criminal Code for Scotland" (2003) p 5; see also ch 1, Introduction, para 1.4 and fn 16.

[2] Representing some of the "English-speaking jurisdictions [which] may have attained greater maturity in their jurisprudence on [the topic of the mental element in murder and culpable homicide in contemporary … law] than Scotland has.": *Petto v HM Advocate* 2011 SCCR 519 para [21].

[3] Ch 2, The structure of Scots homicide law para 2.20 and following paragraphs.

[4] Draft Criminal Code for Scotland, p 5.

- 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?

- would those new statutory provisions have the effect of improving Scots homicide law?

3.5 These questions inform the discussion that follows. We ask the same questions of consultees at the end of this chapter.

The language criticised

3.6 Certain words and definitions in current Scots homicide law have been criticised. They are listed below, in alphabetical order, with dictionary definitions[5] where available:

> *Depraved* (adjective): made bad, deteriorated, perverted, corrupted, especially in moral character or habits.
>
> *Evil* (adjective): bad, harmful; (noun): sin, harm.
>
> *Felonious* (adjective): criminal; of, involving, felony [a noun defined as a "crime of kind legally graver than misdemeanour"].
>
> *Recklessness* (noun): [behaviour] devoid of caution, regardless of consequences, rash; heedless of danger.
>
> *Wicked*: (adjective): sinful, iniquitous, vicious, given to or involving immorality, offending intentionally against the right; spiteful, ill-tempered, intending or intended to give pain, playfully mischievous, roguish.
>
> *Wicked recklessness*: not defined in standard dictionaries. Sir Gerald Gordon offered the definition "recklessness of such a gross type that it indicates a state of mind which falls to be treated as being as wicked and depraved as the state of mind of a deliberate killer".[6]

3.7 It should be noted that, despite specific criticism directed at the words "felonious" and "evil",[7] neither word forms part of current common law definitions of "murder". The word "felonious" is not used at all in modern Scots case law.[8] The word "evil" appears indirectly, in that it defines the *mens rea* of the crime of assault,[9] which is often charged as a precursor of the crime of murder or culpable homicide.[10]

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[5] Mainly brief and "ordinary language" definitions provided by the Concise Oxford Dictionary. The phrase "wicked recklessness" is not defined in standard dictionaries. The reader may wish to consult more detailed dictionaries, including legal dictionaries such as Stroud's Legal Dictionary.
[6] See para 2.6 and fn 22 in ch 2.
[7] See, for example, para [21] of *Petto v HM Advocate* 2011 SCCR 519, quoted in para 1.4 above.
[8] But see Chapter 8, Specific issues in relation to self-defence, para 8.15, fn 22.
[9] The *mens rea* for the crime of assault is "evil intent": Macdonald, p 115; *Lord Advocate's Reference (No 2 of 1992)* 1993 JC 43; cf analysis in TH Jones and I Taggart, *Criminal Law* (7th edn, 2018), paras 9-15 to 9-16.
[10] Some commentators categorise a killing following an assault where the perpetrator lacked the *mens rea* for murder as "unlawful act culpable homicide": see para 2.3, fn 12, above.

Criticisms and calls for change

3.8 In *Petto v HM* Advocate[11] Lord Gill commented:[12]

> " … [i]n Scotland, we have a definitional structure in which the mental element in homicide is defined with the use of terms such as wicked, evil, felonious, depraved and so on, which may impede rather than conduce to analytical accuracy …"

3.9 Lord Gill paid tribute to the work carried out by the authors of the Draft Criminal Code for Scotland, but nevertheless concluded that Scots homicide law remained burdened by unsatisfactory definitions, and by legal principles which were inconsistent and confused.[13] He referred to the greater maturity which may have been achieved by other English-speaking jurisdictions.

3.10 Lord Goff of Chievely, in his address "The mental element in the crime of murder",[14] commended Scots homicide law generally, but had one reservation concerning the concept of "wicked recklessness" (the second branch of the definition of murder). As he put it:

> " … I must confess however that, having regard to the emotional content of the adjective 'wicked', and the ambiguity inherent in 'recklessness', I would prefer to describe the concept as *indifference to death* [emphasis added]. But that is just a matter of words …".[15]

3.11 In Gordon, *Criminal Law*,[16] the terminology of Scots homicide law is described as "circular", dependent upon "a moral judgment … [a] moral consideration rather than … the application of a legal definition", making the law "vague and impossible to state in general terms". The conclusion is that there is "an absence of an academically satisfactory definition of murder":

> "There are … two distinct forms of the *mens rea* of murder: wicked intent to kill and wicked recklessness. To say that, 'A is guilty of murder when he kills with wicked recklessness' means only 'A is guilty of murder when he kills with such recklessness that he deserves to be treated as a murderer'. The main claim to acceptance which this *circular formula* has is that it recognises that when it comes to a choice between murder and culpable homicide, the result does not depend on mathematical assessments of probability measured against the standard of reasonable foreseeability, but depends on a moral judgment which, so far as capital murder was concerned, and the law grew up when all murders were capital, could be summed up in the question: 'Does A deserve hanging?' It may be quite fitting that a murder conviction should in the end of the day depend on this kind of moral consideration rather than on the application of a legal definition of *mens rea*. It makes for great flexibility and makes it possible for both the court and the Crown to substitute culpable homicide for murder in cases where the strict letter of the law would not allow this were murder to be defined without reference to wickedness. *On the other hand, it makes*

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[11] 2011 SCCR 519.
[12] At para [21].
[13] 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".
[14] (1988) 104 LQR 30.
[15] *Ibid*, at p 58.
[16] G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017) para 30.21.

> *the law vague and impossible to state in general terms.* One cannot say that a certain degree of carelessness in a fatal assault always makes it murder, one must look to all the circumstances of each particular case and ask whether they display such wickedness as to make a conviction for murder appropriate. *The absence of an academically satisfactory definition of murder* is, however, perhaps but a small price to pay for the practical advantages of flexibility [emphases added]."[17]

3.12 Further, in his commentary on the case of *Elsherkisi v HM Advocate,*[18] Sir Gerald Gordon observed:

> "Speaking of 'wickedness', it is surely remarkable that the High Court still relies on concepts such as wickedness and 'dole' as propounded in a textbook[19] which, however eminent and indeed brilliant, was written over two centuries ago:[20] cf the Lord Justice Clerk's comments in the recent case of *Petto v HM Advocate* [2011] HCJAC 79; 2011 SCCR 519, and Gordon's *Criminal Law* (3rd edn), para 7.05."

3.13 Professor Claire McDiarmid recognised the vagueness inherent in the use of the term "wicked" in a legal definition. However, she noted that whilst not ideal, the word "wicked" conveyed some of the powerful, non-technical attitudes to murder:

> "As a word to describe a mindset, 'wicked' is vague and carries overt - and, to some extent, archaic – moral connotations. For the reasons for which certainty is important, incorporating such a vague term into a legal definition may provide too much scope for interpretation. Nonetheless, this search for certainty presupposes that other words have a plain meaning which is unchanging and universally understood. In the legal context, this is not necessarily the case. (Simple) recklessness itself, for example, may be interpreted subjectively or objectively … 'Wicked', then, is not ideal if we wish to attach a succinct and unambiguous meaning to a state of mind. It does, however, convey something powerfully expressive of some non-technical attitudes to murder, in a more symbolic sense and, since all legal terms are open to interpretation by courts, its relative indeterminacy is not an absolute bar to its use."[21]

3.14 Michael Christie[22] comments that the word "wicked" is an emotive term, and also one which is used in everyday language, which might encourage juries to treat matters broadly, reaching a verdict on the basis of what they considered to be wicked, irrespective of the trial judge's directions in law.[23]

3.15 When discussing "wicked recklessness", and suggesting that the phrase needs to be replaced with something a little more focused, Victor Tadros[24] observes:

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[17] *Ibid*.
[18] 2011 SCCR 583.
[19] Hume, *Commentaries*.
[20] The first edition of Hume having been published in 1797.
[21] C McDiarmid, "Something Wicked This Way Comes: The *Mens Rea* of Murder in Scots Law" (2012) 4 Jur Rev 283, at pp 289 and 290.
[22] MGA Christie, "The Coherence of Scots Criminal Law: Some Aspects of *Drury v HM Advocate*" (2002) 6 Jur Rev 273 at pp 283-284.
[23] A concern shared by PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 9.16.3.
[24] V Tadros, "The Scots Law of Murder" in J Horder (ed) *Homicide Law in Comparative Perspective* (2007) at pp 205-206.

> " … Where crimes are differentiated by degree, it is important that those declarations reflect morally significant features of the killing. An overly strict set of rules distinguishing between murder and culpable homicide will inevitably fail to achieve that.
>
> … it ought to be required that the jury, in determining whether the accused fulfilled the mens rea of the offence, consider whether the recklessness of the defendant was sufficiently grave …
>
> However, the way in which this is achieved in Scots law is problematic. The term 'wicked' in itself does little to guide the jury in their decision-making and the 'definition' of wicked recklessness is confusing and ragged, leading to evidential problems … It should not be imagined that it would be appropriate to constrain too much the discretion of the jury in determining the question. There are a number of factors that may be relevant in determining whether a killing ought to be classified as a murder or a culpable homicide. More precision in the law of England and Wales leads to the offence of murder being both under- and over-inclusive. But if the terms to be used are vague, they should at least allude to the appropriate kinds of grounds on which the question should be determined.
>
> Here I suggest two possibilities. One is that the accused should be guilty of murder if he acts 'believing that he was exposing another to mortal danger'. Another is that he would be guilty of murder if he *heinously* exposed another to the risk of death. Each of these possibilities includes reference to the risk of death, which is appropriate for the law of murder, and respects the correspondence principle, which is appropriate for an offence as serious as murder. Both attempt to retain the focus on recklessness whilst making clear that merely acting in a way that creates a higher than normal risk of death would be insufficient. Furthermore, both are clearly focused on the nature of the risk-taking in a way that the term 'wicked recklessness' is not. Hence, some of the questions of motive that seem to have created confusion in Scots law are excluded. Of course, the terms are by no means precise and the jury would retain a relatively high degree of discretion. But, given the range of considerations that affect the gravity of a killing, it is difficult to avoid that without warranting inappropriate categorisation in some cases."

The Draft Criminal Code for Scotland

3.16 The authors of the Draft Criminal Code for Scotland (2003)[25] emphasised the importance of fair labelling, and commended the use of "plain English [in] a simple, readable and consistent style".[26] They suggested certain specific redefinitions, as follows:

- The concept of "wicked recklessness" (the second branch of the classic Macdonald definition of murder) should be replaced by the concept of "callous recklessness".[27] While not explicitly criticising the word wicked, they comment:

  > " … 'Callous' describes well the type of recklessness required. It must be more than ordinary recklessness. It must involve a callous acceptance of the risk of

[25] See fn 1 in this chapter, above. Relevant excerpts from the Draft Criminal Code can be found in the Appendix to this Discussion Paper.
[26] The Draft Code, p 5.
[27] The Draft Code, s 37. See the Appendix to this Paper for extracts of the relevant sections of the Code referred to in this para.

> death created by the acts or a callous indifference to the possible fatal consequences of the acts. The terrorist who plants a bomb and gives the police a short advance warning may argue that he did not intend to kill anyone but, if somebody is killed, could be convicted of murder on the ground that he was callously reckless as to whether death was caused. Callous has the advantage of not carrying with it some of the more artificial baggage which accompanies the term 'wickedly reckless' such as the question whether there can be wicked recklessness in the absence of an intention to do some bodily harm …"[28]

- The concept of "intention" should have the meaning given in section 9 of the Code. The definition focuses upon the accused's foresight that the result of an act is certain or almost certain to occur,[29] and a person who intended to harm person A, but in fact harms person B, is treated as intending to harm B.

- The concept of "recklessness" should have the meaning given in section 10 of the Code. The definition focuses upon a person who "is, or ought to be, aware of an obvious and serious risk … but nonetheless acts where no reasonable person would do so".[30]

- The concept of "knowledge" should have the meaning given in section 11 of the Code. The definition of "knowledge" expands the ordinary meaning of the word to include wilful and unreasonable failure to allow the relevant knowledge to be acquired, and situations where a person thinks that a "circumstance almost certainly exists, but nonetheless proceeds where no reasonable person would do so".

- Words such as "wicked, evil, felonious, depraved" and other similar words are not used in the Draft Code.

3.17 Of interest is the fact that in 1983 the Scottish Law Commission (SLC) advised against adopting certain recommendations made by the Law Commission of England and Wales (LCEW), namely that three words – intention, knowledge, and recklessness, as defined in its Report – should be the key and only words used to express the mental element in crime.[31] The SLC did not support either the restriction to these three words,[32] or the proposed definitions of the words.[33] In relation to the definition of "recklessness", the SLC observed:

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[28] The authors refer to CHW Gane and CN Stoddart, *A Casebook on Scottish Criminal Law* (3rd edn, 2001) pp 402-403.

[29] The commentary notes: "(i) … the Crown must show that *the actor* was aware of the likely consequences of his or her conduct. It would not be sufficient, in order to prove intention, for the Crown to show that any reasonable person would have realised that this was the case (ii) … a high degree of probability is required … It is not enough … to show that the accused knew that a particular result was 'likely' or 'highly likely'": *Hyam v DPP* [1975] AC 55 (one of the cases referred to by Lord Goff in (1988) 104 LQR 30).

[30] The definition thus includes (i) the deliberate risk-taker, and (ii) the person who is not aware of the risks, but who, judged by certain objective standards, *ought* to be aware.

[31] Law Commission, *Criminal Law: Report on the Mental Element in* Crime, Law Com No 89 (1978), para 99; Scottish Law Commission, *The Mental Element in Crime*, Scot Law Com No 80 (1983).

[32] Scottish Law Commission, *The Mental Element in Crime,* Scot Law Com No 80 (1983) para 1.7.

[33] *Ibid*, paras 1.8, 4.1 and following paragraphs. The LCEW recommendation for "intention" was "A person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result."

> " … the proposed definition of recklessness would … be wholly inappropriate to the use of that word as commonly used to describe the crime of murder in Scotland."[34]

3.18 The SLC noted that the LCEW hoped to create a comprehensive criminal code,[35] and added:

> "We understand that to a very large extent the criminal law of England and Wales is already statutory, and that the recommendations are made in the expectation that in due course it will be wholly statutory. The situation is quite different in Scotland."

3.19 In a passage headed "The Scottish approach",[36] the SLC commented:

> "It seems to us … that the Scots common law approach to mental element has historically been, and at the present day remains, rather different from that in England and Wales. Until comparatively recent times the only concept to express mental element in Scotland was that of 'dole', described by Hume as 'that corrupt and evil intention, which is essential (so the light of nature teaches, and so all the authorities have said) to the guilt of any crime'. While this rather moralistic concept of general wickedness has to some extent disappeared from Scots law, no doubt largely because of the proliferation of statutory crimes using express words of *mens rea*, it still remains as the background against which the mental element necessary for most common law crimes is to be measured. Indeed the concept of wickedness is still regularly, and on authority, used when describing the crime of murder. This approach to mental element, coupled with the fact that so much of the criminal law of Scotland is still part of the common law, has had several consequences. It has made it unnecessary for courts to consider and to construe words of mental element in relation to a wide range of crimes, and this has in turn meant that Scotland has been spared the proliferation of judicial glosses on such words that has occurred in England … the question of mental element rarely appears to give rise to problems.
>
> 2.15 By contrast, the impression which we form from the Law Commission Report [ie the LCEW Report] and from our examination of English cases is that it is a feature of the system south of the Border that much elaborate, and to the Scots lawyer conceptually difficult, consideration is given to the problem of mental element …"

A brief comparative survey of language used in other jurisdictions

3.20 In his criticism of the language used in Scots homicide law, Lord Gill stated that he had "the impression that other English-speaking jurisdictions may have attained greater maturity in their jurisprudence" on the topic of the mental element in the crime of homicide.[37]

3.21 In considering whether Scots homicide law, and in particular its language and terminology, requires reform, a brief comparative survey of the language used in other English-speaking jurisdictions may be helpful. We look to the USA, Australia, New Zealand, South Africa, England and Wales, and Ireland.

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[34] *Ibid*, para 2.4.
[35] *Ibid*, para 2.1.
[36] *Ibid*, para 2.14.
[37] *Petto v HM Advocate* 2011 SCCR 519, at para [21].

United States of America

3.22 As explained in our paper "Homicide Laws in Other Jurisdictions",[38] the law of homicide in America is codified in the Penal Codes of each of the 50 states and the District of Columbia. There are two models for murder: (i) the model adopted in the California Penal Code (CPC) and certain other codes; and (ii) that adopted in the New York Penal Code (NYPC) and certain other codes. The latter is largely based on the American Law Institute's Model Penal Code (MPC).

3.23 For present purposes, we note only a selection of terms, phrases, and definitions used in American homicide law.

- The MPC uses "purposely", "knowingly" and "recklessly/with extreme indifference";[39] the NYPC uses "intentionally" and "recklessly/with depraved indifference";[40] the CPC uses "malice aforethought" which is divided into express and implied malice.[41]

- "Malice" in the CPC is "express" where "there is manifested a deliberate intention to unlawfully take away the life of a fellow creature";[42] malice is "implied" where "no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart".[43]

- "Purpose", "intention", "knowledge" and "malice", as defined in the Codes, are terms which have been criticised by some commentators as being too vague.[44]

- A type of killing defined as "depraved indifference murder" is found in three penal codes. We consider that type of killing to be equivalent to the Scots law "wicked recklessness" murder.[45]

- There is a felony murder doctrine in the NYPC. This leads to a conviction for second degree murder if a death occurs during one of certain listed felonies.[46] The CPC also has a felony murder doctrine.[47] However the drafters of the MPC abolished the felony murder rule, substituting a rebuttable presumption of recklessness and extreme indifference if the killing occurred during a robbery, sexual attack, arson, burglary, kidnapping or felonious escape.[48]

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[38] See: Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[39] MPC, s 210.2.
[40] NYPC, s 125.25.
[41] CPC, ss 187 and 188.
[42] *Ibid* s 188(a)(1).
[43] *Ibid* s 188(a)(2).
[44] For example, see: D Crump, "What Does Intent Mean?" (2010) Hofstra LR 1059 at p 1074; C Finklestein, "Two Models of Murder: Patterns of Criminalisation in the United States" in J Horder (ed) *Homicide Law in Comparative Perspective* (2007) at p 87.
[45] In the case of *People v Feingold* 852 NE2ed 1163 (NY 2006), it was held that "depraved indifference is best understood as an utter disregard for the value of human life – a willingness to act not because one intends harm, but because one simply doesn't care whether grievous bodily harm results or not".
[46] No proof of a fault element is required: NYPC, s 125.25(3).
[47] CPC, s 189.
[48] MPC, s 210.2(1)(b).

- In terms of the CPC, an accused is guilty of involuntary manslaughter if a death occurs in the course of an unlawful act not amounting to a felony.[49]

3.24 It will be seen that the terminology used in the USA includes the words "felony", "felonious" and "depraved". While the words "wicked" and "evil" are not used, it might be thought that vocabulary such as "malice aforethought", "abandoned and malignant heart", "depraved indifference murder", and "depraved heart murder", have something of the same connotations as "evil" and "wicked", attracting similar criticisms of being vague and moralistic, with emotional baggage.

Australia

3.25 Australian homicide law[50] uses the following language and vocabulary: murder, manslaughter (including unlawful and dangerous act manslaughter and criminal negligence manslaughter), assault resulting in death, intent to kill, intent to cause serious injury/grievous bodily harm, reckless indifference to human life, recklessness towards serious injury/grievous bodily harm, foresight of the virtual certainty of death, awareness that death would occur in the ordinary course of events, and subjective foresight of the possibility of death.

3.26 Australian homicide law does not use terminology such as "wicked", "evil", "felonious" or "depraved".

New Zealand

3.27 New Zealand homicide law uses one all-embracing label, namely "culpable homicide".[51] Culpable homicide is then subdivided into murder, manslaughter, and infanticide. Murder occurs where the offender "means to cause the death" of the person killed, or "means to cause … any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not". Murder also covers situations where death occurs while committing certain specified offences.[52] Manslaughter is a residual category, covering any culpable death (apart from the specially defined infanticide) which does not qualify as murder.

3.28 New Zealand homicide law does not use terminology such as "wicked", "evil", "felonious" or "depraved".

South Africa

3.29 South African homicide law[53] uses the following language and vocabulary: murder (constituted by intent to kill), culpable homicide (constituted by negligent killing, involving concepts of the reasonable man, reasonable foreseeability, and steps to guard against a

[49] CPC, s 192(b).
[50] Each Australian state has its own homicide law. The law of New South Wales is codified in statute. For more detail, see: Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[51] Crimes Act 1961, s 160; and see also, ch 2 para 2.38.
[52] Listed in the Crimes Act 1961, s 168(2), namely treason, espionage, sabotage, piracy, piratical acts, escape or rescue from prison/lawful custody/detention, sexual violation, murder, abduction, kidnapping, burglary, robbery and arson).
[53] Outlined in more detail in: Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

possibility), and infanticide. Intent includes direct intention, indirect intention, and *dolus eventualis* where the accused foresees the possibility that a consequence of his actions might occur, reconciles himself with that risk, and carries on regardless.

3.30 South African homicide law does not use terminology such as "wicked", "evil", "felonious" or "depraved".

England and Wales

3.31 English homicide law[54] uses the following language and vocabulary. Murder (constituted by intent to kill, or intent to cause grievous bodily harm); manslaughter (comprising voluntary manslaughter, and involuntary manslaughter which has two categories, namely (i) unlawful and dangerous act manslaughter, and (ii) gross negligence manslaughter); and infanticide.[55] The definition of murder includes the concept of "malice aforethought".[56] Intent to kill extends to a situation where an accused intended to inflict "serious harm" (whether or not the risk of death was foreseen or anticipated);[57] and where an accused appreciated that death or bodily harm was a "virtual certainty" as a result of his or her actions.[58]

3.32 In 2006, the Law Commission of England and Wales[59] recommended a multi-tier structure of homicide offences comprising first degree murder, second degree murder, manslaughter, and infanticide,[60] and using language and terminology such as "intent to do serious injury", "a serious risk of causing death", "provocation", "diminished responsibility", "suicide pact", "unlawful and dangerous act manslaughter", and "manslaughter by gross negligence". The Commission specifically rejected a definition of murder involving killing where the defendant was reckless as to causing death, taking the view that such a definition could not sustain a morally defensible boundary between murder and manslaughter.[61] Thus the Commission rejected what was, arguably, something akin to the Scots homicide law definition of "wicked recklessness" as many considered it to exist prior to *HM Advocate v Purcell.*[62] Certain aspects of the LCEW's recommendations attracted criticism. One point made was that the failure to define "serious injury" meant that the distinction between first and second degree murder was left to a jury who had no guidance as to the meaning of "serious injury".[63] The Commission's recommendations remain largely unimplemented.

3.33 It can be seen that the homicide law of England and Wales does not use terminology such as "wicked", "evil", "felonious" or "depraved". However it might be thought that the phrase "malice aforethought" has something of the same connotations as "evil" and "wicked".

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[54] *Ibid.*
[55] There are also certain specific homicides, such as causing death by dangerous driving; assisting suicide.
[56] A concept criticised by the Law Commission of England and Wales as causing difficulties: see Law Commission, *A New Homicide Act for England and Wales? An Overview*, Law Com CP No 177 (2005) paras 1.13 to 1.14.
[57] *R v Cunningham* [1982] AC 566.
[58] *R v Woollin* [1999] 1 AC 82.
[59] Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) para 2.1 and following paragraphs.
[60] Together with specific offences such as causing death by dangerous driving, and assisting suicide. See ch 2, The structure of Scots homicide law.
[61] Law Commission, *Murder, Manslaughter and Infanticide,* Law Com No 304 (2006) para 2.13.
[62] 2007 SCCR 520; see discussion in ch 4, Murder.
[63] A Ashworth, "Principles, Pragmatism, and the Law Commission's Recommendations on Homicide Law Reform" (2007) Crim LR 333 at pp 336, 338.

Ireland

3.34 The homicide law of Ireland uses the following language and vocabulary. The mental element in murder is constituted by intent to kill or intent to cause serious injury, in each case with a legal presumption of having intended "the natural and probable consequences" of one's conduct. The lesser crime of "manslaughter" ("voluntary manslaughter") depends upon the jury's acceptance of evidence of provocation, or the use of excessive force in self-defence, or diminished responsibility . "Involuntary manslaughter" is divided into "unlawful and dangerous act manslaughter" and "gross negligence manslaughter". A new offence of "assault causing death" was recommended by the Law Reform Commission of Ireland.[64] The LRCI also suggested a new offence of "drug induced homicide".

3.35 Some commentators argue that the definition of murder should be expanded to include recklessness.[65]

3.36 It can be seen that the homicide law of Ireland does not use terminology such as "wicked", "evil", "felonious" or "depraved".

Views of practitioners involved in homicide trials

3.37 Practitioners who participated in our informal consultations[66] were generally of the view that juries understood concepts such as "wicked", "wicked recklessness", "wicked intent", "evil", "evil intent", and "depraved". While juries could not be asked about their verdicts,[67] practitioners inferred the jury's understanding from (a) the lack of questions from the jury about the meaning of these words, in contrast with more common questions concerning "concert", "the Moorov doctrine", and "corroboration"; and (b) the generally sensible and apparently evidence-based verdicts which juries delivered.[68]

3.38 One interviewee suggested that the words noted above provided a vent for emotions in what was undoubtedly a stressful and highly disturbing context. While there might be an element of moral judgment in the terminology,[69] juries were comfortable with such concepts in the context of a criminal trial concerning the killing of a human being. Another interviewee commented that the language might be old-fashioned, but it conveyed a meaning that made sense, and that the public could grasp. It is a moral judgment on the "degree of badness". A third interviewee noted that juries tended to regard the killing of a human being as obviously "wicked". They appeared to have no difficulty with the use of the word "wicked" as qualifying

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[64] Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) para 5.46, involving a fatal assault where "a reasonable person would not have foreseen that death or serious injury was likely to result in the circumstances".

[65] C Fennell, "Intention in Murder: Chaos, Confusion and Complexity" (1990) 41(4) NILQ 325 at p 335. This would be comparable to the approach taken in Scots law. There are two advantages: (i) recourse to circumstantial evidence when direct intent cannot be proved; and (ii) providing a second and distinct *mens rea* for intent, rather than artificially expanding the parameters of intent (thus avoiding complex discussions and analyses concerning intent). See: Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[66] Comprising three High Court judges, two Advocate deputes, three defence QCs, and one solicitor-advocate QC.

[67] Contempt of Court Act 1981, s 8 as amended by the Criminal Justice and Courts Act 2015.

[68] In particular, it was pointed out that there were few successful appeals in terms of the Criminal Procedure (Scotland) Act 1995, s 106(3) where the appellant had to satisfy the court that the verdict was one which "no reasonable jury, properly directed, could have returned".

[69] Cf the observations of Lord Goff in "The Mental Element in the Crime of Murder" (1988) 104 LQR 30.

"intention to kill".[70] While some practitioners thought the word superfluous in that context,[71] its use did not obscure matters or confuse the jury. Juries were not troubled by the fact that a more rigorous analytical approach to the structure of homicide law might require removal of the word "wicked" in that context. Nor did juries appear to be disturbed by the standard direction used by trial judges and set out in the Jury Manual.[72] A more detailed version of that direction used by one judge was as follows:

> "'Wicked' in the context of intention has no particular legal significance. It just has its ordinary meaning. Intending to kill someone is generally treated by the law as being wicked and murderous, unless there is some special reason to suggest otherwise … provocation is such a feature, and would excuse the necessary wickedness for murder and would dictate a verdict of guilty of culpable homicide."

3.39 That guidance did not appear to cause difficulties for juries.

Is holistic reform necessary?

3.40 As pointed out in Chapter 2, The structure of Scots homicide law,[73] the statutory adoption of certain definitions, terminology, and concepts from other jurisdictions may have disadvantages. Difficulties could arise from:

- Misunderstandings or misinterpretations caused by lack of expertise in the foreign homicide law and legal system generally.
- Overlapping or conflicting concepts resulting in difficulties and ambiguities.
- A need to consult the other jurisdictions' case law, statutes, or *travaux preparatoires*[74] in order to understand the concepts or language used.

3.41 If, therefore, consideration were to be given to adopting aspects of the homicide law of another jurisdiction, a holistic re-drafting of Scots homicide law might be advisable (possibly adopting the entire codification of a particular jurisdiction).[75]

Would alternative terminology benefit Scots homicide law?

3.42 Before seeking the views of consultees on those questions, it might be helpful if we set out some preliminary thoughts.

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[70] As introduced in 2001 by the five-judge bench in *Drury v HM Advocate* 2001 SCCR 583.
[71] Thus agreeing with the critical analysis noted in J Chalmers, "Collapsing the Structure of Criminal Law" 2001 SLT (News) 241, pp 244-245; and in ch 4 below. (By contrast, some other practitioners thought that the insertion of "wicked" was a correct reflection of the law).
[72] The Judicial Institute for Scotland, *Jury Manual* suggests a direction in the following terms: "'Wicked' in the context of intention has no particular legal significance. Intending to kill someone is obviously wicked. The word 'wicked' has no particular meaning."
[73] Para 2.4.
[74] *Travaux preparatoires* are drafts and other documents drawn up in the course of preparing the final text of a legal instrument which reflect the substance of the discussions between and the views of the persons who adopted the instrument: see The Law Society of Scotland, *Glossary of Scottish and European Union Legal Terms and Latin Phrases* (2nd edn, 2003).
[75] Cf the views of the authors of the Draft Criminal Code for Scotland (2003), and see para 2.4 above.

3.43 Lord Gill's criticism arose in 2011, in the context of the death of a tenement resident caused by a fire-raising, where the perpetrator had no intention to kill or injure her.[76] The earlier three-judge decision in *HM Advocate v Purcell*[77] in 2007 had, on one view, changed the law concerning "wicked recklessness", by ruling that the second branch of the classic Macdonald definition of murder (namely, "displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences"[78]) required an element of "intention to injure".[79] Before the judgment in *Petto* was issued, Professor Clive commented:[80]

> " … At the time of writing [this article], the [five-judge court's decision in *Petto*] was still awaited. It will be interesting to see what a larger court does … It is going to be difficult for a court to adopt a principled approach without manifestly taking rather important policy decisions on matters of intense public interest. The best outcome would probably be for the court to do what it can in the short term and suggest that the whole area of murder and culpable homicide be reviewed with a view to legislation, something which it would be quite reasonable for the court to do given that the English Law Commission examined this area relatively recently.[81]
>
> What are we to make of the fact that in 2009 the question of what constitutes murder in the law of Scotland has to be referred to a court of five or more judges? … This is the sort of thing we ought to know by now … If a statute of 1948 had left such questions unresolved – if it had said, for example, 'wicked recklessness suffices but perhaps not in driving cases and perhaps only if there is something like a violent assault or possibly fire-raising' – it would have been severely and rightly criticised …
>
> Here I should note briefly that under section 37 of the draft criminal code,[82] Petto would have been guilty of murder … [One of the] merits in that provision [is that] it has built-in desirable flexibility in the word 'callous' …"

3.44 In this Discussion Paper, we suggest that *Purcell* was an unfortunate decision resulting from (i) the acknowledged public reluctance[83] to label someone involved in a fatal road traffic accident as a "murderer";[84] and (ii) the difficult decision whether to indict the case as "murder" or "culpable homicide" or a statutory offence such as causing death by dangerous driving.[85] We suggest that a combination of these factors in *Purcell* led to a decision which moved away from a previous perception of the common law, and, on one view, resulted in a narrowing of the definition of "wicked recklessness" giving rise to consequential difficulties in cases such

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[76] *Petto v HM Advocate* 2011 SCCR 519. The circumstances were similar to those in *Hyam v DPP* [1975] AC 55, where a fire-raising which killed two children had been started by a woman who was trying to frighten her ex-lover's new fiancée, and who had not intended to kill anyone.

[77] 2007 SCCR 520. A summary of the facts in *Purcell* can be found in para 4.16 and following paragraphs.

[78] See para 2.5 and following paragraphs.

[79] A ruling which many considered to be a major innovation in the definition of wicked recklessness: see ch 4, Murder, para 4.23. It was perhaps a matter of regret that the case did not reach an appeal court, as the decision was made mid-trial, and was followed by the accused's plea of guilty to culpable homicide: see ch 4, para 4.22; J Chalmers, "The True Meaning of 'Wicked Recklessness'" (2008) 12(2) Edin LR 298-302; and Scottish Law Commission, *The Mental Element in* Crime, Scot Law Com No 80 (1983) para 2.32.

[80] E Clive, "Codification of the Criminal Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010), at pp 62-63.

[81] Law Commission, *Murder, Manslaughter and* Infanticide, Law Com No 304 (2006).

[82] Section 37(1): A person who causes the death of another person with the intention of causing such a death, or with callous recklessness as to whether such a death is caused, is guilty of the offence of murder.

[83] Possibly reflected in the judiciary.

[84] Unless a vehicle had obviously been used as a weapon: see ch 4, Murder, para 4.20.

[85] See ch 4, Murder, para 4.18 and following paragraphs.

as *Petto*.[86] We discuss *Purcell* further in Chapter 4, Murder, and ask consultees to give their views on this issue.[87]

3.45 In relation to the further criticisms by Lord Goff and others,[88] we offer one or two preliminary thoughts. We suggest that the pre-*Purcell* perception of "wicked recklessness" is approximately equivalent to Lord Goff's proposal of "indifference to death".[89] We consider that the word "heinously" is arguably as emotive as the word "wickedly" (and in addition is perhaps a word less familiar to a jury). Finally we suggest that there may be a subtle but important difference between "callous" and "wicked". The word "callous" connotes heartless, unfeeling conduct, oblivious to the needs or suffering of others, whereas it may be that "wicked" carries an additional element of a malevolence, an active wish or desire to do evil, a predilection to choose behaviours which average right-thinking members of society would condemn.

3.46 In relation to the concern, following upon the decision in 2001 of the five-judge bench in *Drury v HM Advocate,*[90] that with such an emotive and everyday word as "wickedly" qualifying the phrase "intended to kill", the jury might consider that the issue of "wickedness" was at large for their assessment, and might fail to convict of murder in circumstances where they should so convict because their personal view was that the accused had not acted "wickedly",[91] commentators now suggest that any such danger was averted in 2011 by the case of *Elsherkisi v HM Advocate.*[92] In that case, at paragraph 12, the court gave the following guidance:

> " … We reject any suggestion that [following *Drury*] the question of the wickedness of an intention to kill is at large for the jury in every case, or that the determination of that question is not constrained by any legal limits … [In] a case where there is evidence that the accused shoots his victim in the head at point-blank range and the only explanation is self-induced intoxication … we are in no doubt that it would be appropriate to direct the jury that if they were satisfied beyond reasonable doubt that the accused killed the deceased by shooting him in the head and that he intended to kill the deceased, a matter which they could infer from his actions, they *must* convict him of murder. It would be inappropriate to leave the jury to consider at large the question of the wickedness of the accused's intention … [W]here intention to kill is either admitted or proved … *in the absence of any legally relevant factor capable of justifying or mitigating the accused's actions* [such as self-defence, mental disorder, provocation, diminished responsibility], the jury should be directed that they *must* convict of murder. Any other direction leaving the matter to the discretion of the jury would have the effect of enabling them to ignore the boundaries set by legal relevancy and to determine the issue on the basis of irrelevant considerations … [emphases added]."

3.47 In relation to the language and terminology used in other English-speaking jurisdictions, we have not found any other English-speaking jurisdiction which uses the words

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[86] All as discussed in greater detail in ch 4, Murder.
[87] See ch 4, Murder, para 4.16 to 4.34.
[88] See paras 3.6 and following paragraphs.
[89] See the definitions of "wicked recklessness" listed in ch 4, Murder, para 4.19.
[90] 2001 SCCR 583.
[91] See MGA Christie para 3.14 above; see too G Gordon (MGA Christie (ed)), *Criminal Law* (3rd edn, 2001) para 23.13; PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 9.16.3.
[92] 2011 SCCR 735. See for example G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017) and PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 9.16.4.

"wicked" or "evil" in their jurisprudence on the topic of the mental element in homicide. Scotland appears to be unique in that respect. As already noted, the homicide law of England and Wales uses the phrase "malice aforethought", which has something of the same connotations as "evil" and "wicked", but does not use those precise words. States in the USA use terminology such as "felony", "felonious", and "depraved",[93] but Australia, New Zealand, South Africa and Ireland do not.[94]

3.48 If it were to be considered appropriate to adopt or to replicate the language and terminology from another jurisdiction's homicide law, a considerable degree of care would be required.

3.49 First, as noted in paragraphs 2.4, 2.68 and 3.40 above, problems may arise from selecting particular words, terminology, or concepts from another jurisdiction's homicide law structure. Language and concepts may be subtly yet significantly different in different jurisdictions. A holistic approach might be necessary – in other words, the adoption of an entire criminal code, or entire sections of a code.[95]

3.50 Secondly, although there has been criticism of words such as "wicked" and "evil" as being vague, emotive, moralistic, and carrying too much emotional baggage, it is noteworthy that the homicide laws of some states in the USA have equally emotive words and phrases, such as "depraved indifference", "depraved indifference murder", "depraved heart murder", and "abandoned and malignant heart".

3.51 Thirdly, if new statutory definitions are introduced in Scots homicide law, it is possible that there might be an increase in the number of criminal appeals, challenging, for example the terms of the indictment,[96] or a trial judge's decision to refuse a "no case to answer" submission based on the new law, or a jury's verdict on the basis that the statutory definition was not correctly explained in the charge, and other similar challenges.[97] Such a development might have a prejudicial effect on the resources and costs of the justice system.

3.52 Nevertheless, in *Petto v HM Advocate,* Lord Gill criticised terms such as "wicked, evil, felonious, depraved and so on" as potentially impeding, rather than being conducive to, analytical accuracy. We therefore ask the following questions:

5. (a) Are there valid criticisms and calls for change in relation to the language of Scots homicide law?

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[93] See para 3.22 and following paras above, and: Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/. As noted in relation to para 3.23 above, the New York Penal Code provides for second degree murder where "under circumstances evincing a *depraved* indifference to human life [a person] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person [emphasis added]"; and see the court's analysis of "depravity" in *People v Feingold* 852 NE2ed 1163 (NY 2006).

[94] See paras 3.25 to 3.30 above, and: Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[95] Such as the whole or part of the Draft Criminal Code for Scotland, or the whole or part of New Zealand's codified homicide law.

[96] Ie a preliminary debate in which it is argued that the indictment (the document served on the accused detailing the offence said to have been committed, together with a list of witnesses and productions) does not contain a crime known to Scotland.

[97] Cf para 2.58 above.

(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?**

Chapter 4 Murder

4.1 Independently of the overall structure of Scots homicide law, the question arises whether the offences of murder and culpable homicide would benefit from redefinition.[1] In this chapter we consider whether the crime of murder, as a constituent part of the bipartite structure referred to in Chapter 2 above, should be redefined.[2] We discuss whether the redefinition of murder in *Drury v HM Advocate*[3] has caused any difficulties in practice; examine the restrictive effect of the decision in *HM Advocate v Purcell*[4] so far as relating to the element of wicked recklessness in murder;[5] review the doctrine of constructive malice and its role in Scots homicide law; and finally, note suggestions for reform made in the Draft Criminal Code for Scotland.

Intention to kill: the Drury amendment

4.2 The classic Macdonald definition of murder was amended in 2001 by a five-judge bench in *Drury v HM Advocate,*[6] when the word "wickedly" was inserted before the words "intended to kill", such that the definition reads as follows:

> "Murder is constituted by any wilful act causing the destruction of life, whether *wickedly* intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences [emphasis added]."

4.3 It was suggested to us in our informal consultation that the amendment was aimed at the difficult and sensitive issue of "mercy killings",[7] and that the new definition of "murder" might allow prosecutors a greater degree of discretion when assessing how to proceed in such cases. As noted earlier however,[8] it would appear that even a very sympathetic case may result in a prosecution for murder.[9]

4.4 The amendment attracted criticism, perhaps best summarised by Sir Gerald Gordon who commented:

> " … it is somewhat surprising to find a fundamental restatement of one of the few universally accepted common law definitions of *mens rea* in the context of a case which dealt with a special, if not indeed anomalous, rule about provocation. It seems that

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[1] For example, a redefinition of murder and/or culpable homicide; or an adjustment of the dividing line between murder and culpable homicide; or the addition of a new category of "assault causing death".
[2] For culpable homicide, see Chapter 5.
[3] 2001 SCCR 583.
[4] 2007 SCCR 520.
[5] A restrictive effect illustrated in *Petto v HM Advocate* 2011 SCCR 519.
[6] 2001 SCCR 583, an appeal concerning the partial defence of provocation.
[7] An issue excluded from this paper: see para 1.24 above.
[8] *Ibid*.
[9] See *Gordon v HM Advocate* 2018 SCCR 79, where an otherwise blameless man in his fifties smothered his terminally ill wife to end her suffering. See too the discussion in PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 9.16.5.

> what the court has done has been to incorporate the defences to the crime of murder into the definition of the crime by using the word 'wicked' as a shorthand for all of them … [whereas it might be thought that] it is analytically helpful to distinguish between the definition of a crime, and matters which can constitute defences to the crime."[10]

4.5 Professor Chalmers was of a similar view.[11] He pointed out that there had been no need for a redefinition, and argued that:

> "[p]rovocation and diminished responsibility may always, where relevant, be pleaded in mitigation of sentence. They occupy a special status in the law of homicide for two reasons, however: first, because we recognise that the person who kills under provocation (or while suffering from diminished responsibility) does not deserve the label 'murderer', and secondly, because a person who is found guilty of murder is liable to a mandatory penalty. Because of this, it is necessary to reduce the crime from murder to culpable homicide to allow mitigation to operate. But that is as far as we need go: we do not need to collapse the entire structure of criminal law in order to afford the court a discretion in the sentence it hands down to the provoked killer. The *Drury* analysis, if followed through, has incredibly far reaching consequences."[12]

4.6 Michael Christie[13] suggested that the use of the word "wickedly" was shorthand for the absence of recognised legal defences to murder; alternatively it amounted to a *carte blanche* permission to juries to acquit someone who had killed (with the intention of killing) but had acted without wickedness. He favoured the former interpretation, which involved incorporating at least some of the existing defences into the definition of the crime itself.

4.7 Professor Gane, Sheriff Stoddart, and Professor Chalmers[14] added to the body of criticism:

> " … [Following *Drury*, a] mere intention to kill is not sufficient for murder. A 'wicked' intention is required. This is a surprising suggestion, there being no indication in any prior decision of the court that a 'wicked' intention to kill was required to establish murder. Macdonald's definition of murder has been repeated to juries for most of the last 100 years, and by the appeal court in numerous cases, without any suggestion that it was in some way incomplete … [After referring to *Cawthorne, Brennan,* and *Scott*] … The introduction of the notion of 'wickedness' is problematic in a number of ways, [but] *Gillon v HM Advocate*[15] and *Lieser v HM Advocate*[16] indicate that 'wickedness' in wicked intention is not a question of motive (despite language to this effect in *Drury*). Instead it has become a technical and awkward shorthand for the absence of any recognised justification or excuse, such as self-defence or provocation. Any intention to kill is *per se* wicked unless such a defence (full or partial) can be made out."

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[10] Commentary on *Drury v HM Advocate* 2001 SCCR 583 at pp 618-619, para 2.
[11] J Chalmers, "Collapsing the Structure of Criminal Law" 2001 SLT (News) 241.
[12] *Ibid* pp 244-245.
[13] MGA Christie, "The Coherence of Scots Criminal Law: Some Aspects of *Drury v HM Advocate*" (2002) Jur Rev 273 at 283-284.
[14] CHW Gane, CN Stoddart and J Chalmers, *A Casebook on Scottish Criminal Law* (4th edn, 2009) para 10-21.
[15] 2006 SCCR 561.
[16] 2008 SCCR 797.

4.8 In 2011, matters were clarified to some extent by a three-judge decision in *Elsherkisi v HM Advocate*,[17] where it was held that if the jury concluded that the accused intended to kill, they *must* convict of murder, irrespective of whether or not they believed that the accused had acted "wickedly".[18] The court gave the following guidance:

> "We reject any suggestion that the question of the wickedness of an intention to kill is at large for the jury in every case, or that the determination of that question is not constrained by any legal limits … the law has always claimed the right to decide what is relevant to the determination of that question … [i]n the absence of any *legally relevant* factor capable of justifying or mitigating the accused's actions,[19] the jury should be directed that they *must* convict of murder. Any other direction leaving the matter to the discretion of the jury would have the effect of enabling them to ignore the boundaries set by legal relevancy and to determine the issue on the basis of irrelevant considerations [emphases added]".[20]

4.9 *Elsherkisi* was approved by Sir Gerald Gordon in his commentary on the case:[21]

> "The insertion by *Drury* of the word 'wicked' before 'intention' in the classic definition of murder was criticised at the time, not only by me but by a number of academics, principally because it appeared to confuse the definition of the crime with the defences available to those accused of it … The current case [*Elsherkisi*] effectively supports the academic criticism and restores the distinction between crime and defence, even though it preserves the vocabulary of *Drury,* with its unnecessary reference to 'wickedness'. Deliberate killing is murder, unless the legally defined defences of self-defence etc are satisfied."

4.10 Subsequently, in 2014, *Drury* was discussed by Professors Ferguson and McDiarmid in the second edition of *Scots Criminal Law.*[22] They asked:

> " … whether a further unanticipated consequence of *Drury* has been the creation of a new, ill-defined defence to a murder charge of 'absence of wickedness'."[23]

4.11 Having focused on that question, the authors refer to *Elsherkisi* and suggest that the answer (in the negative) lies in that case.[24]

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[17] 2011 SCCR 735 (Lord Hardie gave the opinion of the court).
[18] *Ibid* at paras [12], [13], [20], [21].
[19] For example, provocation, as in *Drury.*
[20] *Elsherkisi v HM Advocate* 2011 SCCR 735 at para [12]. See too *Meikle v HM Advocate* 2014 SLT 1062.
[21] 2011 SCCR 735, at p 750.
[22] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014), para 9.16.3.
[23] Cf the analysis of Michael Christie, para 4.6 above.
[24] Commenting nevertheless that the problem of "mercy killings", where an accused acts intentionally to bring about death, but not wickedly, still remained (reference being made to *HM Advocate v Brady,* 1997 GWD 1-18).

4.12 Somewhat surprisingly, given the degree of academic discussion, the insertion of the word "wickedly" by the five-judge bench in 2001 in *Drury* appears to have caused little difficulty in practice in homicide trials.[25] Juries appear to have had little difficulty understanding the concept of "wicked intention to kill".[26] Some of the practitioners who participated in our informal consultations agreed with the academic analyses referred to above, describing the insertion of the word "wickedly" as unnecessary and superfluous; but they reported that they had experienced no practical complications arising from the amended definition. Others advised that they considered the insertion of the word "wickedly" to be a correct reflection of the law. They did not agree that the insertion was unnecessary, or that it had caused the collapse of the structure of Scots homicide law. They too had experienced no complications, either practical or theoretical.

4.13 One practitioner commented that juries tended to regard the killing of a human being as obviously "wicked". They did not appear to be disturbed by the standard direction in the *Jury Manual*, which is currently as follows:

> " … 'Wicked' in the context of intention has no particular legal significance. Intending to kill someone is obviously wicked. The word 'wicked' has no particular meaning."

4.14 A charge currently used by one judge gave the jury a more detailed explanation:

> " … 'Wicked' in the context of intention has no particular legal significance. It just has its ordinary meaning. Intending to kill someone is generally treated by the law as being wicked and murderous, unless there is some special reason to suggest otherwise … provocation is such a feature, and would excuse the necessary wickedness for murder, and would dictate a verdict of guilty of culpable homicide."

4.15 Having considered the academic debate provoked by the case of *Drury,* the rarity of appeals in recent years concerning the mental element in murder,[27] and the information obtained from practitioners during our informal consultations, the view might be taken that the amended Macdonald definition of the intentional mental element of the crime of murder is not causing juries any difficulty, and does not appear to be preventing convictions for murder in appropriate cases. We ask the following questions:

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?

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[25] With the exception of *Elsherkisi*.

[26] As juries cannot be asked how they reached their verdicts (Contempt of Court Act 1981, s 8 as amended by the Criminal Justice and Courts Act 2015), practitioners explained that they inferred understanding from (i) the lack of questions from the jury about the concepts of "murder" and "culpable homicide", in contrast with the more common questions concerning "concert", "the Moorov doctrine", and "corroboration"; and (ii) the generally sensible and apparently evidence-based verdicts which juries delivered: there were few successful appeals in terms of the Criminal Procedure (Scotland) Act 1995, s 106(3) where the appellant had to satisfy the court that the verdict was one which "no reasonable jury, properly directed, could have returned".

[27] See ch 1, Introduction, para 1.15 and following paragraphs.

(b) If so, should the qualification of "wickedly" be removed, or do you propose some other reform?

"Wicked recklessness": the *Purcell* restriction

4.16 The second of the three High Court cases to cast doubt on the acceptability and coherence of Scots homicide law was the three-judge decision in *HM Advocate v Purcell*.[28] Unlike *Drury* and *Petto*,[29] which were appeals against conviction after trial and following legal debate before the appeal court, *Purcell* was a decision taken in the course of a jury trial, prior to the jury's verdict.[30]

4.17 The accused was charged with the murder of a 10-year-old boy. The evidence established that he and his companions were trying to escape from the police, and as a result the accused was driving dangerously in a built-up area. The indictment[31] specified driving at excessive speeds and on the wrong side of the road, causing cars to take avoiding action, failing to give way at a roundabout, overtaking lines of traffic (some stationary and queuing) at excessive speed, failing to comply with traffic lights, and finally, when coming to a line of stationary traffic at some traffic lights, exercising a "chicane" manoeuvre by driving in excess of 60 miles per hour between that stationary line and the oncoming traffic, going through a red light, and in so doing running over and killing the 10-year-old boy who was crossing at the lights in obedience to a pedestrian crossing "green man" signal. This was clearly appalling driving, without any concern for the safety of pedestrians or other road users.

4.18 How should such a case be indicted?[32] Case law and academic commentary did not provide a clear answer, as summarised below.

4.19 *Arguments for indicting as murder:* Arguments in favour of an indictment for murder include the widely accepted understanding of "wicked recklessness" as extending to all killings where the accused showed complete indifference to human life, not caring whether the victim lived or died,[33] with there being no need for any intention to injure. Various formulations had been used by judges when explaining "wicked recklessness" either to a jury or in the appeal court, without any mention of intention to injure. For example: "such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences";[34] "totally regardless of the consequences, whether the victim lived or died";[35] "acting with such wicked recklessness as to display a disposition depraved enough to be regardless of the consequences … If you act in such a way as to show that you don't really care whether the

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[28] 2007 SCCR 520.
[29] *Petto v HM Advocate* 2011 SCCR 519.
[30] As was pointed out by J Chalmers, "The True Meaning of 'Wicked Recklessness': *HM Advocate v Purcell*" (2008) 12(2) Edin LR 298 at p 301: "[Dealing with such a submission at such a stage] has significant disadvantages. In particular, appellate courts are more likely to produce 'correct' decisions, not just because of the increased number of judges sitting on them, but because of the opportunities for refinement of argument: they have a previous reasoned decision to consider and counsel can reconsider and refine their arguments on the basis of that decision. As it was, the opinion of the court, while careful and thoughtful, is open to criticisms which might have been avoided had a different procedure been followed at the outset."
[31] The formal document containing the charges against the accused, together with a list of witnesses, productions (paper items such as a book of photographs) and labels (physical items such as a weapon or drugs).
[32] Options would include a road traffic offence, culpable homicide, and murder.
[33] See, for example, *Cawthorne v HM Advocate* 1968 JC 32.
[34] *Cawthorne cit sup* at p 35 (Lord Justice General Clyde).
[35] *HM Advocate v Byfield* 1976 (Lord Thomson), quoted by Lord Goff in (1988) 104 LQR 30 at p 54.

person you are attacking lives or dies, then that can constitute this degree of wicked recklessness which is required to constitute murder";[36] "complete, utter and wicked disregard of the consequences of their attack on the deceased";[37] "wicked recklessness where the conduct of the accused demonstrated that he did not care whether the victim lived or died".[38] It was arguable that Scots law was quite different from English law, in terms of which a person could only be guilty of murder if he intended to kill, or if he intended to do grievous bodily harm.[39] The accused's driving arguably satisfied this widely understood definition of "wicked recklessness", and the appropriate charge was therefore "murder".

4.20 *Arguments against indicting as murder:* Arguments against an indictment for murder include the recognised public reluctance to label a car-driver who had caused a fatal road traffic accident as a "murderer", or even to convict such a person of culpable homicide.[40] In *R v Seymour*,[41] Lord Roskill noted "the extreme reluctance of juries to convict motorists of manslaughter", with most prosecutions being based on breaches of road traffic legislation.[42] At a later date (after the decision in *Purcell*) Sir Gerald Gordon[43] summarised the views of those against a murder charge by asking "… why [had] the Crown decided to abandon their longstanding practice [of prosecuting on the basis of road traffic legislation] and bring a murder charge … [when] until not all that long ago the Crown had great difficulty in persuading juries to convict of culpable homicide in road traffic cases …". Thus there was a strong argument that the case should not be indicted as murder.

4.21 In the end, Purcell was indicted for murder. The charge did not libel "assault", which would have required an intention to injure. There was an alternative charge of a contravention of section 1 of the Road Traffic Act 1988.[44]

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[36] *HM Advocate v Hartley* 1989 SLT 135 at pp 135 to 136 (Lord Sutherland), adding "It may, in the end of the day, come as a considerable surprise to you, and indeed a matter of regret too that your victim dies, but that doesn't alter the fact that you have committed murder, if you have, during the course of the attack, displayed such wicked recklessness as to show that you are regardless of the consequences, that you have no particular interest in whether your victim lives or dies".

[37] *Halliday v HM Advocate* 1998 SCCR 509 at p 513 (Lord Justice General Rodger).

[38] *Cowie v HM Advocate* 2009 SCCR 838 at para [21] (Lord Justice Clerk Gill).

[39] See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/; and J Chalmers, "The True Meaning of 'Wicked Recklessness': *HM Advocate v Purcell*" (2008) 12(2) Edin LR 298-302.

[40] Despite an apparent public dissatisfaction with sentences imposed in death by driving cases: see, for example, S Reid, H Briggs, K Attygalle, K Vosnaki, R McPherson and C Tata, "Public perceptions of sentencing in Scotland: Qualitative research exploring causing death by dangerous driving offences" (Scottish Sentencing Council, 2021) available at: https://www.scottishsentencingcouncil.org.uk/media/2088/20210216-perceptions-of-sentencing-for-causing-death-by-driving-final.pdf.

[41] [1983] 2 AC 493 at 502D.

[42] See too P Ferguson, "Wicked Recklessness" (2008) Jur Rev 1, 1 at p 12.

[43] 2007 SCCR 520.

[44] Causing death by dangerous driving.

4.22 At the trial, after evidence had been led, senior counsel for the defence intimated that he wished to present a submission that there was no basis upon which the jury could return a verdict of guilty of murder.[45] Appreciating the importance of the issue, the trial judge invited two colleagues to assist with the decision.[46] Having heard legal debate, the three-judge bench sustained the submission and gave an oral ruling that the jury should be directed that it was not open to them to convict the accused of murder. The accused then offered a plea of guilty to culpable homicide, which was accepted by the Crown. The trial judge imposed a sentence of 12 years imprisonment, describing the accused's driving as "wild and reckless … wholly atrocious in nature and [placing] the lives of everyone in your wake in serious danger".[47]

4.23 The written opinion of the three-judge court became available later. In that opinion, the court held that "wicked recklessness" required (and had always required) an element of *intention to injure*. Despite the court's statement that intention to injure had always been required,[48] many commentators and practitioners considered the decision to be a major innovation in the definition of wicked recklessness.[49] It is arguable that the *Purcell* decision was a judicial expression of society's unwillingness to label a car-driver who causes death by driving as a "murderer".[50]

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[45] This was an example of a "no case to answer submission". In terms of the Criminal Procedure (Scotland) Act 1995, s 97, "[i]mmediately after the close of the evidence for the prosecution, the accused may intimate to the court his desire to make a submission that he has no case to answer both – (a) on an offence charged in the indictment; and (b) on any other offence of which he could be convicted under the indictment." The trial judge hears the submission outwith the presence of the jury. The defence focuses on the evidence led by the prosecution and the law applicable, and submits that the Crown has failed to prove an offence recognised in Scots law. If the judge agrees, the accused is acquitted of a charge or charges, or alternatively the jury may be directed that they cannot convict of a particular offence, for legal reasons. If the judge rejects the submission (a decision which may subsequently be challenged in an appeal), the trial proceeds. The jury is brought back to court and simply advised that there were administrative or legal matters to discuss. At that stage, the accused may choose to give evidence on his own behalf, and to call witnesses in his defence.

[46] See Criminal Procedure (Scotland) Act 1995, s 1(5).

[47] See the sentencing statement for *HM Advocate v Purcell* 2007 SCCR 520 (available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05_10_07_purcell.pdf) and J Chalmers, "The True Meaning of 'Wicked Recklessness'" (2008) 12(2) Edin LR 298.

[48] A proposition which found support in G Gordon (MGA Christie (ed)), *Criminal Law* (3rd edn, 2001) para 23.17 (para 23.15 in the 2nd edn), interestingly phrased as follows: "Now that it is accepted that a drunken motorist who drives his car at 70 miles an hour in a built-up area and kills a pedestrian on a pedestrian crossing or on the pavement is guilty (at common law) only of culpable homicide, *it is submitted that the law can be accepted as being that murder cannot be committed unless the accused intended to cause some personal injury"* [emphasis added]; cf *R v Hyam* [1975] AC 55, Viscount Hailsham LC [one of the two dissenting judges] at 77-78. Support for the proposition was also provided by para 23.33: " … The acceptance [of the view that the recklessness in murder … could be committed only in the course of committing another crime, or at least by an assault] was aided by the absence of any definition of recklessness in Scots law, and also by the development of the law as a result of which motorists and other 'non-criminal' persons who cause death recklessly are not charged with murder, however gross their lack of care or rash their behaviour. Although this suggested development is in line with Lord Cooper's remark that 'we have practically reached the position where only intentional killing is murder' [in his evidence to the Royal Commission], the actual situation is that there is murder wherever death is caused with wicked intention to kill or by an act intended to cause physical injury and displaying a wicked disregard of fatal consequences."

[49] See, for example, J Chalmers, "The True Meaning of 'Wicked Recklessness': *HM Advocate v Purcell*" (2008) 12(2) Edin LR 298; M Plaxton, "Foreseeing the Consequences of Purcell" 2008 SLT (News) 21; CG Stephen, "Blazing a (New) Trail for Murder? *Petto v HM Advocate*" 2009 SLT (News) 177; C McDiarmid, "Something Wicked This Way Comes: The Mens Rea of Murder in Scots Law" (2012) 4 Jur Rev 283. See too the absence of any mention of an element of "intent to injure" in Scottish Law Commission, *The Mental Element in Crime*, Scot Law Com No 80 (1983) para 2.32; Scottish Law Commission Memorandum to a Select Committee on Murder and Life Imprisonment in England and Wales and in Scotland (1989) Vol III – Oral Evidence, Pt 2 and Written Evidence, 24 July 1989 (HL Paper 78-III) at p 385; and *Scott v HM Advocate* 1995 SCCR 760.

[50] Unless, of course, a vehicle is obviously used by the driver as a lethal weapon.

4.24 The repercussions of *Purcell* are well demonstrated by using the examples, both real-life and hypothetical, in an address given in 1987 by Lord Goff of Chievely, "The mental element in the crime of murder".[51] Prior to the decision in *Purcell,* a Scottish jury in each of the following examples would have been entitled to convict of murder, on the basis of the second branch of the classic Macdonald definition, namely "wicked recklessness"; but following upon the decision in *Purcell,* it is doubtful that they would be so entitled. Each example is given below, followed by Lord Goff's explanation of how Scots law (pre-*Purcell*) would have entitled the jury to return a verdict of murder:

> (1) *DPP v Smith*:[52] A thief was driving through south east London with stolen items in his car. He was stopped by police, but after slowing down, accelerated away. One police officer hung onto the car until he was thrown off and killed.
>
> When arrested, the thief said: "I didn't mean to kill him, but I didn't want him to find the gear".[53]
>
> "[This] appears to be a classic case of a man acting totally regardless of the consequences, not caring whether the victim lived or died. If the jury had so concluded, he would, in Scots law, have been guilty of murder …"
>
> (2) *R v Hyam*:[54] A woman set fire to the house of her former lover's new fiancée in order to frighten her. She had carefully ascertained beforehand that her former lover was not in the house. The fiancée's two children were killed.
>
> A Scottish jury might have concluded that the accused was wickedly reckless, "having regard to the fact that she carefully ascertained beforehand that her former lover was not in the house."
>
> (3) *R v Moloney*:[55] A man had a heavy drinking session with his step-father, to whom he was deeply attached. In the early hours of the morning, they entered into some sort of competition involving two shotguns. At one point, the man pulled a trigger and killed his stepfather. Afterwards he said: " … I did not aim the gun. I just pulled the trigger …"
>
> "[A Scottish jury] could have been asked: did he mean to kill his stepfather? Or, if not, did he act regardless of the consequences, not caring whether his stepfather died or not? It would have been open to the jury to convict on the latter basis."
>
> (4) *R v Hancock and Shankland*:[56] During the coalminers' strike in 1984-85, a non-striking miner was being driven to work in a taxi with a police escort. As the convoy

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[51] (1988) 104 LQR 30.
[52] [1961] AC 290.
[53] Cf the circumstances of a more recent murder trial in England, *R v Long, Bowers and Cole* (sentencing statement available at: https://www.judiciary.uk/judgments/r-v-long-bowers-and-cole/), concerning the death of PC Harper (whose feet became entangled in the tow-rope attached to the accused's car, resulting in his death when dragged for about a mile as the accused tried to escape the police). In Scotland, certainly pre-*Purcell,* a jury would be entitled to return a verdict of murder on the basis of wicked recklessness: but in England, as mentioned in paras 3.19 and 4.19 above, a person can only be guilty of murder if he intended to kill, or if he intended to do grievous bodily harm.
[54] [1975] AC 55.
[55] [1985] AC 905.
[56] [1986] AC 455.

passed under a motorway bridge, the two defendants pushed a 45-lb concrete block and a 65-lb concrete post off the bridge. The taxi-driver was killed.

"Again, [a Scottish] jury could have been directed to consider the case on the two alternative bases, ie intention to kill or 'wicked recklessness', and again it would have been open to them to convict on the basis of 'wicked recklessness'."

(5) *Fights involving a knife or a broken glass*: From his own trial experiences, Lord Goff pointed out that an accused in a fight involving a knife or a broken glass often intended to cause the victim "serious bodily harm", but never intended to cause death.

Lord Goff argued that, "adoption of the concept of 'wicked recklessness' provides a far more just solution than does this form of intent, and indeed renders it surplus to requirements[57] … The test whether he intended to cause really serious bodily harm does not … provide a satisfactory answer – whereas the test whether he acted regardless of the consequences, not caring whether the victim died or not, introduces the element of indifference to death which … provides an appropriate hallmark of murder in cases such as this."

(6) Professor Glanville Williams' example of a bomb on an aircraft: Lord Goff introduced this example as follows:

> " … [Jurists] are discovering that some cases, which they *feel* ought to be embraced within the crime of murder, do not quite fit within the concept of intention; and so they are embarking on the enterprise of illegitimately expanding the concept of intention to include these cases. The classic example of this technique is to be found in the idea of 'oblique' intent[58] as expounded by Professor Glanville Williams in his *Textbook of Criminal Law.*[59] … To take a hypothetical case: suppose that a villain … sends an insured parcel on an aircraft, and includes in it a time-bomb by which he intends to bring down the plane and consequently to destroy the parcel. His immediate intention is merely to collect on the insurance. He does not care whether the people on board live or die, but he knows that success in his scheme will inevitably involve their deaths as a side-effect …"[60]

Lord Goff expressed the concise view that "[p]lainly, although the accused did not mean to kill anybody, he should be convicted of murder on the basis of wicked recklessness."

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[57] Lord Goff refers to the US Model Penal Code, in which the intention to do grievous bodily harm has no express significance, but is subsumed within the wider categories of "extreme indifference" murder (s 210.2(1)(b)) or reckless manslaughter (s 210.3(1)(a)) … In the New York Penal Code, an "intent to cause serious physical injury", under s 125.20 only creates liability for first degree manslaughter (see BE Gegan, "A Case of Depraved Mind Murder" (1975) 49 St John's LR 417, especially at pp 436-440).

[58] A person has "oblique intention" when an event is a natural consequence of their voluntary act, and they foresee it as such. A person is held to intend a consequence (obliquely) when that consequence is a virtually certain consequence of their action, and they knew it to be a virtually certain consequence: *R v Woollin* [1999] 1 AC 82. In his address, when dealing with "oblique intention, Lord Goff refers to JE Stannard, "Mens Rea in the Melting Pot" (1986) 37 NILQ 61 at pp 70-71; RA Duff, "The Obscure Intentions of the House of Lords" [1986] Crim LR 771 at p 778; AKW Halpin, "Intended Consequences and Unintentional Fallacies" (1987) 7 OJLS 104 at p 114, which support the argument that the mens rea of murder should be widened but without artificially extending the meaning of "intention".

[59] G Williams, *Textbook of Criminal Law* (2nd edn, 1983) at pp 84-85.

[60] (1988) 104 LQR 30, at p 45.

(7) *Terrorists*: Lord Goff outlined certain scenarios involving terrorists:

> "Take the case of a terrorist who leaves a time-bomb in a dustbin in a street, [which] goes off later and kills somebody. He can well say that he did not *mean* to kill anybody or even to cause grievous bodily harm to anybody; but it is a classic case of wicked recklessness. Then take the case of a terrorist who leaves a time-bomb in a busy store, and telephones to say that it will go off in half-an-hour's time. The store is evacuated, but somebody gets left behind and is killed when the bomb goes off, or a bomb disposal expert is killed trying to defuse the bomb. It will be for the jury to decide, on the evidence, whether the terrorist was indifferent whether anybody was killed or not, or whether he merely intended to terrify people. This seems to me to be a legitimate question to be put to a jury, though the inherently dangerous nature of a bomb is likely to persuade them to convict".[61]

Lord Goff concluded that the terrorists' actions as he described them amounted to "a classic case of wicked recklessness".

(8) *Reckless motorists*: Lord Goff describes a category of:

> " … the reckless driver who overtakes on a blind corner, realising that his action may result in a head-on collision and the death of the driver of the on-coming car, but optimistically hoping that no such thing will happen …"[62]

He noted that "[o]bviously, [reckless motorists] will not be guilty of wicked recklessness in all but the most extraordinary cases; the ordinary reckless motorist is a foolish optimist, who hopes and believes that neither he himself nor anybody else will be killed, or even hurt."

4.25 Against the background of these illustrative cases, Lord Goff reaches the following conclusion:

> "So it looks as though the concept of 'wicked recklessness' works well in practice. Moreover, having regard to the reactions of judges and juries in some of the decided cases, it appears to produce results which conform to their feelings. It has another advantage, because, with this as an alternative, intention to kill can be confined to its ordinary meaning – did the defendant mean to kill the victim? We do not have to try to expand intention by artificial concepts such as oblique intention.[63] Furthermore, in directing juries on intention to kill, judges should not have to embark on complicated dissertations about foresight of consequences and such like. With the alternative of 'wicked recklessness' open to them, the jury in *Hancock* (the case of the striking miners) should not have been puzzled if they had been told to ask themselves the simple questions – did the defendants mean to kill? Or did they act totally regardless of the consequences, indifferent whether anybody in the convoy died or not? But for me, the most important point is this. I am talking about a principle which has for long been applied in a sister jurisdiction in the United Kingdom. Innumerable Scottish juries have been charged on this basis, and no doubt many people convicted of murder upon it.[64] So far as I know, in Scotland neither judge, nor jury, nor jurist, sees any objection

[61] *Ibid*, at p 57.
[62] *Ibid*, at p 52.
[63] See the definition of "oblique intent" in fn 58 above.
[64] Lord Goff refers to G Gordon, "The Burden of Proof on the Accused" 1968 SLT (News) 41.

to it.[65] What greater recommendation can there be for a principle than that it has been successfully applied in practice?"

4.26 This exercise carried out in Lord Goff's address demonstrates the breadth of the concept of wicked recklessness as it had been generally understood prior to *Purcell.* However post-*Purcell,* the results in many of the cases would appear to be different, in that it would not be open to the jury to convict of murder no matter how strongly they felt they should. In *DPP v Smith* (as in *Purcell*) the accused was trying to escape the police. In *R v Hyam* the accused was trying to frighten her former lover's new fiancée. In *R v Moloney* the accused pulled the trigger but did not "aim the gun". In *R v Hancock and Shankland* the two defendants were taking steps to support the coalminers' strike. In Professor Glanville Williams' example of a bomb on an aircraft, the accused intended to collect on the insurance. In scenarios involving terrorists, the accused's position was an intention to make a point of principle and not to injure anyone. In all of these examples, the Crown might find it difficult to prove an intention to injure.

4.27 The narrowing or restriction of the definition of murder post-*Purcell* was thrown into sharp relief some years later in *Petto v HM Advocate*.[66]

The effect of *Purcell* in the case of *Petto*

4.28 In *Petto,* the appellant and a man named Rawlinson (R) lived in a ground floor flat in a Glasgow tenement. On 14 March 2004, they had a major argument. The appellant had been drinking. He stabbed R eight times, and killed him. In the course of the day, the appellant and others devised a plan to dispose of R's body. They obtained three canisters of petrol. They poured the petrol throughout the ground floor flat, and ignited it. There was an explosion and a major fire affecting the whole tenement. Fire and rescue services were summoned. Subsequently a second floor flat dweller (Mrs D) was found lying in her hall. She had tried to leave the building, but had been overcome by smoke. She was taken to hospital, but died the following morning. The appellant was charged with the murder of both R and Mrs D. At his trial on 1 October 2004, he pled guilty to the culpable homicide of R, and to the murder of Mrs D. A mandatory sentence of life imprisonment was then imposed.

4.29 Several years later, while the appellant was serving his life sentence for murder, the opinion in *HM Advocate v Purcell*[67] became available. Having taken legal advice, the appellant lodged a note of appeal against conviction, seeking to withdraw his plea of guilty to the murder of Mrs D, and to argue that the decision in *Purcell* meant that there had been an insufficient basis, in both the indictment and the evidence, for a conviction of murder of Mrs D.

4.30 On 12 March 2009, the appeal was heard by a bench of three judges. In view of the importance of the issues involved, they remitted the case to a bench of five judges.[68] The

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[65] Lord Goff refers to the Scottish Law Commission, *The Mental Element in* Crime, Scot Law Com No 80 (1983) paras 2.34-2.36, and to the Scottish Law Commission, *Attempted Homicide*, Scot Law Com Consultative Memorandum No 61 (1984) para 3.4, which highlight the small number of appeals concerning the mental element in murder under Scots law, when compared to the rest of Britain. Lord Goff also refers to *Forensis* [1986] JLSS 354 at p 355.

[66] 2011 SCCR 519.

[67] 2007 SCCR 520.

[68] Lord Justice Clerk Gill, Lord Osborne, Lord Kingarth, Lord Eassie, and Lord Carloway.

appeal was heard on 4 and 5 May 2010, and the opinion of the court was subsequently given by Lord Justice Clerk Gill.

4.31 The Lord Justice Clerk's opinion contained the following passages:

> "[3] This appeal raises an important question regarding the *mens rea* of murder. It arises as a consequence of the decision of this court in *HM Advocate v Purcell …*
>
> [7] This appeal is founded on the proposition that, since the libel did not allege that the appellant assaulted Mrs D, or had any intention to cause injury to her or any other person, it did not instruct a relevant charge of murder. The plea of guilty to murder having therefore been tendered in error, the appellant should be allowed to withdraw it …
>
> **Submissions for the appellant**
>
> [8] Counsel for the appellant submitted that the modern definition of murder was that set out in the following definition in Gordon's *Criminal Law:* '[T]he actual situation is that there is murder wherever death is caused with wicked intention to kill or by an act intended to cause physical injury and displaying a wicked disregard of fatal consequences' (3rd edn, at para 23.33).
>
> An Extra Division had approved that definition in *HM Advocate v Purcell.* This prosecution had proceeded on a doctrine of constructive malice that was not now accepted in Scots law. Statements by Hume, Alison and Macdonald on murder in the course of fire raising were no longer good law (Gordon, op cit, para 23.32[69]). It was not the law that any homicidal conduct displaying wicked recklessness constituted murder. There had to be wicked recklessness in carrying out *an intention to cause physical injury*. The Crown's approach was that a person who caused death was guilty of murder where his actings demonstrated his willingness to risk causing death or serious injury, or where such a risk was obvious. *That approach had been rejected in HM Advocate v Purcell.* Wilful fire raising was an offence against property. Setting fire to a house could not of itself be deemed to be *an attack on the person. There would have to be circumstances from which an intention to do physical harm could be inferred. The libel failed to aver that the appellant knew that there were other people living in the building …* [emphases added]."

4.32 Counsel for the appellant had the support of Gordon in the passage in *Criminal Law* (3rd edn), para 23.33, which stated:

> "the actual situation is that there is murder wherever death is caused with wicked intention to kill or by an act intended to cause physical injury and displaying a wicked disregard of fatal consequences"

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[69] G Gordon (MGA Christie (ed)), *Criminal Law* (3rd edn, 2001) para 23.32: "*Fire-raising* … [Statements suggesting that death caused by wilful fire-raising is murder] can be disregarded as deriving from a doctrine of constructive malice of a kind no longer accepted in Scots law. It is submitted that death caused by a fire-raiser cannot be murder unless the fire-raising displayed wicked recklessness. It may be that in view of the serious nature of fire-raising this case forms an exception to the suggested rule that murder also requires an intention to cause physical injury, but in the absence of any authority it cannot be asserted that this is so. Fire-raising is certainly a very serious and potentially dangerous crime, but so also is driving a car recklessly and under the influence of drink, and to cause death in the latter way is not murder in modern law."

4.33 It can be seen that it was the court's approval of the statement of the law propounded in Gordon, *Criminal Law,* together with the reasoning of the court in *Purcell* (both of which many would describe as narrowing or restricting the definition of murder) which caused problems for the court in *Petto v HM Advocate.* In pre-*Purcell* times,[70] many would argue that a jury would have been entitled to conclude that the appellant's conduct, in setting fire to the ground floor flat of a Glasgow tenement, constituted murder in terms of the second branch of the definition (wicked recklessness), and accordingly that an appeal such as was presented in *Petto* should be refused *for that reason*. As it happened, the appeal court found other reasons for refusing that particular appeal.[71]

4.34 The Lord Justice Clerk then made the observations[72] which were instrumental in bringing about the current Scottish Law Commission project entitled "The Mental Element in Homicide":

> "[20] Since this appeal can be decided on the narrow basis as to the meaning of intent in the clear cut circumstances of this case, it is unnecessary for us to explore the greater profundities of the mental element in murder and culpable homicide in contemporary Scots law. The discussion of that subject in Gordon's *Criminal Law* (3rd edn, paras 23.10-23.22) should suffice to persuade any reader that the subject is in need of a thorough re-examination. The submissions that we have heard in this case and in the appeal in *Telford v HM Advocate,* with which it was conjoined, have given us a glimpse of at least one of the major problems. It is regrettable that in this appeal, heard by five judges, in which the Crown sought to establish an important principle, the advocate depute relied almost exclusively on Scottish sources, referred briefly to some English case law and failed to refer us to any decisions on this familiar fact situation in other English speaking jurisdictions.
>
> [21] From my own researches on the point, pursued in response to the Crown submission, I have the impression that other English speaking jurisdictions may have attained greater maturity in their jurisprudence on this topic than Scotland has. In Scotland we have a definitional structure in which the mental element in homicide is defined with the use of terms such as wicked, evil, felonious, depraved and so on, which may impede rather than conduce to analytical accuracy. In recent years, the authors of the Draft Criminal Code for Scotland (2003) have greatly assisted our thinking on the matter; but 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.

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[70] Looking at the definitions and examples of conduct which constituted "wicked recklessness" set out in paras 4.19 and 4.24 above.

[71] See para [20] quoted in para 4.34 below.

[72] Reflecting, to some extent, the views of commentators who had been awaiting the outcome of the *Purcell-Petto* tension: see, for example, J Chalmers, "The True Meaning of "Wicked Recklessness': *HM Advocate v Purcell*" (2008) 12(2) Edin LR 298; E Clive, "Codification of the Criminal Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) at pp 62-63: " … At the time of writing, the larger court's decision was still awaited. It will be interesting to see what a larger court does. It is to be hoped that it does not distort the law on assault in order to solve problems in the law of murder. It is also to be hoped that it does not regard fire-raising as some sort of unprincipled *ad hoc* exception to a more general rule … The best outcome would probably be for the court to do what it can in the short term and suggest that the whole area of murder and culpable homicide be reviewed with a view to legislation … the question of what constitutes murder in the law of Scotland … is the sort of thing we ought to know by now … If a statute … had said … 'wicked recklessness suffices but perhaps not in driving cases and perhaps only if there is something like a violent assault or possibly fire-raising – it would have been severely and rightly criticised."

> [22] My own view is that a comprehensive re-examination of the mental element in homicide is long overdue. That is not the sort of exercise that should be done by ad hoc decisions of this court in fact specific appeals. It is pre-eminently an exercise to be carried out by the normal processes of law reform."[73]

4.35 In the light of the apparent narrowing of the definition of murder following upon the ruling in *Purcell* that "wicked recklessness" requires intention to injure before there can be a conviction of murder, we seek your views as follows:

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 life**[74]
- **acting "in such a way as to show that you don't care whether a person lives or dies"**[75]
- **being "totally regardless of the consequences, whether the victim lived or died"**[76]
- **showing "such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences"**[77]
- **being recklessly or intentionally engaged in criminal conduct where it was objectively foreseeable that such conduct carried the risk of life being taken**[78]
- **exposing someone to the risk of serious harm**[79]
- **demonstrating willingness to run the risk of causing death (or serious injury), or creating an obvious and serious risk of death (or serious injury)**[80]

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[73] Lord Carloway stated at para [32]: " … following the analysis and research of your Lordship in the Chair, a comprehensive re-examination of the classic definition of murder, which (subject to *Drury v HM Advocate*) remains that set out in Macdonald's *Criminal Law* (5th edn) at p 89, to be carried out in the normal course of law reform, may be desirable."

[74] The phrase used in question 5 of the issues for consideration in our informal consultations.

[75] *HM Advocate v Hartley* 1989 SLT 135 at 136.

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

[77] *Cawthorne v HM Advocate* 1968 JC 32.

[78] A formulation suggested by a member of our Advisory Group.

[79] Again, a formulation suggested by a member of our Advisory Group.

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

(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?

Constructive malice

4.36 We now turn to examine the doctrine of constructive malice, and its role in Scots homicide law.

4.37 One of Lord Gill's criticisms in *Petto* was that Scots homicide law remains:

> " … 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".[81]

What is "constructive malice"?

4.38 "Constructive malice" is a doctrine which attributes liability for the crime of "murder" where a killing occurs in the course of some other crime, such as robbery. The emphasis is on the *actus reus* (the physical circumstances leading to the death), rather than on the *mens rea* (the accused's state of mind and guilty knowledge). The doctrine is, therefore, an exception to the Scots homicide law rule that in general, both *actus reus* and *mens rea* are required before a person can be found liable for an offence.[82]

4.39 Applying a doctrine of constructive malice in Scots homicide law, a robber or an arsonist[83] might subsequently be surprised and shocked to learn that a death had occurred as a result of the robbery or arson, but despite the lack of wicked intent or wicked recklessness normally required for murder, would be liable for murder.[84]

Constructive malice in other jurisdictions

4.40 Some jurisdictions have adopted a doctrine of constructive malice, leaving no doubt about its nature and extent. For example, in New Zealand, by section 168 of the Crimes Act 1961, the offender will be liable for murder if he or she means to cause bodily injury for the purpose of facilitating any of the offences listed, and in so doing, causes death. The offences listed are treason, espionage, sabotage, piracy, piratical acts, escape or rescue from prison/lawful custody/detention, sexual violation, murder, abduction, kidnapping, burglary, robbery, and arson. The statute provides that the crime will be murder:

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[81] 2011 SCCR 519, at para [21].
[82] See ch 1, Introduction, para 1.2. In effect, constructive malice is a form of strict liability.
[83] Such as the accused in *HM Advocate v Petto* 2011 SCCR 519.
[84] Thus had such a doctrine been clearly extant in Scots homicide law in the 21st century, there might have been an obvious "route to verdict" in *Petto:* see the points made in the appellant's submissions in *Petto,* noted in para 4.31 above.

" … whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:

(a) if he or she means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned in subsection (2), or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission thereof, or for the purpose of resisting lawful apprehension in respect of any offence whatsoever, and death ensues from such injury:

(b) if he or she administers any stupefying or overpowering thing for any of the purposes aforesaid, and death ensues from the effects thereof:

(c) if he or she by any means wilfully stops the breath of any person for any of the purposes aforesaid, and death ensues from such stopping of breath."

4.41 Other jurisdictions with a clear doctrine of constructive malice include Australian states which have the crime of "felony murder", where death occurs during or as a result of another serious offence.[85] States in the USA also have the offence of "felony murder", adopting either the model New York Penal Code (NYPC) or the California Penal Code (CPC).[86] Likewise Trinidad and Tobago have a similar offence.[87]

4.42 Some jurisdictions have, however, abolished any doctrine of constructive malice. For example, in England and Wales, the perceived severity of sentencing an accused to death in circumstances where there was no intent to kill or to cause grievous bodily harm led to the abolition of felony murder and "constructive malice" in 1957.[88] Similarly the doctrine has been abolished in Hong Kong,[89] and in states in the USA which adopt the Model Penal Code (MPC).[90]

Constructive malice in Scotland

4.43 In Scotland, the position is unclear.

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[85] No intention to kill or inflict grievous bodily harm is required, nor is there a need to prove that the accused could foresee the likelihood of causing death (see *Halsbury's Laws of Australia*, paras 130-3200 and 130-3300.). Tasmania specifically lists the relevant serious offences, including piracy, escape from prison, resisting lawful apprehension, rape, forcible abduction, robbery, burglary and arson.

[86] In terms of the NYPC, s 124.25(3), there may be a conviction for second degree murder if a death occurs during one of the listed felonies (no proof of a fault element is required) although there may be a defence if the accused did not commit or aid the homicidal act, was not armed, had no reasonable ground to believe that another participant was armed, or had no reasonable ground to believe that any other participant would engage in conduct likely to result in death or serious physical injury; and in terms of the CPC a felony murder doctrine applies to both first and second degree murder: CPC s 189(a), 189(e) and case law.

[87] In terms of the Criminal Law Act 1979, s 2A where someone is killed in the course of an arrestable offence involving violence, the perpetrator(s) are liable to be convicted of murder even if the killing was done without intent to kill or to cause grievous bodily harm: see *Khan v The State* [2003] UKPC 79.

[88] Homicide Act 1957, s 1: see Law Commission, *Murder, Manslaughter and Infanticide* Law Com No 304 (2006) para 1.30 fn 24.

[89] *Halsbury's Laws of Australia*, paras 130.305 and 130.307: "The former rule, whereby a killing in the course or furtherance of another offence was murder, has now been abolished … The doctrine of constructive malice has been abolished."

[90] The drafters of the MPC abolished the felony murder rule, and in its place created a rebuttable presumption of recklessness and extreme indifference if the killing occurred in a robbery, sexual attack, arson, burglary, or felonious escape: see MPC s 210.2(1)(b).

4.44 The doctrine appeared to be recognised in Scots law, at least in the context of certain crimes, by a number of institutional writers such as Burnett (fire-raising),[91] Hume (robbery),[92] Alison (abortion, wilful fire-raising, robbery and rape),[93] and Macdonald (abortion, rape and robbery).[94] However, despite this historical support, in terms of modern case law, only cases involving robbery demonstrate something more than a merely tenuous claim that the doctrine exists.

4.45 In *HM Advocate v Fraser and Rollins*,[95] two co-accused caused the death of the victim during a robbery in a park. In his charge to the jury, Lord Sands stated that "[i]f a person attempts a crime of serious violence, although his object may not be murder, and if the result of that violence is death, then the jury are bound to convict of murder".[96]

4.46 A subsequent case was *HM Advocate v Miller and Denovan*.[97] Two co-accused enticed men into a park to rob them. They struck the victim on the head with a piece of wood and killed him. In his charge to the jury, Lord Wheatley said: "If in perpetrating this crime of robbery a person uses serious and reckless violence which may cause death without considering what the result may be, he is guilty of murder if the violence results in death although he had no intention to kill".[98]

Modern commentary

4.47 Gordon suggests that these are the two main cases[99] offering any support for the doctrine of constructive malice involving killing in the context of a robbery, and in modern practice the doctrine does not apply in cases of abortion, rape and fire-raising as advanced by the institutional writers.[100] In this context, it is noteworthy that the words "constructive malice" did not find their way into Scots case law until the case of *Purcell*. An old English doctrine bearing the same name ("constructive malice"), which was abolished by the Homicide Act 1957, never formed part of Scots law.

4.48 While recognising that the applicability of the doctrine of constructive malice in murder does not remain free from doubt, Ferguson and McDiarmid agree with Gordon that if it were to apply, it would do so only in the context of death in the commission of a robbery.[101]

4.49 However, Plaxton takes a more cautious view, and concludes that any support for the doctrine of constructive malice in the two cases mentioned is tentative at most.[102] He suggests that in both cases the degree of violence used by the accused was the operative factor, and

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[91] Burnett, *A Treatise on Various Branches of the Criminal Law of Scotland* (1811) at ch I, p 6.
[92] Hume, *Commentaries on the Law of Scotland* (1844) at pp 24-5.
[93] Alison, *Principles of the Criminal Law of Scotland*, (1832) Vol I at pp 51-53.
[94] Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th edn 1948) at pp 91-92.
[95] 1920 JC 60.
[96] *Ibid* at p 78.
[97] Unreported November 1960, High Court at Glasgow; December 1960, High Court of Justiciary on Appeal.
[98] Transcript of Judge's charge at pp 30-31.
[99] *HM Advocate v Fraser and Rollins* 1920 JC 60; *HM Advocate v Miller and Denovan* Unreported November 1960, High Court at Glasgow; December 1960, High Court of Justiciary on Appeal.
[100] G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017) paras 30.26 to 30.32.
[101] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn 2014) para 9.12.5.
[102] M Plaxton, "Foreseeing the Consequences of *Purcell*" (2008) SLT (News) 21 at p 24.

that it was for this reason (and not constructive malice) that the trial judge in *Miller and Denovan* directed the jury that a verdict of culpable homicide was not open to them.[103]

Purcell and Petto

4.50 The two most recent cases to touch upon the subject of constructive malice were *HM Advocate v Purcell*[104] and *Petto v HM Advocate*.[105] In the former case, Lord Eassie said:

> "At least in its former vigour, the doctrine of constructive malice no longer forms part of the modern law in Scotland (though some traces may possibly exist in death caused in the course of an assault or robbery) … We would add further that, as respects the examples of death resulting from abortion or during rape instanced by [Alison, Hume, Burnett and Macdonald], it may be noted that … Gordon similarly regards them as not being consonant with the modern law".[106]

4.51 This reasoning was adopted by Lord Wheatley at the trial in *Petto.*[107] He agreed that "the doctrine of constructive malice has been discarded … subject to a possible surviving trace in the case of death caused in the course of an assault and robbery".[108]

4.52 On appeal, Lord Wheatley's approach was approved by Lord Gill who, while chairing the five-judge bench, was of the opinion that in the specific context of wilful fire-raising, the modern law did not support the doctrine of constructive malice.[109]

4.53 Plaxton is of the view, however, that rather than clarifying or resolving the issue of constructive malice, the court in *Purcell* merely acknowledged its existence, and by stating that constructive malice may still apply in limited circumstances of robbery and assault, simply re-affirmed what has largely already been accepted and did not resolve or add anything new to the debate.[110]

Conclusion relating to constructive malice in modern homicide law

4.54 Overall, there is mixed opinion about the existence of the doctrine of constructive malice in contemporary Scots law, even in the limited circumstances of robbery and assault. Case law and academic commentary are not conclusive. The issue remains uncertain. This uncertainty can be contrasted with the position in England and Wales, where the perceived severity of sentencing an accused to death in circumstances where there was no intent to kill or to cause grievous bodily harm led to the abolition of the doctrine in the Homicide Act 1957.[111]

Practitioners' views on constructive malice

4.55 Practitioners whom we interviewed as part of our informal consultations had not experienced any recent examples of prosecution on the basis of constructive malice.

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[103] *Ibid* at p 24.
[104] 2007 SCCR 520.
[105] 2011 SCCR 519.
[106] 2007 SCCR 520 at para [15].
[107] 2011 SCCR 519.
[108] *Ibid* at para [7] (Lord Wheatley).
[109] *Ibid* at para [19] (Lord Gill).
[110] M Plaxton, "Foreseeing the Consequences of *Purcell*" (2008) SLT (News) 21 at p 24.
[111] Homicide Act 1957, s 1.

Nevertheless it was observed that it was unsatisfactory not to be sure whether or not the doctrine currently existed, and if so, within what parameters. Most interviewees were of the view that the doctrine should be abolished.

4.56 We ask the following question:

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

The Draft Criminal Code for Scotland: suggestions for reform

4.57 In the final part of this chapter, we note certain suggestions for reform of the definition of the crime of murder made by the authors of the Draft Criminal Code for Scotland.[112]

4.58 In keeping with their overall approach in the Draft Criminal Code,[113] the authors[114] propose (a) retaining the simple bipartite structure of "murder" and "culpable homicide";[115] (b) using *mens rea* as the defining element which divides murder and culpable homicide;[116] (c) subdividing murder into "intention" and "callous recklessness";[117] (d) retaining the partial defences of provocation and diminished responsibility.[118]

4.59 The definition of "intention" focuses upon a person foreseeing a result as "certain or almost certain to occur",[119] and provides that a person who intends to harm a person but harms another instead is to be treated as intending to harm the other person.[120] The definition of "callous recklessness" is based upon the concept of a person being "aware of an obvious and

[112] Relevant excerpts from the Code can be found in the Appendix to this paper.
[113] Namely that the Code is "based firmly on laws which have stood the test of time … firmly based on the existing law and is recognisably the traditional criminal law of Scotland, updated and set out in modern form" (p 3). It "is not … a copy of some foreign model" (pp 2-3), but nevertheless "involves some reforms so that the new law is a restatement with the elimination of perceived defects and anomalies" (p 2).
[114] E Clive, P Ferguson, C Gane, and A McCall Smith.
[115] Ss 37 and 38: this contrasts with homicide law in other jurisdictions such as Italy and the USA (see para 2.2 above); and also with the observations of Professor L Farmer, "Structuring Homicide: A Broad Perspective" (Joint SLC, University of Strathclyde and University of Glasgow Seminar, 26 October 2018) available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[116] The Draft Code does not therefore use *actus reus* as the defining element, contrary to the proposals made and questions raised by Professor Farmer and Professor McDiarmid (Joint SLC, University of Strathclyde and University of Glasgow Seminar, 26 October 2018) available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[117] Cf the current subdivision (see para 2.3 above), but "wicked intention" is replaced by "intention" as defined in s 9 of the Code, and "wicked recklessness" is replaced by "callous recklessness", with recklessness being defined in s 10 of the Code.
[118] S 38(3)(a) and (b), and s 38(5). The retention of provocation and diminished responsibility can be contrasted with some jurisdictions where such defences have been abolished (see, for example, England and Wales, and New Zealand: ch 10, Provocation, paras 10.40 and 10.43). Also the retention of provocation does not accord with: Professor L Farmer, "Structuring Homicide: A Broad Perspective" (Joint SLC, University of Strathclyde and University of Glasgow Seminar, 26 October 2018) available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[119] This approach reflects the current position in England and Wales. In *R v Woollin* [1999] 1 AC 82, it was held that "the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case." (Lord Steyn at p 96 of *Woollin*).
[120] S 9(1)(a) and (b). S 9(2) also provides that "there is no rule or presumption that a person intends the natural and probable results of that person's acts".

serious risk" of a result or circumstance or danger, "but nonetheless [acting] where no reasonable person would do so".[121]

4.60 The following points may be relevant when considering the Code's new definition of murder.

More complex directions for juries

4.61 If the Code is used to define "murder", no fewer than three statutory sections[122] are required. Section 9 (Intention) comprises over 100 words; section 10 (Recklessness) over 130 words; and section 37 (Murder) over 120 words. A trial judge might feel unable to risk abbreviating or paraphrasing the statutory language, and thus would have to give an opening direction of about 350 words. Thereafter the judge might endeavour to assist the jury by explaining what is meant by foresight of consequences; by a result which is certain or almost certain to occur; by the word "harm";[123] and by the absence of a presumption that a person intends the natural and probable results of their acts. It is possible that directions along these lines would be difficult for trained lawyers to understand and apply, all the more so for non-lawyers in the jury.

4.62 Thus the approach adopted in the Code does not appear to follow the advice of experienced judges, lawyers, and legal commentators, namely to avoid complex jurisprudential dissertations when charging a jury. In this context, the following guidance is of particular note.

4.63 In 1983 the Scottish Law Commission[124] pointed out that "Scotland has been spared the proliferation of judicial glosses on [words such as 'intention', 'knowledge' and 'recklessness'] that has occurred in England."

4.64 In 1987, Lord Goff in his lecture "The mental element in the crime of murder"[125] commended the current Scots law of homicide for its simplicity and the fact that it "works well in practice". He warned that "in directing juries on intention to kill, judges should not have to embark on complicated dissertations about foresight of consequences and such like."[126]

4.65 In 1989 the Scottish Law Commission[127] confirmed that "intent to kill" had "always received [its] ordinary and natural meaning in Scotland, and [had] not presented the courts with problems", adding "[w]e are aware that concepts of intent and intention have been a source of difficulty in English law,[128] but, as Scots lawyers, we offer no comment on those

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[121] S 10.
[122] Ss 9, 10 and 37.
[123] "Harm" can extend to psychological harm, emotional harm, and financial harm: while this may be thought a minor detail, it may be necessary for the trial judge to explain what sort of harm is envisaged by the statute.
[124] Scottish Law Commission, *The Mental Element in Crime*, Scot Law Com No 80 (1983) para 2.14.
[125] (1988) 104 LQR 30.
[126] He referred to JE Stannard, "Mens Rea in the Melting Pot" (1986) 37 NILQ 61 at pp 70-71; RA Duff, "The Obscure Intentions of the House of Lords" [1986] Crim LR 771 at p 778; AKW Halpin, "Intended Consequences and Unintentional Fallacies" (1987) 7 OJLS 104 at p 114, which support the argument that the mens rea of murder should be widened but without artificially extending the meaning of "intention".
[127] In a Memorandum to a Select Committee on Murder and Life Imprisonment in England and Wales, The Nathan Committee, Vol III – Oral Evidence, Pt 2, and Written Evidence, 24 July 1989 (HL Paper 78-III) at p 386 para 11. The Memorandum was prepared without any formal consultation process, and was a response to a proposal that the crime of murder be set out in a UK-wide statute: see para 4.65.
[128] Referring to *DPP v Smith* [1961] AC 290; *R v Hyam* [1975] AC 55; *R v Hancock* [1986] AC 455.

cases where those difficulties have arisen".[129] The Commission explained that "we do not favour any statutory definition of murder for Scotland", and pointed out that a statutory definition which did not use the word "wicked" would "have the undesirable consequence of changing the Scots definition of murder when … no need for change [had] been made out".[130] Turning to the word "recklessness", the Commission stated that "[i]n Scotland, so far as we are aware, the concept of recklessness has presented no problems for the courts … A departure from the concept of recklessness would, we anticipate, be likely to lead to uncertainty and, possibly, to unintended changes in the law of murder in Scotland."

4.66 In 1995 Professor RAA McCall Smith[131] noted that "Scots law has avoided the prolonged, and often perplexing, discussion of intention to kill which has plagued English law in cases such as *Hyam v Director of Public Prosecutions*[132] …".

4.67 In 1999 Lord Hope of Craighead, sitting in the House of Lords,[133] emphasised the need for any direction to a jury to be "both clear and simple. It should be expressed in as few words as possible. That is essential if it is to be intelligible."

4.68 Against that background, there may be a concern that the definition of "murder" outlined in sections 9, 10 and 37 of the Draft Code might result in over-complex directions to juries with consequential difficulties, related appeals,[134] and an increase in the number of resultant re-trials.

Is "callous recklessness" a suitable substitute for "wicked recklessness"?

4.69 The authors of the Draft Code recommend the use of "callous recklessness" rather than "wicked recklessness" to describe the special type of recklessness required for the crime of murder.[135] They observe:

> " … 'Callous' describes well the type of recklessness required. It must be more than ordinary recklessness. It must involve a callous acceptance of the risk of death created by the acts or a callous indifference to the possible fatal consequences of the acts. The terrorist who plants a bomb and gives the police a short advance warning may argue that he did not intend to kill anyone, but, if somebody is killed, could be convicted of murder on the ground that he was callously reckless as to whether death was caused. Callous has the advantage of not carrying with it some of the more artificial baggage which accompanies the term 'wickedly reckless' such as the question whether there can be wicked recklessness in the absence of an intention to do some bodily harm."[136]

4.70 However this recommendation, involving as it does the redefinition of the concept of "wicked recklessness", should be read along with the Memorandum submitted by the Scottish Law Commission to the Select Committee on Murder and Life Imprisonment in England and

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[129] Memorandum, p 386 para 11.
[130] Memorandum, pp 386 to 397 at paras 13 and 17.
[131] "Homicide", 7 *Stair Memorial Encyclopaedia,* para 267, fn 2.
[132] [1975] AC 55, adding "For a discussion of intention to kill, see RA Duff, *Agency and Criminal Liability* (1990)".
[133] In *R v Woollin* [1999] 1 AC 82.
[134] Arguing, for example, that the jury had been misdirected, or that a "no case to answer" submission had been wrongly refused.
[135] Draft Code, p 84.
[136] Here, the authors refer to CHW Gane and CN Stoddart, *A Casebook on Scottish Criminal Law* (3rd edn, 2001) pp 402-403, where that issue is discussed.

Wales and in Scotland (the Nathan Committee) in 1989. In that Memorandum the Commissioners,[137] when advising against the enactment of "a single statutory crime of murder applying throughout the United Kingdom"[138], made the following observations:

> "17. In the first place we recognise that, as was pointed out by Lord Goff, the words 'wicked' and possibly also 'recklessness' might be regarded as inappropriate for modern legislation. The use of any other words would have the undesirable consequence of changing the Scots definition of murder when, as we have suggested above, no need for change has been made out.
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> 18. So far as the word 'recklessness' is concerned … In Scotland, so far as we are aware, the concept of recklessness has presented no problems for the courts … A departure from the concept of recklessness would, we anticipate, be likely to lead to uncertainty and, possibly, to unintended changes in the law of murder in Scotland.
>
> 19. The word 'wicked' may be an even greater stumbling block. Even if the concept of recklessness were to be replaced by something like 'indifference to death', we would still regard it as essential to retain a word such as 'wicked' in order to give a killing that added character of heinousness which will elevate it from the crime of culpable homicide or manslaughter to murder. The point is that these lesser crimes may also, in many cases, involve some indifference to death; but indifference, like recklessness, can vary in quality and in moral guilt. If there is to be a separate crime of murder, and if it is to go beyond a deliberate intention to kill, some way must be found of marking the dividing line between murder and culpable homicide. In our view the concept of wickedness successfully achieves this purpose. If, contrary to our views, there were to be legislation for Scotland in relation to the crime of murder, we would strongly urge that any concept such as recklessness or indifference to death should remain qualified by the word 'wicked' or, if it can be found, some other word which conveys substantially the same meaning. A statutory provision which failed to contain a concept such as a 'wickedness' would undoubtedly alter the Scots crime of murder to a significant extent."

4.71 As we have pointed out in Chapter 3, The language of Scots homicide law, at paragraph 3.45, there may be a subtle but important difference between "callous" and "wicked".[139] On one view, the concept of "wicked recklessness" is a greater safeguard for an accused in a murder trial than the concept of "callous recklessness".

The dangers of cherry-picking

4.72 As noted earlier in Chapter 2, paragraph 2.68, and Chapter 3, paragraph 3.49, "cherry-picking" certain reform proposals and incorporating them into an existing time-tested structure, may result in unforeseen consequences and unwelcome repercussions. While the authors of

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[137] Namely Lord Davidson (chair), Dr EM Clive, Professor PN Love CBE, Sheriff CGB Nicholson QC, and WA Nimmo Smith QC.

[138] Memorandum, p 387 at para 16 and following paragraphs.

[139] A suggestion which may be supported to some extent by the fact that there is little overlap between "callous" and "wicked" in *Webster's Dictionary of Synonyms*. Synonyms for "callous" include "affectless, case-hardened, cold-blooded, compassionless, desensitized, hard, hard-boiled, hard-hearted, heartless, indurate, inhuman, inhumane, insensate, insensitive, ironhearted, merciless, obdurate, pachydermatous, pitiless, remorseless, ruthless, slash-and-burn, soulless, stony, stonyhearted, take-no-prisoners, thick-skinned, uncharitable, unfeeling, unmerciful, unsparing, unsympathetic". Synonyms for "wicked" include "bad, black, dark, evil, immoral, iniquitous, nefarious, rotten, sinful, unethical, unlawful, unrighteous, unsavoury, vicious, vile, villainous, wrong".

the Draft Code envisage implementation of parts of the Code,[140] they caution that "[e]ffective modernisation of the law requires legislation, and effective modernisation of a whole area of law requires comprehensive legislation."[141]

4.73 We would welcome views on the following questions:

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?

[140] "The draft code is not presented as something which must be accepted or rejected as a package. Its content is for the Scottish Parliament to determine." (p 4).
[141] P 7.

Chapter 5 Culpable homicide

Introduction

5.1 The common law crime of culpable homicide does not have a classic definition in Scots law. It has been said that:

> " … the crime of culpable homicide covers the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills."[1]

> " … [culpable homicide] is unlawful killing of a criminal kind in circumstances where the crime does not amount to murder. It can occur in a wide variety of circumstances."[2]

Murder reduced to culpable homicide

5.2 As already noted,[3] the partial defences of provocation and diminished responsibility[4] may reduce what would otherwise be "murder" to the lesser offence of culpable homicide.[5] The dividing line between murder and culpable homicide is often a fine one,[6] but it is of major importance for both fair labelling and sentencing.[7]

Other types of fatal case: the importance of social policy

5.3 Conduct which may be blameworthy and causes death, but which does not amount to "murder", covers a wide range of circumstances. A person may have been manhandled out of a car,[8] or left exposed to the elements.[9] A gas installer may have carried out a defective installation.[10] A faulty system of work in a large corporation may have resulted in the death of an employee. An anaesthetist may have failed to notice that a tube had become disconnected, leading to the death of the patient.[11] A drug-dealer may have supplied illegal drugs to a

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[1] *Drury v HM Advocate,* 2001 SCCR 583, para [13] (Lord Justice General Rodger).
[2] *Transco plc v HM Advocate (No 1)* 2004 SCCR 1, para [35] (Lord Hamilton).
[3] Ch 2, The structure of Scots homicide law.
[4] See ch 10, Provocation, and ch 11, Diminished responsibility.
[5] Despite the doubts expressed by Lord Justice General Rodger in *Drury v HM Advocate*, the majority of legal scholars and practitioners support the concept of "reduction" of the crime of murder to the lesser crime of culpable homicide. Where murder is so reduced, the resultant culpable homicide is described by some writers and legal systems as "voluntary culpable homicide", the adjective "voluntary" reflecting the clear intention to kill as opposed to "involuntary" culpable homicide where there is no intention to kill: see ch 2, fn 12. However the voluntary/involuntary classification did not emanate from the institutional writers, and the classification is infrequently referred to in day-to-day practice in Scottish murder trials and appeals.
[6] See ch 2, The structure of Scots homicide law, paras 2.14 to 2.19; and see *Ross v Lord Advocate* 2016 SCCR 176, para [29] (Lord Carloway): " … Depending upon the nature of the act, the crime of [homicide] may be murder or culpable homicide. Exactly where the line of causation falls to be drawn is a matter of fact and circumstance for determination in each individual case."
[7] See ch 2, paras 2.20 to 2.23.
[8] *Bird v HM Advocate* 1952 JC 23.
[9] *HM Advocate v McPhee* 1935 JC 46.
[10] See the unreported case of *Ross Fontana* (March 1990), referred to in TH Jones and I Taggart, *Criminal Law* (7th edn, 2018) para 9-76.
[11] Cf the circumstances in the English case of *R v Adomako* [1995] 1 AC 171.

customer who voluntarily ingested them and died as a result.[12] A car-driver may have caused a fatal road traffic accident.[13] A single punch thrown in the course of a dispute may have caused the victim to fall and suffer a fatal head injury.[14]

5.4 Although each of the above cases resulted in a fatal outcome, the question whether a particular set of circumstances should result in the perpetrator being subjected to a criminal prosecution and, if convicted, labelled a "killer",[15] often presents difficult questions of morality, contemporary views, and social policy, in addition to legal principle and precedent. Different societies and different legal systems may take different approaches. Issues may prove highly contentious.

5.5 In Scotland, for example, there are widely differing views about the appropriate approach to adopt in respect of (i) certain fatal road traffic cases;[16] (ii) assisted suicide and assisted dying; (iii) failures in duty on the part of professional persons and tradesmen resulting in death; (iv) the supply of illegal drugs where there has been voluntary ingestion by the recipient; (v) omissions to act in certain circumstances; and (vi) a death occurring as a result of a corporate body's faulty system of work. The issues and conflicts may ultimately be resolvable by the courts and/or Parliament only on the basis of a combination of legal principle and social policy.

5.6 The importance of social policy and the range of socially-acceptable solutions is illustrated in the type of case referred to above. Fatal road traffic cases and the reluctance of jurors to label a car-driver a "murderer" or a "killer" led to the enactment of UK-wide legislation in the form of the Road Traffic Acts.[17] Issues arising from assisted suicide and assisted dying are widely considered to require debate and decision by the UK Parliament.[18] Failures on the part of professionals and tradesmen are currently rarely prosecuted in the criminal courts in Scotland,[19] but different approaches may be adopted in other jurisdictions.[20] Death caused by the voluntary ingestion of illegal drugs supplied by another has resulted in different approaches in English and Scottish courts,[21] while fatal cases involving omissions to act have resulted in

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[12] As in *MacAngus and Kane v HM Advocate* 2009 SCCR 238.
[13] As in *HM Advocate v Purcell* 2007 SCCR 520.
[14] Such a situation may involve the "thin skull" rule, namely taking your victim as you find him (or her). It is no defence to a charge of homicide that the victim of an assault had, unknown to the accused, a pre-existing condition such as an abnormally thin skull, or a heart condition, or some congenital abnormality, which contributed to the death: *HM Advocate v Rutherford* 1947 JC 1, 1947 SLT 3; *Bird v HM Advocate* 1952 JC 23, 1952 SLT 446.
[15] The consequence of a conviction for culpable homicide.
[16] See, for example, the debate in the case of *Purcell,* noted in paras 4.19 and 4.20 above.
[17] Statutory offences include causing death by dangerous driving; causing death by careless or inconsiderate driving; causing death by driving while unlicensed, disqualified or uninsured; and causing death by careless driving when under the influence of drink or drugs (Road Traffic Act 1988, ss 1, 2B, 3ZB, 3ZC, and 3A).
[18] To date, two private members bills have failed in the Scottish Parliament: The End of Life Assistance (Scotland) Bill, defeated in 2010 by 85 votes to 16, and the Assisted Suicide (Scotland) Bill defeated in 2015 by 82 votes to 36. And see L Campbell, "Current Debates about Legislating for Assisted Dying: Ethical Concerns" (2018) 24(1) MLJI 20 at p 21.
[19] See fn 10 above and fns 46-47 and 56 below.
[20] For example, in England and Wales there are prosecutions for "gross negligence manslaughter", where a person carrying out a job requiring special skill or care (such as a doctor, an anaesthetist, a policeman, a prison officer, a ship's captain, an electrician) fails to meet the expected standard and causes death: see Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996) para 2.8 and following paragraphs; and the case of *R v Adomako* [1995] 1 AC 171.
[21] Scottish courts have held that there may be no break in the chain of causation, and that the drug supplier may be responsible for the death: *Lord Advocate's Reference (No 1 of 1994)* 1995 SCCR 177; *MacAngus and Kane v HM Advocate* 2009 SCCR 238, para [48]. By contrast, courts in England and Wales consider voluntary ingestion to be a *novus actus interveniens* which breaks the chain of causation: *R v Kennedy (No 2)* [2008] 1 AC 269.

a less well-established jurisprudence in Scotland than in England.[22] Deaths occurring as a result of a corporate body's faulty system of work led to UK-wide legislation, namely the Corporate Manslaughter and Corporate Homicide Act 2007. However there is remaining criticism concerning lack of accountability and insufficient punishment,[23] leading to attempts in Scotland to redefine culpable homicide by private members' bills.[24]

5.7 In Scotland, in addition to the policy decisions required of the courts and Parliament, further policy-based decision-making is carried out by the Lord Advocate, who has discretion when prosecuting.[25] The Lord Advocate's decisions about whether, when, and how to prosecute in respect of a death reflect not only the proper application of the law, but also the views and values of contemporary Scottish society.

5.8 As a result, culpable homicide is an area of criminal law in which social policy is often as important as legal principle or precedent.

Reform of the law of culpable homicide?

5.9 The breadth and flexibility of the crime of culpable homicide have often been regarded as strengths in the structure of Scots homicide law.

5.10 The majority of practitioners interviewed in the course of the homicide project[26] did not favour reform of culpable homicide by the introduction of prescriptive grades of

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[22] In the law of manslaughter in England and Wales, a prosecution for involuntary manslaughter by gross negligence committed by omission may follow where a duty of care was owed to an individual, the duty was neglected, and the individual died: Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996) para 2.22 and following paragraphs. The law in Scotland is less clear: see para 5.18 and 5.19 below. See too *Bone v HM Advocate* 2005 SCCR 829 at fn 63 below.

[23] See S Field "Ten Years On: The Corporate Manslaughter and Corporate Homicide Act 2007: Plus Ca Change?*"* (2018) ICCLR 511; S Field, "The Corporate Manslaughter and Corporate Homicide Act 2007 and Human Rights: Part 1 – Has Universal Protection of the Right to Life Been Advanced?" (2019) ICCLR 369; V Roper "The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10-year Review" (2018) J Crim Law 48, concluding that while the statutory offence offered a superior basis of liability, encompassing more than small companies, nevertheless results over a 10-year range were disappointing, with (in England and Wales) fewer prosecutions than envisaged, unjustifiable inconsistency in sentencing, a continued lack of individual accountability, and a prosecutor preoccupation with a limited range of defendants.

[24] In December 2014, Richard Baker MSP carried out a consultation concerning a Culpable Homicide (Scotland) Bill, which did not become statute. In April 2019 Claire Baker MSP commenced a consultation concerning a Culpable Homicide (Scotland) Bill, seeking to have corporate wrongdoers treated with the same level of gravity and moral opprobrium as an accused in a homicide trial. The bill was introduced to the Scottish Parliament on 1 June 2020 and the Presiding Officer gave a negative statement on introduction that the provisions of the bill were outwith the legislative competence of the Scottish Parliament. The bill fell at Stage 1 on 21 January 2021. There were 26 votes for, 89 against, and 0 abstentions. The bill sought to create two kinds of statutory culpable homicide, namely death caused "recklessly" and death caused by "gross negligence", with the possibility of liability being brought home to individual office-holders with resultant convictions and sentence. The intention was that the new definitions embodied standards which could be established objectively, thus avoiding proof of any mental element on the part of the organisation. As explained in the foreword, the proposed legislation attempted to introduce appropriate legal remedies for loss of life where the recklessness or gross negligence of employers, businesses or corporations is proved. Critically, the legislation also sought to provide a greater focus on health and safety in organisations and in the workplace, supporting a reduction in fatalities, and changing the culture in Scotland for the better. It was proposed that the definitions of "recklessness" and "gross negligence" follow those under the Draft Criminal Code for Scotland, and that there should be a clearly defined "duty of care" owed to employees. The statutory offences would have been in addition to, and not in substitution for, existing offences of culpable homicide at common law.

[25] See *dicta* of Lord Cameron in *Boyle v HM Advocate* 1976 JC 32 at 37.

[26] Interviewed in our informal consultations: see ch 1, Introduction, para 1.44.

blameworthiness or by the re-structuring of the offence into particular categories. Some disadvantages of such a detailed and prescriptive approach were identified as:

- Difficulty in obtaining the appropriate majority verdict if too many options were available to the jury.

- A reduced scope in the jury's exercise of judgment and discretion in reaching a verdict.

5.11 It was pointed out that degrees of culpability and mitigation could be adequately reflected in sentencing.

5.12 One interviewee suggested that it would be useful to know why a jury had opted for culpable homicide and not murder. A verdict with a rider such as "by reason of provocation" or "by reason of diminished responsibility" would assist in both sentencing and any subsequent appeal. Another interviewee requested more clarity about the circumstances which entitled a judge to withdraw the option of culpable homicide from the jury.[27]

5.13 On balance, the practitioners we interviewed considered that the Scots law of culpable homicide is working well in practice.[28]

5.14 Nevertheless, some commentators consider that reform is necessary. Professors Chalmers and Leverick point out that the conviction label "culpable homicide" may violate the fair labelling principle, and may give insufficient information to employers and other bodies.[29] Professor McDiarmid comments that the range of offences covered is too wide and varied, and that consideration should be given to sub-dividing culpable homicide into degrees of blameworthiness.[30]

5.15 Professor Farmer suggests that a more accurate calibration of the wide range of behaviour might be achieved by greater reliance upon the *actus reus* of any offence, classifying the particular way in which death was brought about, and creating a "ladder" or "grid" of crimes of increasing gravity.[31] He points to other legal systems which define offences in such a way, using either *actus reus* or a combination of *actus reus* and *mens rea.* For example, the German Criminal Code specifies certain elements of the *actus reus,* namely

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[27] If such clarification was not possible, the interviewee suggested that a discussion (outwith the presence of the jury and prior to the judge giving the charge) would be helpful. Those points arose because in current practice, the option of culpable homicide may be withdrawn if the trial judge considers that the evidence does not justify that lesser verdict, thus restricting the verdicts open to the jury to murder or acquittal: see G Gordon (J Chalmers and F Leverick (eds)), *Criminal Law* (4th edn, 2017), para 30.28. As the judge is the last person to speak to the jury, withdrawal of culpable homicide without warning or discussion may cause difficulties (if, for example, the defence had hoped for that verdict).

[28] Tribute was paid to juries who, as a composite body, were thought generally to be very acute.

[29] J Chalmers and F Leverick, "Fair Labelling in Criminal Law" (2008) 71(2) MLR 217 at 223.

[30] Para 2.31 above, and also the paper prepared by Professor McDiarmid on the Scottish Law Commission Homicide website. Similarly, the Law Commission of England and Wales (LCEW) express concern about the wide range of offending conduct included in the equivalent offence of manslaughter. As was noted in Law Commission, *A New Homicide Act for England and Wales? An Overview*, Law Com CP No 177 (2005) para 1.30: "Manslaughter is of even wider scope than murder. In 1992 Lord Chief Justice Geoffrey Lane said of the offence, 'it ranges in gravity from the borders of murder right down to those of accidental death' … 5.1 … the fundamental weakness of the law of homicide is that its structure is not designed to ensure that different levels of criminality are accurately graded and labelled …".

[31] See paras 2.27 to 2.30 above.

killing "for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence", which change the offence from one of "voluntary manslaughter" to "murder".[32]

Would reform of the crime of culpable homicide be beneficial?

5.16 Reform of the common law crime of culpable homicide could be achieved by a statutory restatement of general principle.[33] Alternatively legislation could divide the offence (or some aspects of it) into particular graded offences, reflecting specific levels of gravity.[34] Any statutory reform might have advantages, but there may also be disadvantages.

Possible advantages of legislative reform

5.17 *A clear dividing line between culpable homicide and murder:* Statutory provisions could assist in defining the dividing line between murder and culpable homicide. Legislation could provide that a killing in certain specific circumstances would result in the crime of "murder" and not culpable homicide. For example, statute might provide that a death caused by a driver trying to evade the police would constitute murder.[35] Other particular circumstances amounting to murder could include death caused as a result of treason, espionage, sabotage, piracy, piratical acts, escape or rescue from prison/lawful custody/detention, sexual violation, abduction, kidnapping, burglary, robbery and arson.[36]

5.18 *Defining what culpable and reckless conduct constitutes culpable homicide*: The common law of culpable and reckless conduct constituting culpable homicide depends for its definition on decided cases and commentary in textbooks. Authoritative cases to date include *Khaliq v HM Advocate*[37] (recklessness causing real injury where a shop-keeper sold glue-

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[32] German Criminal Code, s 211. Other examples include the Canadian Criminal Code (see para 5.46 below), and the New Zealand Crimes Act 1961 (see paras 5.30 to 5.32 below).

[33] See, for example, the Draft Criminal Code for Scotland, s 38 (the full text of s 38 can be found in the Appendix.) The Code divides culpable homicide into two broad categories: the first category includes unlawful deaths caused by assault or by other acts which might reasonably involve personal injury; and also deaths caused by reckless acts which are not in themselves unlawful. The second category is murder reduced to culpable homicide through the partial defence of provocation or diminished responsibility. It is of note that the authors have not opted for a "ladder" or "grid" of specific offences identified by *actus reus.* "Recklessness" is specifically defined in s 10, and the authors comment that the Draft Criminal Code "is more precise than the common law about what is meant by recklessness" (commentary on s 38, at p 86). The high level of condemnation to which a conviction for killing gives rise has particular resonance in the context of defining culpable homicide. As Husak notes, "[t]he criminal law is different and must be evaluated by a higher standard of justification because it burdens interests not implicated when other modes of social control are employed … Even when the state has a good reason to discourage a given type of behaviour, it may lack a good reason to subject those who engage in it to the hard treatment and reprobation inherent in punishment": see D Husak, "The Criminal Law as Last Resort" (2004) 24 OJLS 207, at p 234.

[34] A task acknowledged to be a difficult one: see, for example, Professor McDiarmid in the paper prepared for the Scottish Law Commission.

[35] See the circumstances in *HM Advocate v Purcell* 2007 SCCR 520; *DPP v Smith* [1961] AC 290; and the murder trial in 2020 concerning the death of PC Harper, whose feet became entangled in the tow-rope attached to the accused's car, resulting in his death when dragged for about a mile as the accused tried to escape the police (*R v Long, Bowers and Cole,* sentencing statement available at: https://www.judiciary.uk/judgments/r-v-long-bowers-and-cole/). Note the type of provision in the state of Georgia, USA, where a homicide is "first degree homicide by vehicle" if the driver "was attempting to flee from a law enforcement officer" (AM Trapp, *Vehicular Homicide Laws* (2004)); and in Canada, where the fact that the victim is a "police officer or other person employed for the preservation and maintenance of the public peace acting in the course of his duties, or a prison employee acting in the course of his duties", renders any killing automatically a crime of first degree murder (Canadian Criminal Code, s 231(4)).

[36] As is provided in the New Zealand Crimes Act 1961, s 168(2).

[37] 1983 SCCR 483.

sniffing kits to children in the knowledge of their intended use); *Ulhaq v HM Advocate*[38] (a case with similar facts to *Khaliq*, but in which the people who were sold the intoxicating substances were not children and the substances were not supplied in "sniffing kits"); *Lord Advocate's Reference (No 1 of 1994)*[39] (the supply of illegal drugs, culpably and recklessly, caused the death of the recipient who voluntarily ingested the drugs);[40] and *Transco v HM Advocate*[41] (recklessness accepted as a relevant basis for culpable homicide).[42] Statutory provisions relating to culpable and reckless conduct might have the benefit of clarifying this area of the law. The authors of the Draft Criminal Code for Scotland retained the common law concept of reckless culpable homicide in section 38(1)(a), but gave a more precise definition as to what is meant by recklessness.[43]

5.19 *Gross negligence and culpable homicide:* Scots law in relation to what constitutes gross negligence in culpable homicide has changed over the years. The area is arguably unclear and may benefit from statutory reform. A useful summary entitled 'The old law' can be found in paragraphs 31.04 to 31.09 of Gordon, *Criminal Law* (4th edn, 2017).[44] Reference is made to institutional writers;[45] some older cases;[46] and the development of a type of culpable homicide in late 19th century cases.[47] The standard of care was "due care and circumspection", or a simple neglect of duty. The development of the statutory crime of causing death by reckless driving is noted, as is the 19th century practice of the Crown to libel not only culpable homicide but also a lesser charge such as a road traffic charge. Ultimately the conclusion reached is that:

> "The law does not appear to have changed throughout the 19th century but, apart from traffic cases, this type of culpable homicide became less common, perhaps because of a number of unsuccessful prosecutions."
>
> There is then a paragraph entitled 'The modern law', noting that:
>
> "… the use of explosives, and the management of factories and mines, are now governed by statute, so that it is possible to deal with them without reference to the common law, and fatal accidents caused by carelessness are normally followed at most only by statutory prosecutions … No one would be taken seriously who suggested that whenever a fatal factory or mine accident was caused by gross

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[38] 1990 SCCR 593.
[39] 1995 SCCR 177.
[40] The court's automatic equiparation of the supply of drugs with reckless and culpable conduct, regardless of the circumstances, has been criticised: PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) at p 218. Note that in Scotland, voluntary ingestion of the drugs may not break the chain of causation: *MacAngus and Kane v HM Advocate* 2009 SCCR 238 para [48] (Lord Justice General Hamilton); contrast with England (*R v Kennedy (No 2)* [2008] 1 AC 269, paras [14], [24] to [26].
[41] 2004 SCCR 1.
[42] At para [4] (Lord Osborne); paras [35] – [38] (Lord Hamilton).
[43] Defined in s 10: see the full text in the Appendix to this paper.
[44] Eds J Chalmers and F Leverick.
[45] Hume and Alison.
[46] Concerning the absent-minded discharge of a fowling-piece; an out-of-control carriage where the horses were left driver-less; workmen throwing rubbish from a roof; the accidental discharge of a gun; careless rock-blasting; bad driving; and bad management of ships.
[47] Involving carelessness by persons lawfully using guns; by chemists; by builders; by persons conducting blasting operations or storing explosives; by pit managers, miners, and persons in charge of machinery; by coachmen or horsemen; by persons in charge of boats; by engine drivers; by railway signalmen; and by other persons responsible for the proper running of railways. The *locus classicus* of the 19th century law of culpable homicide is identified as the charge to the jury in *Wm Paton and Richd McNab* (1845) 2 Broun 525, setting out a standard of negligence very similar to the current standard in civil law.

> negligence the manager or foreman or other person responsible should be charged with culpable homicide.[48] But on principle and on 19th-century authority, such a charge would be quite proper, and could be brought even where an employer merely failed to employ competent staff or to instruct his staff properly, or where he allowed the use of dangerous machinery.[49]
>
> One reason for the absence of such prosecutions during the 20th century is the complex nature of modern factories and mines, which makes it very difficult to single out the negligent party.[50] The negligence may also be far removed in time and place from the death …
>
> Another reason is probably the reluctance of the authorities to brand a respectable factory owner or senior employee as a common law criminal[51] … It is accordingly the present practice, if not the present law, that an employer [in cases of death caused by gross carelessness]… is not guilty of culpable homicide."

5.20 Thus prosecutions for culpable homicide based on carelessness have been rare in the 20th century. A minimum of culpable and reckless conduct is required.[52]

5.21 Some case law and comments during the 19th to 21st centuries include the following. In 1853, a chemist's assistant (a medical student) pled guilty to a charge of culpable homicide after creating a deadly potion without proper authority.[53] In the early 19th century, Macdonald defined a form of culpable homicide as "homicide by the doing of any rash and careless act, from which death results, though not foreseen or probable", including resulting negligence or rashness in the performance of lawful duty.[54] In 1936 in the context of road traffic deaths, Lord Justice Clerk Aitchison[55] acknowledged negligence as an offence, but set a high bar for the test as "gross, or wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences". In 2017, a (rare) prosecution against a doctor failed due to insufficiency of evidence.[56] In other jurisdictions,[57] professionals and tradesmen may be prosecuted in the event of fatality,[58] but there are few similar prosecutions

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[48] In fact, Claire Baker's bill made that suggestion.
[49] Standing the enactment of The Corporate Manslaughter and Corporate Homicide Act 2007, it is currently unclear whether an indictment based on the common law of culpable homicide would be regarded as relevant: see para 5.6 and fns 22 and 23 above.
[50] As was illustrated in *Transco v HM Advocate (No 1)* 2004 SCCR 593.
[51] A reluctance which may be thought similar to the reluctance of society, courts, and juries to brand a car-driver a "murderer" or "killer": see ch 4, Murder, para 4.20.
[52] See, for example, *Quinn v Cunningham* 1956 JC 22, at pp 24 to 25 (not overruled in *Harris* 1993 SCCR 559); *Cameron v Maguire* 1998 JC 63 at p 66, which link in with the 19th century railway cases.
[53] *Edmund Wheatley* (1853) 1 Irv 225. Contrast with the case of *George Armitage* (1885) 5 Coup 675, where the circumstances were similar, but a jury found the accused not guilty. See too *HM Advocate v Wood* (1903) 4 Adam 150.
[54] Macdonald at p 150.
[55] *Paton v HM Advocate* 1936 JC 19 at p 22.
[56] "Doctor Acquitted Over Friend's Drug Death" *BBC News* (26 May 2017) available at: https://www.bbc.co.uk/news/uk-scotland-tayside-central-40057847. The Crown did not appeal.
[57] For example, England (*Adomako* [1995] 1 AC 171, where an anaesthetist failed to notice that a breathing tube had become disconnected).
[58] The offence being "gross negligence manslaughter", where a person carrying out a job requiring special care or skill (for example, doctor, police officer, prison officers ship captain, electrician) fails to meet the expected standard and causes death: see Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996), para 2.8 and following paragraphs.

currently in Scotland.[59] Statutory provisions relating to gross negligence might have the benefit of clarifying the law in this area.

5.22 *Omissions and culpable homicide:* In Scots law, an omission to act may in certain circumstances amount to murder or culpable homicide.[60] Rescue situations are unclear,[61] and commentators have suggested that:

> " … a statutory offence of 'failure to render aid' could be enacted. This could impose liability only where the accused could have acted to save life or prevent serious injury without putting herself at risk of harm."[62]

5.23 Where a duty is owed by a parent to a child, failure to act may result in criminal liability.[63] However in the context of spouses and partners, there is no Scottish authority.[64] Similarly there is no Scottish authority for cases involving siblings or friends.[65] Criminal liability may arise in other situations, where there has been an assumption of responsibility,[66] and possibly where the accused created a dangerous situation.[67] Legislation reforming culpable homicide might provide an opportunity to clarify the law concerning criminal liability for omissions or failures in duty, and to calibrate and label such offences appropriately.

5.24 *Specific new crimes:* Statute could introduce specific new crimes, such as "assault causing death".[68] Australian statutory provisions relating to "one-punch" homicides discard the elements of intention and foreseeability, and simply describe the act as "an offence" or "a

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[59] Where alleged negligence generally forms a ground of action in a civil case seeking damages.
[60] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 9.10.1. There is English authority: see *Stone and Dobinson* [1977] QB 354, discussed at fn 66 below.
[61] In contrast with some jurisdictions with a law of easy rescue: see M Menlowe and A McCall Smith (eds), *The Duty to Rescue: The Jurisprudence of Aid* (1993). See also the difficult situation which arose in the 2008 case of Alison Hume, whose rescue from a mineshaft was delayed due to health and safety concerns, resulting in her death: "No Prosecution over Alison Hume Ayrshire Mineshaft Death" *BBC News* (29 November 2013) available at: https://www.bbc.co.uk/news/uk-scotland-glasgow-west-25153177.
[62] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 6.8.5.
[63] *Bone v HM Advocate* 2005 SCCR 829, described as "a rare example of homicide by omission" in TH Jones and I Taggart, *Criminal Law* (7th edn, 2018) para 3-10 fn 15; and see too the English case of *R v Gibbins and Proctor* (1919) 13 Cr App R 134 (murder as a result of neglect and deliberate failure to feed a 7-year-old child); and G Gordon (MGA Christie (ed)), *Criminal Law* (3rd edn, 2001) para 3.30.
[64] In an English case *R v Hood* [2003] EWCA Crim 2772 it was held that there was a legal duty upon a husband to summon medical assistance for his wife following an accidental fall. However in a Scottish criminal trial *HM Advocate v Crilley* (unreported) in 2019, a jury acquitted an elderly husband who did not summon medical assistance when his wife (also elderly) had a fall which resulted in her lying for days until she died.
[65] In an English judicial review *Lewin v CPS* [2002] EWHC 1049 (Admin) the court had to consider a challenge to a decision by the Crown Prosecution Service not to prosecute where a drunk friend was left in a car for several hours in extreme heat, and died. The challenge failed, the court holding that being friends was not enough to create a duty: more was required, such as leaving the friend in a foreseeably dangerous situation.
[66] Again there is little Scottish authority. In *William Hardie* (1847) Ark 247 a charge of culpable homicide was brought against an Inspector of the Poor who ignored the deceased's application for poor relief: see discussion in PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn 2014) para 6.7.1; and TH Jones and I Taggart, *Criminal Law* (7th edn 2018) para 3-11. In the English case of *Stone and Dobinson* [1977] QB 354, the voluntary assumption of care for a sister led to a conviction for manslaughter when she died from malnutrition and infected bed sores.
[67] Being one interpretation of *HM Advocate v McPhee* 1935 JC 46 where a woman was beaten and left unconscious in a field, exposed to the inclemency of the weather. However another interpretation of that case might be that the accused had acted "with wicked recklessness, not caring whether the victim lived or died".
[68] An offence introduced by legislation in many Australian states (New South Wales, Victoria, Queensland, Western Australia, and Northern Territory) to answer the problem of minor assault manslaughter such as one punch in the course of a pub brawl proving fatal. For example, the statutory provision in Victoria refers specifically to a single punch or strike to a person's head or neck, even if the injury from which the person dies is not the punch or strike itself, but another injury resulting from impact caused by the punch or strike (Crimes Act 1958 (Vic) s4A(4)).

crime", or "a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act."[69] However the authors of the Draft Criminal Code for Scotland retained culpable homicide as the appropriate conviction for a "one-punch" assault, stating that "as assault is an intentional invasion of another's bodily integrity, anyone who commits assault can reasonably be held liable for the consequences, however unexpectedly severe they may be."[70]

Possible disadvantages of legislative reform

5.25 As with any enactment of the law, a new statutory definition of culpable homicide might give rise to disagreement and debate about the proper interpretation of the provisions. There might be an increase in "no case to answer" submissions and in criminal appeals.

5.26 If a ladder or grid approach were to be adopted, there may be difficult and sensitive issues to be dealt with when defining the different offences in the ladder or grid. There might be strongly held and contrasting views in various sectors of society.

5.27 A statutory ladder or grid of offences representing the sub-division of culpable homicide according to particular blameworthiness or particular circumstances might result in a significant loss of flexibility. A judge or jury, the Lord Advocate and the Crown Office might find the scope for the exercise of judgment or discretion to be severely limited. A specific categorisation of offences might result in an inability to adapt labelling and sentencing to the particular circumstances of the offence and the offender.[71]

5.28 It is possible that a statutory definition of culpable homicide might create what would, in effect, be "strict liability" or some form of "constructive malice".[72] Depending on the precise wording of the statute, an accused might be convicted of the serious crime of culpable homicide although he or she had little or no relevant *mens rea.*

Culpable homicide or its equivalent: the approach adopted in other jurisdictions

5.29 It may assist in the consideration of any possible reform of the Scots common law crime of culpable homicide to refer to equivalent offences in other jurisdictions.

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[69] Reflecting the view that these offences are regarded as less serious, carrying less moral blameworthiness than other manslaughter offences: cf C Ferguson and R Robson, "A Legal and Social Analysis of 'One Punch' Cases in Western Australia" (2004) UWSLR 19 at p 28. Note however that the Criminal Code of Western Australia prescribes a sentence of 20 years imprisonment, apparently taking a graver view: Criminal Code (WA) s 281(1). Also some critics argue that the statutory provisions have not solved the social issues underlying the offence, namely violence amongst groups of young men: Ferguson and Robson, *op cit,* p 43.

[70] Draft Criminal Code for Scotland (2003) commentary on s 38 at p 86.

[71] In the USA, for example, "felony murder" provisions (where death resulting from arson, rape, robbery or burglary constitutes first degree murder) have been "consistently disfavoured by courts and commentators as being irrational and unduly harsh": V Bergelson, "United States of America" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) p 229.

[72] See the discussion concerning constructive malice in ch 4, Murder, para 4.36 and following paragraphs. Constructive malice was criticised by Lord Justice Clerk Gill in *Petto v HM Advocate* 2011 SCCR 519, particularly at para [21].

New Zealand

5.30 In New Zealand, the term "culpable homicide" is used as an all-inclusive umbrella definition for any unlawful killing.[73] Culpable homicide therefore comprises three homicide offences of murder, manslaughter and infanticide. "Manslaughter" is defined in section 171 as follows:

> "Except as provided in section 178 [infanticide], culpable homicide not amounting to murder is manslaughter."

5.31 As manslaughter is so defined (as a clearly residual category), it is necessary to note the extent of the crime of murder in New Zealand law. In terms of section 167, "murder" occurs where the offender means to cause death;[74] or means to cause bodily injury (known to the offender to be likely to cause death) and is reckless whether or not death ensues;[75] or means to cause death or such bodily injury to one person and by accident or mistake kills another person;[76] or does an act (which the offender knows to be likely to cause death) for the purpose of any unlawful object, although the desire was to attain that object without hurting anyone.[77] Further, in terms of section 168, "murder" also occurs in certain specified cases whether or not the offender meant death to ensue, or knew or did not know that death was likely to ensue. In particular an offender commits murder if he or she meant to cause grievous bodily harm[78] for the purpose of facilitating the commission of treason, espionage, sabotage, piracy, piratical acts, escape or rescue from prison/lawful custody/detention, a sexual violation, murder, abduction, kidnapping, burglary, robbery and arson.[79]

5.32 Thus New Zealand has opted for the specification of particular circumstances in certain cases in order to define the dividing line between "murder" and "manslaughter". In other words, there is significant reliance upon the *actus reus* in addition to, or at times in place of, the *mens rea.*

The United States of America

5.33 In the United States of America, the California Penal Code (CPC)[80] defines manslaughter as "the unlawful killing of a human being without malice". It is of three kinds:

> "(a) Voluntary – upon a sudden quarrel or heat of passion. (b) Involuntary – in the commission of an unlawful act, not amounting to a felony; or in the commission of a

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[73] Crimes Act 1961, s 160.
[74] Cf the first branch of the Scots law definition of murder ("wicked intention"), but the word "wicked" is absent. Under New Zealand law, a mercy killing would undoubtedly be murder, although there may be exercises of prosecutorial discretion in particular cases.
[75] A concept similar to Scots law's "wicked recklessness", where the offender displays "such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences": see ch 4, Murder. However a limiting factor in New Zealand law is that the offender must know that the bodily injury is "likely to cause death". This is more restrictive than the Scots law of wicked recklessness.
[76] Cf the doctrine of transferred intent (G Gordon (MGA Christie (ed)), *Criminal Law* (3rd edn, 2001) paras 9.12 to 9.13. It is not clear whether a doctrine of transferred intent is part of Scots law, but it may be that "wicked recklessness" would cover such a situation.
[77] In effect a form of constructive malice (see ch 4, Murder) or possibly a form of "wicked recklessness" as defined in Scots homicide law.
[78] Or administered a stupefying thing causing death, or wilfully stopped someone's breathing causing death, in order to achieve the purposes listed in s 168(2).
[79] S 168(2), on one view, a form of constructive malice (see ch 4, Murder).
[80] CPC, ss 191.5 and 192.

> lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle. (c) Vehicular [all concerning driving a vehicle, with definitions and subdivisions such as 'with gross negligence' and 'the commission of a lawful act which might produce death, in an unlawful manner']".[81]

5.34 The New York Penal Code (NYPC)[82] defines manslaughter in the first degree as follows:

> "A person is guilty of manslaughter in the first degree when:
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> 1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or
>
> 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; or
>
> 3. He commits upon a female pregnant for more than twenty-four weeks an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05; or
>
> 4. Being eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly engages in conduct which creates a grave risk of serious physical injury to such person and thereby causes the death of such person.
>
> Manslaughter in the first degree is a class B felony."

5.35 There are special provisions concerning the death of a police officer in the performance of official duties.[83]

5.36 In terms of the Model Penal Code (MPC), a homicide that would otherwise be murder is reduced to manslaughter when committed "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse".[84]

5.37 It can be seen that the Codes rely upon both *mens rea* and *actus reus.* In the latter category, there are specifications of particular circumstances, including the death of a police officer in the performance of official duties, a death occurring during "the commission of an unlawful act not amounting to a felony", and in certain circumstances where the victim was "less than 11 years old".

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[81] Possibly reflecting a societal trend already noted in chs 1 and 4 above, namely the public's reluctance to classify causing death by driving as murder or culpable homicide (or their equivalents): see CPC, s 191.5.
[82] NYPC s 125.20.
[83] NYPC s 125.21-22.
[84] MPC s 210.3. Courts have adopted a subjective standard, diverging from the common law reasonable person test, and allowing the jury greater latitude: D Brody, J Acker & W Logan, *Criminal Law* (2001) p 353.

South Africa

5.38 In South Africa,[85] culpable homicide comprises only negligent killings.[86] Negligence requires three elements: (a) would a reasonable person have foreseen the reasonable possibility of the consequences, including the unlawfulness; (b) would a reasonable person have taken steps to guard against the possibility; and (c) did the accused fail to take the steps which he should reasonably have taken to guard against it.[87] Case law defines "the reasonable man", "reasonable foreseeability", and the steps which should reasonably have been taken.[88] This category of crime is therefore a broad one, but does not include murder reduced to culpable homicide by provocation or diminished responsibility.

5.39 Thus South Africa does not define any particular circumstances which would constitute culpable homicide. The main focus of the definition is upon the *mens rea.*

Italy

5.40 In the five-tier homicide law of Italy[89] the equivalent of culpable homicide, namely Article 584 (*omicidio preterintenzionale)*, appears to be a category similar to Scots culpable homicide. Article 584 covers:

> " … the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills"

5.41 No particular circumstances are defined. The focus is upon the *mens rea.*

Australia

5.42 Australia has nine jurisdictions, four common law, and four codified, and also a Commonwealth[90] jurisdiction. Each jurisdiction has categories of "murder" and "manslaughter",[91] and some have a third offence namely "assault resulting in death". The crime of manslaughter is similar to that of culpable homicide in Scots law, being a residual offence for those criminal killings falling short of murder. There are two categories: voluntary and involuntary manslaughter. *Voluntary manslaughter* covers intentional killings mitigated by partial defences, and some states have codified the circumstances amounting to

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[85] See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[86] Culpable homicide no longer encompasses unintended death arising from illegal activity, or cases involving provocation or diminished responsibility. Partial defences no longer exist under South African law: the court has a preliminary inquiry into criminal capacity, taking into account any factor which might impair it (such as provocation, emotional stress, voluntary intoxication): if the court finds that criminal capacity has been impaired, the accused is acquitted: JM Burchell and J Milton, *Principles of Common law* (3rd edn, 2005) p 428.

[87] Burchell and Milton, *op cit,* p 525.

[88] See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/, one case being *S v Van As* 1976 (2) SA 921 (A) where the accused slapped the deceased, who lost his balance, fell backwards, hit his head, and died.

[89] See Scottish Law Commission, "Homicide Laws in Other Jurisdictions", available at: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.

[90] The Commonwealth jurisdiction also has homicide (murder and manslaughter) laws: Criminal Code Act 1995, ss 71.2, 71.3, 115.1 and 115.2.

[91] There may be different definitions and different "liability lines" in different states: for example, in the Australian Capital Territory, reckless indifference to the probability of causing the death of any person is a sufficient fault element for murder; but in the Northern Territory, recklessness is not a sufficient fault element for murder, but may be sufficient for manslaughter.

provocation, diminished responsibility, excessive self-defence, and domestic abuse.[92] *Involuntary manslaughter* is subdivided into (i) unlawful and dangerous act manslaughter, and (ii) criminal negligence manslaughter.[93] (i) Unlawful and dangerous act manslaughter covers any act (not restricted to assault) where, viewed objectively by a reasonable person, there is an appreciable risk of serious injury to the victim.[94] (ii) Criminal negligence manslaughter does not require intention to cause death or injury, but simply an act:

> " … which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk of death or grievous bodily harm would follow, that the doing of the act merited criminal punishment."[95]

5.43 The core elements are (a) a duty of care;[96] (b) a standard of care;[97] and (c) a gross departure from the standard of care.[98]

5.44 The third category of assault resulting in death was created by statute in several Australian jurisdictions.[99] The statutory provisions discard the elements of intention and foreseeability, and simply describe the act as "an offence", or "a crime", or "a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act".[100] The legislation in Victoria specifically refers to a single punch or strike to a person's head or neck, even if the injury from which the person dies is not the punch itself, but another injury resulting from impact caused by the punch or strike.[101]

5.45 While therefore the Australian states tend to focus on *mens rea* rather than detailed specification of the *actus reus,* it is of interest that the "one-punch" killing[102] has been selected as appropriate for classification by the *actus reus* rather than the *mens rea.*

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[92] And also partial defences defined as "infanticide" and "suicide pact".
[93] *Wilson v The Queen* (1992) 174 CLR 313.
[94] Contrast with Scots law, where "[c]ulpable homicide is simply the causing of death by any unlawful act. The unlawful act must be intentional, but it is quite immaterial whether death was the foreseeable result of that act." (*HM Advocate v Hartley* 1989 SLT 135, at p 136 (Lord Sutherland)).
[95] *Nyadam v The Queen* [1977] VR 430, at pp 444-445.
[96] A general duty of care exists at common law; but some Codes legislate specific duties of care.
[97] An objective test based on a reasonable person and reasonable foreseeability of death or injury: P Fairall, *Homicide: Laws of Australia* (1st edn, 2012) at pp 254-256. Scots law is less clear, as previous case law indicating that an objective test was to be applied was qualified by *dicta* in *Transco plc v HM Advocate (No 1)* 2004 SCCR 1, at para [38], by taking account of "the actual state of mind of a person accused of culpable homicide of this kind" rather than basing the question of guilt or innocence on an objectively set standards. Some commentators in Australia have argued for a subjective approach: Model Criminal Code Officers Committee, *Discussion Paper: Fatal Offences against the Person* (1998) at p 149.
[98] See *Nyadam, cit sup:* many courts prefer not to define a gross departure, leaving it to the jury to decide the matter (see, for example, *R v Stephenson* [1976] VR 376, at p 383). In Scotland, these elements are traditionally found in civil actions for damages rather than in criminal prosecutions.
[99] New South Wales, Victoria, Queensland, Western Australia, and Northern Territory.
[100] Reflecting the view that these offences are regarded as less serious, carrying less moral blameworthiness, than other manslaughter offences: see C Ferguson and R Robson, "A legal and social analysis of 'one punch' cases in Western Australia" (2014) UWSLR 19 at pp 28-30. Note however that the Criminal Code of Western Australia prescribes a sentence of 20 years imprisonment, apparently taking a graver view: see Criminal Code (WA) section 281(1). Also some critics argue that the statutory provisions have not solved the social issues underlying the offence, namely violence amongst groups of young men: C Ferguson and R Robson, *op cit,* p 43.
[101] Crimes Act 1958 (Vic) s 4A(4).
[102] Which has caused much debate and difficulty in many jurisdictions.

Canada

5.46 In the Canadian Criminal Code,[103] "culpable homicide" includes murder, manslaughter, and infanticide.[104] Unlawful act manslaughter is based on an objective test of foreseeability of bodily harm.[105] The presence of certain elements in the *actus reus* automatically renders the offence one of first degree murder. These include:

- Where the victim is "a police officer … or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties or a prison employee acting in the course of his duties;[106]

- Where death is caused in the course of: an aircraft hijacking; a simple or aggravated sexual assault, or where the sexual assault involves a weapon, threats to a third party, or bodily harm; a kidnapping or forcible confinement; or hostage taking".[107]

Germany

5.47 The German Criminal Code[108] has a general definition of "voluntary manslaughter" which becomes "murder" when the accused kills a person –

> "for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence."[109]

5.48 Other offences include negligent manslaughter, involving a duty of care and foreseeability, and gross negligence manslaughter (for example, robbery recklessly causing death).[110]

England and Wales

5.49 In England and Wales, "manslaughter" is the broad equivalent of "culpable homicide".

5.50 A charge of murder may be reduced to "voluntary manslaughter" where partial defences apply (namely loss of self-control;[111] diminished responsibility;[112] and killing in

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[103] Which uses both *mens rea* and *actus reus.*
[104] Criminal Code s 222(4).
[105] *R v Creighton* [1993] 3 SCR 3, 105 DLR (4th) 632, "where an experienced drug dealer and user, injected another user with heroin resulting in her death": see M Gibson and A Reed, "Reforming English Homicide Law" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) at p 54.
[106] Criminal Code s 231(4).
[107] Criminal Code s 231(5). A killing in the course of any sexual crime is first degree murder, regardless of the gravity of the sexual offence.
[108] Which uses both *mens rea* and *actus reus.* A translation of the German Criminal Code by M Bohlander can be found at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1939.
[109] German Criminal Code s 211. An example of "a danger to the public" is setting an apartment building on fire: K Ambos and S Bock, "Germany" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) at p 253.
[110] German Criminal Code ss 221, 222 and 251: see generally K Ambos and S Bock (*ibid*).
[111] Coroners and Justice Act 2009, s 54-55. In terms of section 54(2), it does not matter whether or not the loss of control was sudden. Sexual infidelity is expressly excluded from the qualifying triggers for loss of self-control: s 55(6)(c).
[112] *Ibid* s 52.

pursuance of a suicide pact[113]). Involuntary manslaughter is divided into two categories: "unlawful and dangerous act manslaughter" and "manslaughter by gross negligence".[114]

Unlawful and dangerous act manslaughter

5.51 An accused is guilty of unlawful and dangerous act manslaughter if he or she caused the death of another person by committing a criminal act which is objectively dangerous.[115]

> "[T]he unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm".[116]

Manslaughter by gross negligence

5.52 At common law, the leading case is *R v Adomako*.[117] The test was defined as follows:

> " … the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal."

5.53 When carrying out a review in 2005,[118] the Law Commission of England and Wales (LCEW) expressed dissatisfaction with the current definition of manslaughter. In the Overview

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[113] Homicide Act 1957, s 4.

[114] A possible third category, "reckless manslaughter", where the accused was aware that his or her conduct involved the risk of causing death or serious injury, and unreasonably took that risk, was considered by the LCEW to constitute either gross negligence manslaughter, or (where there was intent to injure), second degree murder; see Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996) para 2.26; F Stark, "Reckless Manslaughter" (2017) Crim LR 763; CMV Clarkson, "Context and Culpability in Involuntary Manslaughter: Principle or Instinct" in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (2000) p 135.

[115] Some think this too punitive where an accused did not intend to cause serious injury, and did not foresee the risk of death or injury: Law Com No 304 para 3.43; J Horder, *Ashworth's Principles of Criminal Law* (8th edn, 2016) p 296; (9th edn, 2019) p 300.

[116] *R v Church* [1966] 1 QB 59, a test criticised by some as too severe where the consequences were unforeseen: see Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996) para 3.5, giving an example of a push resulting in a fall and fatal brain injury, and the recommendation for abolition in para 5.16. A real-life application of the test can be seen in *R v M* [2013] 1 WLR 1083 (the accused were guilty of manslaughter where physical contact during a disturbance caused the rupture of an asymptomatic aneurism with fatal blood loss). However others consider that a person should be accountable for a violent unlawful act: CMV Clarkson, "Context and Culpability in Involuntary Manslaughter: Principle or Instinct" in A Ashworth and B Mitchell (eds) *Rethinking English Homicide Law* (2000) p 158-159.

[117] [1995] 1 AC 171 at p 187. The LCEW criticised the test as being circular, leaving to the jury the question whether the actions of the accused were of a criminal nature (Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) para 3.9); and also criticised the use of civil law terms such as "duty of care" and "negligence" (para 3.10).

[118] See ch 2, paras 2.44 and following paragraphs.

document accompanying their Consultation Paper "A New Homicide Act for England and Wales?"[119] the LCEW summarised matters as follows:

> "1.28 The law of England and Wales categorises homicide offences in a very blunt rudimentary fashion. There are only two general homicide offences: murder and manslaughter. The majority of unlawful homicides have to be slotted into one or the other offence. As a result, each offence has much work to do, accommodating a wide range of behaviour displaying very different levels of criminality …
>
> 1.30 Manslaughter is of even wider scope than murder. In 1992 Lord Chief Justice Geoffrey Lane said of the offence, 'it ranges in gravity from the borders of murder right down to those of accidental death' …
>
> 5.1 … the fundamental weakness of the law of homicide is that its structure is not designed to ensure that different levels of criminality are accurately graded and labelled …"

5.54 In proposing a three-tier structure with first degree murder, second degree murder, and manslaughter,[120] the LCEW recommended defining manslaughter as:

> "(1) killing another person through gross negligence ('gross negligence manslaughter'); or (2) killing another person: (a) through the commission of a criminal act intended by the defendant to cause injury, or (b) through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury ('criminal act manslaughter')".[121]

5.55 In the light of the discussion above, we would welcome the views of consultees on the following questions:

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?

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?

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*?

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?

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[119] Law Commission, *A New Homicide Act for England and Wales? An Overview*, Law Com CP No 177 (2005).
[120] See chs 2 and 4.
[121] Law Com No 304, para 9.9.

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

Chapter 6 Defences: an introduction

Introduction

6.1 Having discussed the structure of the Scots law of homicide and its specific offences in Chapters 2 to 5, we now consider some of the main defences to a charge of homicide. This chapter acts as an introduction to more in depth discussions of particular defences in Chapters 7 to 12.

Defences to a charge of homicide

6.2 Chalmers and Leverick offer a definition of a criminal defence, and explain the different ways in which defences may be classified.[1] They suggest that a criminal defence is "any identifiable set of conditions or circumstances that provides sufficient reason why the accused ought not to be convicted of a particular offence or ought not to stand trial for a particular offence."[2] The second leg of this definition is designed to capture "pleas in bar of trial" (such as time bar, insanity in bar of trial and non-age) which provide reasons why the accused ought not to stand trial in the first place rather than reasons not to convict after a trial. Pleas in bar of trial are not discussed in this paper, as they are of general application rather than specific to homicide offences and so not within the scope of this project.

6.3 In terms of classification, the authors suggest that there are at least four grounds on which defences can be distinguished; "whether they are complete or partial defences; whether they are general or specific defences; whether they are common law or statutory defences; and according to the rationale for admitting the defence."[3]

Complete and partial defences

6.4 In Scots law, partial defences exist only in relation to the crime of murder, and so the complete/partial classification is appropriate given the subject matter of this paper.

6.5 A complete defence is one that, if pled successfully, results in the accused being acquitted. For example, in relation to a charge of murder, a successful plea of self-defence negates the *mens rea* (wicked intent or wicked recklessness) necessary for that crime, leading to the acquittal of the accused. Chapters 7, 8 and 9 will look at the complete defences of self-defence, necessity and coercion specifically in the context of homicide.

6.6 A partial defence is one which, if pled successfully, will reduce what would otherwise be a conviction for murder to one of culpable homicide. The defences of provocation and diminished responsibility are the only two partial defences currently recognised by Scots law.

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[1] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006).
[2] *Ibid*, para 1.01.
[3] *Ibid*. In terms of the last ground (rationale for admitting the defence) they go on to say that defences can be divided into five broad categories of failure of proof defences, justifications, excuses, lack of capacity defences and non-exculpatory.

They will be discussed in Chapters 10 and 11 respectively.[4] Chapter 12 looks at the application of the defences of provocation, diminished responsibility and self-defence in the specific context of killings by victims of domestic abuse.

General and specific defences – exclusions from scope of the paper

6.7 As Chalmers and Leverick note,[5] another potential classification of criminal defences is the distinction between general defences, which can be pled in relation to all offences, and specific defences, which can be pled in relation to certain specific offences only.

6.8 We propose to exclude general defences from the scope of this paper, as they apply to all offences and not just to the homicide offences of murder and culpable homicide, and would merit a separate wider-ranging review. Into this category of general defences would fall alibi and incrimination,[6] error (of fact and of law),[7] entrapment,[8] superior orders[9] and accident.[10]

6.9 We make certain exceptions to our approach of excluding general defences. For example, we look at the general defence of self-defence in Chapters 7 and 8 but we restrict our consideration to its application to homicide offences, on the basis that it is commonly pled in those cases. We will also look at the defences of necessity and coercion in Chapter 9 to assess the extent to which they are recognised in the context of homicide.

6.10 Similarly, the defences of mental disorder, intoxication and automatism apply across all offences, and not just homicide offences. As such, we do not give them a detailed treatment in this paper. However, as each involves a claim by the accused that they ought to be excused from criminal liability on the basis that their mental condition was in some way not "normal" at the time of the offence, we look at the legal tests for these defences by way of comparison in the discussion of the partial defence of diminished responsibility in Chapter 11. Any wider exploration of these general defences would be for another project.[11]

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[4] Automatism is also briefly touched on in ch 11, Diminished responsibility: see paras 6.10 and 11.43 below.
[5] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 1.03.
[6] Both defences also given the technical, procedural classification of being "special defences" (along with mental disorder and self-defence). Special defences are those that require the defence to give advance notice to the prosecution if they are to be pled at trial (see Criminal Procedure (Scotland) Act 1995, s 78(1)).
[7] Error of fact is categorised by Chalmers and Leverick (para 1.06) as a "failure of proof" defence in that due to a relevant error of fact made by the accused, all or part of the *mens rea* of an offence is not satisfied. Error of law, subject to some limited exceptions, is not a recognised defence in Scots law.
[8] Entrapment is an argument by the accused that he or she was tricked into committing a criminal offence by the police or a state official.
[9] The superior orders defence (sometimes termed "justifiable homicide"), whilst cases are few and far between, has been recognised in Scots law usually in a military context where a soldier kills or commits another offence under the instruction of a superior officer whose orders he was bound to obey. See for example the case of *HM Advocate v Sheppard*, 1941 JC 67, where a soldier shot and killed a deserter prisoner on being told by his lance corporal to shoot if necessary to prevent the prisoner from escaping. The defence, however, can only be successful if the order is not obviously unlawful.
[10] Accident (sometimes known as "casual homicide") is where a jury finds that a death was caused by a pure accident and, in those circumstances, no criminal liability attaches to the person even where, on the face of it, they appear to have been involved in bringing about the death. On the basis that a death due to an accident means all or part of the *mens rea* element of murder or culpable homicide is not satisfied, it is sometimes categorised as a "failure of proof" defence in a similar way to error of fact (see fn 7 above).
[11] We took a similar view in our Discussion Paper: *Discussion Paper on Insanity and Diminished Responsibility*, Scot Law Com DP No 122 (2003) paras 1.13 to 1.15.

6.11 Before discussing our selected defences in detail, we ask:

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

Chapter 7 Self-defence

Introduction

7.1 As mentioned earlier,[1] self-defence is a "complete" defence in that, if pled successfully, it results in the acquittal of an accused charged with either murder or culpable homicide. Self-defence can also be categorised as a "general" defence in that it is not restricted to homicide: it can be pled in cases of, for example, assault and breach of the peace.

7.2 Chalmers and Leverick note that "[s]elf-defence is part of a family of defences (which would also include necessity and coercion) that all involve the commission of a crime in order to avert a threatened harm".[2] But there are distinguishing features: self-defence involves defensive force being directed at the *source* of the threat posed, whereas necessity involves harming a bystander who was not posing a direct threat to the accused, and coercion involves the avoidance of harm by *complying with the demands* of the threatener.[3]

7.3 Although it is common for an accused person to plead both self-defence and provocation, the effect and procedural basis of the pleas are very different.[4] Self-defence requires a restrictive approach to the degree of violence used and the lack of a reasonable means of escape; whereas provocation requires a loss of self-control by the accused, a requirement wholly absent from self-defence.[5]

7.4 Self-defence is what is termed in Scots law a "special defence".[6] This is a procedural matter requiring the accused to give both the court and prosecution advance written notice of the intention to plead the defence.[7]

Requirements of the defence

7.5 In Scots law, the classic test for a successful plea of self-defence involves three requirements:

> (a) the accused must have been in imminent danger of death or serious injury, or must reasonably have believed himself to have been in such danger, and acted in that belief ("imminent danger");

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[1] See para 6.5 above.
[2] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 3.02.
[3] *Ibid*.
[4] Self-defence being a complete defence which, if successfully pled, leads to acquittal; provocation, on the other hand, is a partial defence to murder which, if successfully pled, reduces a conviction for murder to one for culpable homicide.
[5] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014), para 21.7.1. And see ch 10, Provocation.
[6] Along with the common law defences of alibi and incrimination and the statutory defence of mental disorder (Criminal Procedure (Scotland) Act 1995, s 51A). The Criminal Procedure (Scotland) Act 1995, s 78(2) provides that the defences of diminished responsibility, automatism, coercion or consent in relation to certain sexual offences are to be treated as if they were special defences.
[7] See Criminal Procedure (Scotland) Act 1995 s 78(1).

(b) there must have been no reasonable opportunity to escape ("the retreat rule"); and

(c) the accused must have used no more than a reasonable amount of force in order to protect himself ("proportionality").

Imminent danger

7.6 The accused must have been in imminent danger of death or serious injury, or have reasonably believed himself to have been in such danger and acted in that belief. The requirement for imminent danger can be traced to the institutional writer Hume,[8] but has been repeatedly restated in modern case law. In the leading case of *Owens v HM Advocate*,[9] the court held that:

> "… self-defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds. Grounds for such belief may exist though they are founded on a genuine mistake of fact."[10]

7.7 Any mistaken belief must be reasonable. There had been some concern amongst academics that the change in the *mens rea* of murder to "wicked intention" in *Drury*[11] could have unanticipated and undesirable consequences in relation to the requirement for reasonable belief. As Ferguson and McDiarmid point out:

> "The contention was that an accused who believed in all honesty that her life was in danger, however unreasonable the grounds on which she held that belief, could not be said "wickedly" to intend to kill. She may well have intended to kill but her purpose was not wicked: it was to save her own life."[12]

7.8 However, the post-*Drury* case *of Lieser v HM Advocate*[13] re-affirmed that any mistaken belief on the part of the accused must be held on reasonable grounds and that Scots law does not allow unreasonable mistakes to found a plea of self-defence.[14] Whilst some Scottish academics have argued that *Lieser* does not, in fact, resolve the issue arising from *Drury* it does, nonetheless, arrive at the right result.[15] Another point to note in relation to the "imminent danger" requirement is that killing in self-defence is permitted not only where the accused faces a threat to life but also where the accused faces a threat of serious bodily injury. In

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[8] See J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) paras 3.05 to 3.07 for more detail on Hume's exposition of the defence.
[9] 1946 JC 119.
[10] At p 125, (Lord Justice General Normand). The case of *Owens v HM Advocate* has been followed in a long line of subsequent case law including *Crawford v HM Advocate* 1950 JC 67 at p 72, *McCluskey v HM Advocate* 1959 JC 39 at p 43, *McLean v Jessop* 1989 SCCR 13 at p 17, *Jones v HM Advocate* 1989 SCCR 726 at p 738 and *Burns v HM Advocate* 1995 SCCR 532 at p 537.
[11] *Drury v HM Advocate* 2001 SCCR 583. See the detailed discussion of this case in ch 3, The language of Scots homicide law.
[12] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 21.8.5, referring to F Leverick, "Mistake in Self-Defence after *Drury*" (2002) 1 Jur Rev 35.
[13] 2008 SCCR 797.
[14] See para [10] (Lord Kingarth).
[15] See F Leverick, "Unreasonable Mistake in Self-Defence: *Lieser v HM Advocate*" (2009) 13 Edin LR 100 at pp 103-104, J Chalmers, "*Leiser* and Misconceptions" 2008 SCL 1115 at p 1121 and PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014), para 21.8.6.

Burns v HM Advocate, the Lord Justice-General (Hope) referred to killing that was "necessary to preserve [the accused's] own life or protect himself from serious injury."[16]

7.9 The issue of self-defence in killing to prevent rape is discussed in Chapter 8, Specific issues in relation to self-defence. Criticism that the requirement of "imminent danger" does not work well in cases of killings committed following years of domestic abuse by a partner is discussed in Chapter 12, Domestic abuse.

7.10 Chalmers and Leverick note than an alternative approach might be to follow English and Canadian law, which treat imminence of danger as merely one factor among many in determining whether the use of defensive force is reasonable, rather than as an independent factor as Scots law does.[17]

The retreat rule

7.11 The accused should use lethal force in self-defence only as a last resort. If there is a reasonable opportunity to escape, then the accused must take that opportunity.[18] For example, in the case of *HM Advocate v Doherty*[19] the accused was attacked in a building by a man with a hammer. The accused was given a bayonet by one of his friends with which he lethally stabbed his attacker. However, there was an open door behind the accused leading down a set of stairs and into a yard (providing him with a potential escape route) which, as the trial judge noted in his charge to the jury, he had not made any attempt to use. He was convicted as charged of culpable homicide.

7.12 However, the accused is not bound to take *any* opportunity to escape. The case of *McBrearty v HM Advocate*[20] confirms that only failure to take advantage of a *reasonable* opportunity to retreat will prevent an accused from pleading self-defence. In that case, the trial judge's direction that the accused had to have "no means of escape or retreat" was held to be imprecise, as the judge did not explain that the means of escape had to be reasonable.[21]

7.13 Chalmers and Leverick note that in making the retreat rule an independent requirement of self-defence, Scots law is relatively strict in comparison to other jurisdictions.[22] For example, the Canadian Criminal Code contains a retreat rule in relation to provoked, but not unprovoked, attacks and codes in Germany and several US states impose no duty on the accused to retreat, even if a safe opportunity to do so exists. They also note that in English law, the failure to take an opportunity to retreat is only one of a number of factors to be taken into account in deciding whether or not any force used in self-defence was reasonable in response to the initial attack.[23]

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[16] 1995 SCCR 532, at p 536.
[17] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 3.09. They cite the case of *Shaw v R* [2001] UKPC 26 for England and *Lavallee v R* [1990] 1 SCR 852 for Canada.
[18] See *McCluskey v HM Advocate* 1959 JC 39 at 43, (Lord Russell); *Fenning v HM Advocate* 1985 SCCR 219, at p 225; *Burns v HM Advocate* 1995 SCCR 532 at p 536; *Pollock v HM Advocate* 1998 SLT 880 at p 882.
[19] 1954 JC 1.
[20] 1999 SCCR 122.
[21] Additionally, as noted below in para 7.17, there is no duty to escape when acting in self-defence of another: see *HM Advocate v Carson* 1964 SLT 21 and *Dewar v HM Advocate* 2009 SCCR 548..
[22] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 3.13.
[23] They cite the case of *R v Bird* [1985] 1 WLR 816 in this regard.

Proportionality

7.14 The final element required for a successful plea of self-defence in Scots law is that the accused must have used no more than a reasonable amount of force in order to protect himself. In other words, the accused must have retaliated to the initial attack proportionately.

7.15 In the leading case of *Fenning v HM Advocate*,[24] Lord Cameron stated that the accused must not use "force grossly in excess of that necessary to defend himself" and that the defence could not be relied on "where the force used to repel the attack is excessive".[25] The case established that for the defence to be successful, a jury must be satisfied that there had been no "cruel excess" on the part of the accused.[26] The courts have also guided juries that, when determining whether or not "cruelly excessive" force has been used they should not judge the accused on "too fine [a scale]". As Lord Keith charged the jury in the case of *HM Advocate v Doherty*:

> "You do not need an exact proportion of injury and retaliation; it is not a matter that you weigh in too fine scales, as has been said. Some allowance must be made for the excitement or the state of fear or the heat of blood at the moment of the man who is attacked…"[27]

7.16 The question of a possible partial defence of excessive force in self-defence is discussed in Chapter 8, Specific issues in relation to self-defence.

Further general points

7.17 In addition to the three well-established requirements for the defence, there are some other general points to note. First, in Scots law the concept of self-defence extends to the defence of others.[28] In this situation, the rules are largely the same as those outlined above, except that the accused is not required to take any reasonable opportunity to escape.[29] Secondly, the initiator of physical violence is not necessarily precluded from relying upon the defence of self-defence.[30] Even where the accused was the initiator of physical violence, he will be able to plead self-defence if the victim responded to the initial attack in a disproportionate manner and the accused had no other means available to save his own life.[31]

7.18 Chalmers and Leverick comment that the defence of self-defence is well-established, referring to its availability as a plea in cases of homicide as far back as the 13th century and its detailed treatment in both Mackenzie (first published in 1678) and in the first edition of Hume (published in 1797).[32] They submit that, perhaps because of its long history, the requirements of the defence are well settled.

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[24] 1985 SCCR 219.
[25] At p 225.
[26] *Ibid*.
[27] 1954 JC 1, at pp 4-5.
[28] See *HM Advocate v Carson* 1964 SLT 21 and *Dewar v HM Advocate* 2009 SCCR 548.
[29] See *Dewar v HM Advocate* 2009 SCCR 548 and *McCloy v HM Advocate* 2011 SCL 282.
[30] See *Boyle v HM Advocate* 1992 SCCR 824; *Pollock v HM Advocate* 1998 SLT 880.
[31] *Burns v HM Advocate* 1995 SCCR 532. However Chalmers and Leverick point out that such an approach is inconsistent with prior fault precluding resort to defences such as automatism, intoxication, coercion and necessity: see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) at para 3.26.
[32] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 3.01. For more detail on Hume's exposition of the defence see paras 3.05 to 3.07.

7.19 With the exception of the issues discussed in Chapter 8[33] and Chapter 12,[34] we are not aware of calls for changes to the three essential elements that form the core of the defence as it applies to homicide offences. That said, we would welcome views on the following questions:

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?

[33] Namely excessive force in self-defence; self-defence of property; and self-defence in rape attacks.
[34] Domestic abuse.

Chapter 8 Specific issues in relation to self-defence

8.1 In this chapter, we discuss certain specific issues concerning self-defence in the context of homicide. These are:

(a) excessive force in self-defence;

(b) self-defence of property; and

(c) self-defence in rape attacks.

8.2 Aspects of self-defence particularly relevant to domestic abuse are discussed in Chapter 12.

Excessive force in self-defence

8.3 As noted in Chapter 7, the third requirement of the plea of self-defence is that the accused must have used no more than a reasonable amount of force necessary to stop an attack.[1] Currently, Scots law does not recognise a partial defence of excessive force in self-defence.[2] Thus a trial judge might explain to a jury:[3]

> "You can only acquit on the basis of self-defence if each of three conditions is satisfied:
>
> [First, imminent danger of attack; secondly, violence as a last resort; and]
>
> Thirdly, the accused must have used no more than a reasonable amount of force. *The aim of self-defence is only to stop an attack.* The accused doesn't have a licence to use force grossly in excess of what's needed for his/her defence. If he/she went beyond what you thought was reasonable force, he/she is guilty of the offence. Equally, if he/she acted in revenge, retaliation, or anger, that is not self-defence.
>
> In applying these three tests, you have to allow for fear and the heat of the moment. Don't judge an accused's actions too finely. Take a broad and reasonable approach in considering the type and degree of violence faced, and the type and scale of force in the response."

8.4 Difficult questions may arise in cases where an accused appears, on the face of it, to have used excessive force in self-defence, resulting in the death of the deceased. While this might be said to be a classic matter for a jury to decide, in practice, it would appear to present

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[1] The other two requirements being imminent danger of death or serious injury (or reasonable belief that such existed), and violence used as a last resort: see paras 7.6 and 7.11 above.

[2] *Crawford v HM Advocate* 1950 JC 67 at p 69 (Lord Justice General Cooper); *Fenning v HM Advocate* 1985 SCCR 219 at p 224 (Lord Cameron). See J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) paras 3.17 and 3.18 for more detail.

[3] What follows is one style used by a trial judge: further formulations and styles may be found in The Judicial Institute for Scotland, *Jury Manual*.

a stark choice between a verdict of murder (with the mandatory life sentence), and a verdict of acquittal (on the basis of the plea of self-defence). Subject to the operation of the partial defence of "provocation",[4] there would appear to be no half-way house of culpable homicide.[5]

8.5 On that basis, one possible solution might be the creation of a new partial defence of "excessive force in self-defence". Such a partial defence would operate in the same way as the existing partial defences of provocation and diminished responsibility in that, if successful, it would reduce what would otherwise be a conviction for murder to a conviction for culpable homicide.

8.6 The main argument in favour of the creation of such a partial defence is that the moral culpability of someone who kills with excessive force, in the mistaken but reasonably held belief that the amount of force used was necessary to repel the attack, is less than that of a person who kills in a cold-blooded and premeditated way. Whilst not justifying an acquittal,[6] it is arguable that the comparatively lower level of moral culpability should entitle the perpetrator to plead a partial defence which, if successful, would lead to a conviction for culpable homicide rather than murder.

8.7 A subsidiary argument is that the principle of "fair labelling" comes into play. As Leverick points out, it may be inappropriate to label someone who made a reasonably held mistake as to the level of force needed for self-defence as a "murderer" (except where the force used was grossly excessive). The label "murderer" should arguably be reserved for only the most serious and morally blameworthy examples of killing.[7]

8.8 Some jurisdictions have decided not to adopt the concept of a partial defence of excessive force in self-defence, including Canada,[8] some states of Australia,[9] and New Zealand.[10] The Law Commission of England and Wales considered the possibility of introducing such a partial defence, but rejected it on the basis that their proposals to reformulate the defence of provocation allowed for an excessive response to a fear of violence, such that the partial defence was unnecessary.[11]

8.9 Other jurisdictions do permit a partial defence of excessive force in self-defence. These include India[12] and Ireland, where unreasonable force results in a conviction for

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[4] See para 8.11 below.
[5] Which might, in certain cases, more accurately reflect the jury's view of events.
[6] As would the standard defence of self-defence, if accepted by the jury: see para 7.1 above.
[7] F Leverick, *Killing in Self-Defence* (2006) p 174; and see para 2.22 above.
[8] See the Supreme Court decision in *R v Faid* [1983] 1 SCR 265, a decision later confirmed in *R v Reilly* [1984] 2 SCR 396.
[9] Although the partial defence was recognised temporarily as a result of the case of *Viro v R* (1978) 141 CLR 88, that case was overturned 9 years later by the High Court in *Zecevic v DPP*, (1987) 162 CLR 645. Some Australian states, such as South Australia and New South Wales, have since reintroduced the partial defence through legislation (see, for example, in New South Wales, the Crimes Act 1900, s 421).
[10] The Crimes Act 1961, ss 48 and 62, as amended by the Crimes Amendment Act 1980.
[11] See Law Commission, *Report on Partial Defences to Murder*, Law Com No 290 (2004) at para 4.31 and preceding paragraphs.
[12] In the Indian Penal Code since its inception - see exception 2 to s 300.

manslaughter rather than murder, so long as the accused believed the force to be reasonable.[13]

8.10 Ferguson and McDiarmid argue that Scotland should follow Ireland and enact a similar provision, provided that the accused's belief was held on reasonable grounds.[14] Similarly Leverick considers that a conviction for murder where a person has used excessive force in self-defence is unnecessarily harsh, and that there seems to be as good a reason for accepting "excessive force in self-defence" as a partial defence, as there is for accepting the partial defences of provocation and diminished responsibility.[15]

8.11 One argument against the creation of such a partial defence might be the availability of the partial defence of provocation.[16] When charging the jury in a murder trial, a standard direction from the judge might be as follows:[17]

> "[Following upon directions on the full defence of self-defence] I am now going to tell you about provocation. And what I'm about to tell you is only relevant if you have rejected self-defence, because if you think that self-defence is established, or if the question of self-defence leaves you with a reasonable doubt about the guilt of the accused, you would acquit him, and there would be no need to go on to consider provocation.
>
> Provocation is in law quite different from self-defence, and must be considered quite separately from the question of self-defence. Provocation does not result in an acquittal, but may result in a lesser verdict of culpable homicide rather than a verdict of murder. I'll explain why:
>
> The essence of provocation is that the accused acted in hot blood, while suffering from a loss of control. Provocation may arise for consideration when each one of these four circumstances exists:
>
> 1) where the accused has been attacked physically, or where he believed he was about to be attacked, and reacted to that. The danger of attack must be immediate, not in the future. The belief must have been held on reasonable grounds, even though they might turn out to have been mistaken. A mistaken belief must have had an objective background. It can't be purely subjective or of the nature of a hallucination;
>
> 2) where he has lost his temper and self-control immediately;
>
> 3) where he has retaliated instantly and in hot blood. If he had time to think, and then acted, that would be revenge, not acting under provocation;

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[13] *The People (AG) v Dwyer* [1972] IR 416; *The People (DPP) v Barnes* [2007] 3 IR 130; the Criminal Law (Defence and the Dwelling) Act 2011; and "First murder case defended under Defence and the Dwelling Act ends in acquittal" *Irish Legal News* (14 March 2018) available at: https://www.irishlegal.com/article/first-murder-case-defended-defence-dwelling-act-ends-acquittal. See too D Pendergast, "Defensive killing by initial aggressors: *People (DPP) v Barnes* revisited" (2015) 54 Irish Jur 115.

[14] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 21.9.9, adopting the same approach to errors of fact as in other areas of Scots criminal law.

[15] F Leverick, *Killing in Self-Defence* (2006), p 176.

[16] See ch 10, Provocation.

[17] Further variations of style can be found in the Judicial Institute for Scotland, *Jury Manual*.

> 4) where the violence of his retaliation was broadly equivalent to the violence he faced. There must be no gross disproportion between the accused's violence and the violence which prompted it. It's the degrees of violence you compare. The fact that the effect of the retaliating violence was more serious than that of the provoking violence doesn't necessarily mean that it was grossly disproportionate.
>
> These matters are to be tested by the standards of an ordinary person. They are not to be measured in too fine a scale. So you should ask yourselves, 'would an ordinary person be provoked into such loss of self-control in the face of such conduct?'
>
> If an accused person is found to have killed while acting under provocation, what would normally be regarded as a case of 'murder' is reduced to a case of culpable homicide – culpable homicide covering, as I have said, the causing of death by an intentional, unlawful, and culpable act, but without that *wicked state of mind* which I described to you when defining murder. So "provocation" alters the nature of the crime. Provocation makes the crime less serious. But provocation does not lead to a complete acquittal. So if, having heard the evidence, you concluded that the accused *was* provoked, and reacted in a way in which an ordinary man would have been liable to react in the same circumstances, or if the evidence about provocation leaves you with a reasonable doubt as to whether the accused acted 'wickedly', you would return a verdict of culpable homicide."

8.12 It is arguable therefore that the partial defence of provocation may cover the majority of situations envisaged in the context of excessive force in self-defence, even in the context of sexual assaults.[18]

8.13 In this context, it is perhaps of some significance that the authors of the Draft Criminal Code for Scotland[19] do not discuss a possible defence of "excessive force in self-defence". The suggested definition of self-defence in section 23[20] provides that a person acts in self-defence "only if the acts in question are immediately necessary and reasonable". Section 23(3)(a) provides that "any acts likely to kill a person are not to be treated as reasonable except where they are immediately necessary for the purpose of saving the life of, or protecting from serious injury, the person doing the acts or some other person". In their commentary, the authors note that subsection (3)(a) makes it clear that where deadly force is used, the accused must have been acting to repel a threat to his or her own life, or that of a third party.[21] There is no mention of a possible defence of "excessive force in self-defence".

8.14 In light of the discussion above, we ask the following questions:

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

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

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[18] See para 8.26 and following paragraphs below.
[19] E Clive, P Ferguson, C Gane, and A McCall Smith.
[20] See Appendix for full text of section 23 of the Draft Criminal Code.
[21] Noting that this is in line with the European Convention on Human Rights, Article 2.

Self-defence of property

8.15 Scots law gives clear priority to the sanctity of human life. Although there is some suggestion in Hume's writings that he regarded killing in defence of property as legitimate in certain situations,[22] there is no support for such a proposition in modern Scots case law. The leading cases on self-defence do not address the issue directly, but suggest that it would be highly unlikely that Scottish courts would accept such a defence. For example, the court in *McCluskey v HM Advocate*[23] emphasised the "principle of the sanctity of human life"[24] and in *Elliot v HM Advocate*[25] the court approved the trial judge's charge to the jury in *McCluskey* that "homicide will not be justified by self-defence unless it is committed of necessity in the just apprehension on the part of the killer that he cannot otherwise save his own life."[26] Chalmers and Leverick take the view that:

> "[g]iven these comments, and the strict rules relating to other aspects of self-defence, it can probably be concluded that the acquittal of an accused who had killed in defence of property could not be legally justified."[27]

8.16 Scotland is not the only jurisdiction to view killing in defence of property as unacceptable. Leverick points out that the Canadian Supreme Court has confirmed that lethal force can be used only in defence of persons and never in defence of property,[28] while the US Model Penal Code explicitly rules out the use of deadly force to protect property[29] as does the state of New South Wales in Australia.[30] South Africa is cited as an example of a jurisdiction where courts have, in the past, permitted killing to protect property, but Leverick doubts whether such a precedent would be followed today.[31]

8.17 A notable exception to the approach favoured in the above jurisdictions is that of South Australia, which relaxes the proportionality requirements of the defence of self-defence where the defendant acted to protect property. Section 15A(1) of the Criminal Law Consolidation Act 1935 provides for a (complete) defence where a defendant caused death while trying to protect

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[22] For example, killing a thief where a robbery takes place "on the highway, in the night and in a solitary place" (Hume, i, 220) or repelling the invasion of one's property where that invasion was made "in that forcible and felonious manner, which naturally puts the owner in fear" (Hume, i, 218-19).
[23] 1959 JC 39.
[24] *Ibid*, at p 43 (Lord Justice General Clyde).
[25] 1987 SCCR 278.
[26] *Ibid* at p 281 (Lord Justice General Emslie).
[27] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 3.22.
[28] See *Gunning v The Queen* [2005] 1 SCR 627 at para [26].
[29] S 306(3)(d), but with an exception where there is an attempt to dispossess the accused of their dwelling. Most US states have this rule and exception too.
[30] Crimes Act 1900, s 420.
[31] See the case of *Ex p die Minister van Justisie: In re S Van Wyk* 1967 (1) SA 488 (AD) where a shopkeeper set up a shotgun that would be triggered by anyone coming into the shop when closed, and displayed a warning notice to this effect. A burglar triggered the shotgun on breaking into the store; he was hit in the chest and killed. The shopkeeper relied on the South African defence of private defence and was acquitted of murder. However, in the more recent case of *Ex p The Minister for Safety and Security and the National Commissioner of the South African Police Service: In re The State v Walters and Walters* (2002) 7 BCLR 663, the Constitutional Court of South Africa hinted that allowing killing in defence of property might be unconstitutional. In the high profile appeal in the case of Oscar Pistorious, the Supreme Court of Appeal of South Africa held that the trial court should have found that the accused was guilty of murder and not culpable homicide, and that his defence of putative private defence could not be sustained: *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204.

property,[32] but did not intend to cause death nor was reckless as to causing death. Moreover, section 15A(2) provides for a partial defence (reducing murder to manslaughter) where a defendant unintentionally caused death while trying to protect property, but where "the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist". It is for the prosecution to disprove the section 15A defences beyond reasonable doubt.[33]

8.18 For completeness, we consider the question whether killing to protect property could be justified as a matter of principle.

8.19 Leverick examines the question from a theoretical perspective,[34] beginning with the premise that all human beings, even those who commit or attempt to commit serious crimes, have a right to life. Even assuming some temporary forfeiture of rights on the part of the perpetrator, she argues that it is difficult to see how lethal force could possibly be permissible against anything less than a threat to life. Her contention ultimately is that the right to life cannot be forfeited by a threat to property, because no item of property is of such value that it outweighs the value of human life.

8.20 Leverick then focuses on the specific case of killing in defence of property in the home.[35] She points to several US states which make an exception to the general rule in circumstances where defendants are threatened with the dispossession of their dwellings, or with burglary or arson. However, she concludes[36] that it is never permissible to kill in defence of property, even where the property in question is one's own home, as the value of human life always outweighs the value of property. She accepts that some threats to property will also carry with them an accompanying threat to life, or at least a reasonable belief that life is threatened. Whilst she argues that the use of lethal force should be permissible in these situations, the justification is the actual or reasonably perceived *threat to life*, not the threat to property.

8.21 Applying such a theoretical approach to Scots law, whilst a householder would not be entitled to kill in defence of his or her property, the general principles of self-defence would apply if the householder reasonably believed that they were in imminent danger of death or serious physical injury.[37] That is no different from the ordinary operation of the Scots law of self-defence, as there must still be an imminent threat of death or serious injury, an inability to avoid the attack, and the use of reasonable force. However, if the law were to be that a householder could stand his or her ground no matter what retreat options might be available, that would be a major change in Scots law.

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[32] Protection of property extends to "unlawful appropriation, destruction, damage or interference", and this section also applies to defendants who acted to "prevent criminal trespass" or "to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large".
[33] Criminal Law Consolidation Act 1935, s 15A(4).
[34] F Leverick, *Killing in Self-Defence* (2006), ch 7.
[35] *Ibid*, p 137.
[36] *Ibid*, p 142.
[37] And also that there were no other ways of avoiding the attack, and that the householder's responding violence did not go beyond what the jury considered to be reasonable force.

8.22 That position is reflected in the Draft Criminal Code for Scotland.[38] While section 23 envisages self-defence to protect property,[39] the acts must be "immediately necessary and reasonable", and lethal acts do not qualify as reasonable "except where they are immediately necessary for the purpose of saving the life of, or protecting from serious injury, the person doing the acts or some other person."[40]

> England and Wales, on the other hand, have introduced specific changes to the law of self-defence with the aim of giving greater protection to householders.[41] In particular, section 76 of the Criminal Justice and Immigration Act 2008 expressly allows householders to use what might be regarded as excessive force when they are defending their property from trespassers,[42] as long as such force is reasonable and not "grossly disproportionate".[43] This change in the law has attracted criticism as authorising "state-sponsored revenge" and giving home owners a legal licence to kill.[44] Paul Mendelle QC, as chairman of the Criminal Bar Association, said of the proposed changes (which were eventually incorporated in the 2008 Act):
>
> "The law should always encourage people to be reasonable, not unreasonable; to be proportionate, not disproportionate … [By permitting killing in defence of property, you] would have, in effect, sanctioned extrajudicial execution or capital punishment for an offence, burglary, that carries a maximum of 14 years – which is the sentence that Parliament decided was appropriate."[45]

8.23 On the other hand, do these provisions really give householders a "licence to kill"? In householder cases, it has been held that force will be regarded as "reasonable" unless it is "grossly disproportionate".[46] However, one may well take the view that killing an intruder who posed no threat to life would (or ought to be) regarded as "grossly disproportionate" and so juries could well decide the defence is not available to householders who kill in this situation.

8.24 There is also an argument that these changes in England and Wales are in contravention of Article 2(1) ECHR which states that "[e]veryone's right to life will be protected by law". Ashworth[47] points out that Article 2 makes no exemption for killing in defence of property in any circumstances. There are exceptions in Article 2, namely for those countries with the death penalty (Article 2(1)); and for those killings occurring in the prevention of

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[38] E Clive, P Ferguson, C Gane, and A McCall Smith, *Draft Criminal Code for Scotland* (2003). Relevant extracts of the Code can be found in the Appendix at the end of this Discussion Paper.
[39] S 23(2)(c) and (d).
[40] S 23(3)(a).
[41] This can be viewed predominantly as a response to certain high-profile cases, such as the Tony Martin case (*R v Martin (Anthony*) [2001] EWCA Crim 2245), where a householder was convicted of murder for using what was deemed to be excessive force against intruders.
[42] Criminal Justice and Immigration Act 2008, s 76(6). Several amendments to s 76 were made by the Crime and Courts Act 2013, s 43 and these came into effect in April 2013.
[43] Criminal Justice and Immigration Act 2008, s 76(5A). A useful analysis of the language and concepts in s 76 can be found in *R (on the application of Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin). In particular, s 76 draws a distinction between "householder" cases where the accused believed (even wrongly) that the victim was a trespasser and the force used can be "disproportionate" (although not "grossly disproportionate"), and "non-householder" cases where no such belief is relevant.
[44] See S Miller, "'Grossly Disproportionate': Home Owners' Legal Licence to Kill", (2013) 77(4) J Crim L 299-309; and see also the critique of the provision in DC Ormerod and K Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th edn, 2018) para 10.6.1.4.
[45] Frances Gibb, "Lawyers fight 'licence to kill burglars'" *The Times* (25 January 2010) p 3.
[46] *R (on the application of Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin).
[47] I Dennis, "What Should be Done about the Law of Self-Defence" [2000] Crim LR 417, quoting A Ashworth, *The Human Rights Act and the Criminal Justice and Regulatory Process* (1999).

unlawful violence, or in the course of lawful arrest, or in the lawful quelling of a riot (Article 2(2)). But those exceptions specifically provide that the use of force must be "no more than absolutely necessary." Miller argues that "the extension of self-defence to allow for lethal force to protect property in certain circumstances will push English law far beyond the remit of the European Convention on Human Rights", and authorises disproportionate force rather than the "no more than absolutely necessary" test set out in Article 2(2).[48]

8.25 Given the discussion above, we are not minded to recommend the extension of self-defence to permit the use of lethal force to defend property in any circumstances, even where that property is a home. That said, we would welcome views on the following questions:

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?

Self-defence in rape attacks

Introduction

8.26 In this section, we examine the exceptional common law plea which allows a woman to kill in order to prevent being raped; the new definition of "rape" in terms of the Sexual Offences (Scotland) Act 2009; some traditional and theoretical justifications for the exceptional common law plea; proposals made in the Draft Criminal Code for Scotland; the approaches adopted in other jurisdictions; some practitioners' views; and some factors which might be taken into account when considering possible law reform.

The exceptional common law plea

8.27 As noted earlier,[49] the first of the three elements necessary for a successful plea of self-defence is that there must have been imminent danger of death or serious injury, or a reasonable belief that such danger existed.

8.28 Exceptionally, the law has permitted a woman to plead self-defence where she killed while trying to prevent being raped. As Hume[50] explained:

[48] S Miller, "'Grossly Disproportionate': Home Owners' Legal Licence to Kill" (2013) 77(4) J Crim L 199 at p 308.
[49] See ch 7, Self-defence, para 7.5.
[50] Writing in in late 18th and early 19th century.

> "In like manner as a man may kill in resistance of an attempt on his life, so may a woman in resistance of an attempt to commit a rape on her person, an attempt at which she is entitled to feel the highest indignation and resentment."[51]

8.29 A woman's entitlement to plead self-defence in such circumstances was confirmed in *McCluskey v HM Advocate*[52] and *Pollock v HM Advocate*.[53]

8.30 However, this exceptional form of the plea is not available to a man seeking to defend himself from what was then regarded as a sexual assault,[54] although it would appear that it is available to a third party[55] who killed in order to prevent a woman being raped. In *Pollock v HM Advocate*, the male accused claimed to have killed to prevent the deceased from raping his girlfriend. On appeal,[56] the High Court seems to have accepted that a third party killing in order to prevent the rape of a woman could rely on the plea. The court observed:

> "…the crucial point is not whether the appellant had or had not a genuine belief that the deceased might still rape [his girlfriend] but rather whether a reasonable jury could consider that the steps he took were taken to defend her."[57]

A new definition of "rape": the Sexual Offences (Scotland) Act 2009

8.31 A fundamental redefinition of the crime of rape was made by the Sexual Offences (Scotland) Act 2009 ("the 2009 Act").[58] Section 1 provides:

> "Rape
>
> (1) If a person ("A"), with A's penis –
> (a) without another person ("B") consenting, and
> (b) without any reasonable belief that B consents,
> penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.
>
> (2) For the purposes of this section, penetration is a continuing act from entry until withdrawal of the penis; but this subsection is subject to subsection (3).
>
> (3) In a case where penetration is initially consented to but at some point of time the consent is withdrawn, subsection (2) is to be construed as if the reference in it to a continuing act from entry were a reference to a continuing act from that point of time.

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[51] Hume, i, 218.
[52] 1959 JC 39.
[53] 1998 SLT 880.
[54] But would now be regarded as rape. See para 8.31 and following paragraphs, below.
[55] Male or female.
[56] An appeal which did not directly address the issue of defence against rape.
[57] 1998 SLT 880 at p 883. The appeal court upheld the trial judge's withdrawal of self-defence from the jury on the basis that a jury could not find other than that there had been excessive force. The appeal was rejected on unrelated grounds.
[58] The 2009 Act implements recommendations made in: Scottish Law Commission, *Report on Rape and Other Sexual Offences*, Scot Law Com No 209 (2007).

(4) In this Act –

"penis" includes a surgically constructed penis if it forms part of A, having been created in the course of surgical treatment, and
"vagina" includes –
(a) the vulva, and
(b) a surgically constructed vagina (together with any surgically constructed vulva), if it forms part of B, having been created in the course of such treatment."

8.32 The *actus reus* of the crime of rape has therefore been radically altered. It is no longer restricted to penetration of a vagina by a penis, but now includes vaginal, anal or oral penetration by a penis. As a result, anyone could be the victim of a rape. The Act also defines an offence of "sexual assault by penetration",[59] which comprises non-consensual vaginal or anal penetration with "any part of [the accused's] body", or with any thing.

8.33 In the light of this radical reform of the crime of rape, commentators have suggested that the exceptional plea of self-defence available to a woman trying to prevent rape should either be abolished, or should be extended to everyone.[60]

8.34 We consider this issue to be an important matter of social policy ultimately for the decision of Parliament. What we propose to do in this paper is (i) set out some traditional and theoretical justifications for the exceptional defence; (ii) note the proposals made by the authors of the Draft Criminal Code for Scotland; (iii) outline how other jurisdictions approach the issue; (iv) record practitioners' views; and (v) suggest some factors which might be taken into account if a social policy decision is to be discussed.

(i) Some traditional and theoretical justifications

8.35 Hume based his argument on rape being a "cruel and irreparable injury" to which a woman "is entitled to feel the highest indignation and resentment".[61] Hume described the harms of rape as being "an injury of the most grievous nature: being a robbery of that in which a woman's honour, her place in society, and her estimation in her own eyes depend; and being also, in the perpetration, necessarily accompanied with great alarm and terror, beside the actual violence to the person".[62] By contrast, a man could not avail himself of the defence. In *McCluskey v HM Advocate*, a case involving an attempted sexual assault by one man on another man, Lord Justice General Clyde said:

[59] Sexual Offences (Scotland) Act 2009, s 2.
[60] See PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2014) paras 21.8.8 and R McPherson, "Fatal Self-defence Against Rape: A Call for Clarification in Scots Law" (2012) Jur Rev 111 at p 125.
[61] Hume, i, 218.
[62] Hume, i, 301.

> "Dishonour, it is suggested, may be worse than death. But there are many ways of avoiding dishonour without having to resort to the taking of a human life, and, so far as I am concerned, I do not see how the taking of a human life can ever be justified by the mere fact that there have been threats of dishonour or indignities or even of some bodily harm, which falls short of creating reasonable apprehension of danger to life."[63]

8.36 Of modern commentators, Professor Leverick provides the most in-depth discussion of the possible theoretical justifications for the exceptional plea.[64]

8.37 First, the author discusses theoretical justifications offered by Kates and Engberg.[65] One is an argument that the threat of rape is equivalent in seriousness to a threat of serious bodily harm. As killing in order to prevent serious bodily harm can found a plea of self-defence, it is contended that the plea should also be available to an accused who killed in order to prevent rape.[66] However, Leverick suggests that the assumption that it is *always* permissible to kill in order to avoid serious bodily harm is questionable, and that instead an argument has to be constructed that the harm of rape is worse, namely:

> "that the harm of rape is so serious that it is equivalent to, or at least approaches, the harm of deprivation of life itself."[67]

8.38 Leverick then questions whether the infliction of psychological harm would be a sufficient justification. She points out that the level of psychological harm described above might not occur every case, and concludes that a different justification might be needed to capture all cases.[68] She also points out that reliance on psychological harm as a basis for self-defence in this context might make it more difficult to argue against allowing a plea of self-defence where there had been a killing in defence of property.[69]

8.39 Ultimately Leverick prefers the arguments offered by Hampton[70] and Gardner and Shute[71] who conclude that the wrongness in rape lies in the fact that the rapist uses the victim as an object, and in so doing, dehumanises him or her. Gardner and Shute further note that the particular wrong of sexual penetration lies in the social meaning which has been given to the act of penetration in modern society.[72] Leverick concludes by arguing that the justification for the use of lethal self-defence to prevent rape is the fact that the crime of rape "approaches

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[63] *McCluskey v HM Advocate*, 1959 JC 39 at p 42. Chalmers and Leverick comment that it would appear that the Lord Justice General "simply assumed it should be permissible" for a woman to kill to avoid rape, without offering any analysis or differentiation from his view concerning the male victim: J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 3.21.

[64] F Leverick, *Killing in Self-Defence* (2006), ch 8.

[65] DB Kates Jr and NJ Engberg, "Deadly Force Self-Defense Against Rape" (1982) 15 UC Davis LR 873-906.

[66] It is often going to be difficult to separate out a threat of death or serious bodily injury and a threat of rape. In many cases of rape, it would be perfectly reasonable for the victim to believe that he/she might be killed or seriously injured if they resisted. So the arguably "normal" law of self-defence is going to cover most cases. That only leaves the question of whether it is permissible to kill to prevent a rape where there was no accompanying danger of death/serious bodily harm and there were not reasonable grounds for the victim to think that there were. This is unlikely to be a large sub-set of cases and so this might be a question that arises more in theory than in practice.

[67] F Leverick, *Killing in Self-Defence* (2006), at p 152.

[68] *Ibid*, at pp 154 to 156.

[69] See paras 8.15 and following paras above, one argument being that loss of, or damage to, property could cause a similar level of psychological harm.

[70] J Hampton, "Defining Wrong and Defining Rape", in K Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape* (1999) at pp 118-56.

[71] J Gardner and S Shute, "The Wrongness of Rape", in J Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (2000) at pp 193-217.

[72] *Ibid*, at p 204.

the standard of wrong equivalent to a deprivation of life itself",[73] as "the rapist uses the victim as an object through the act of sexual penetration, an act that has been given a particular significance by society, and, in so doing, denies the victim's humanity".[74]

(ii) The proposals made in the Draft Criminal Code for Scotland

8.40 Interestingly, in section 23 of the Draft Criminal Code for Scotland, the authors propose restricting the common law defence (summarised in the commentary as "[allowing] a woman to kill to prevent rape but [not permitting] a man to kill to prevent non-consensual sodomy"[75]). Section 23 permits acts likely to kill a person only "where [that is] immediately necessary for the purpose of saving the life of, or protecting from serious injury, the person doing the acts or some other person". There is no automatic recognition of a woman's right to kill to prevent rape. It may be inferred that the authors would take the same approach following upon the radical change made by the 2009 Act: in other words, there would be no automatic right of a victim of a rape attack to kill to prevent rape. Self-defence by a third party trying to prevent rape is expressly recognised, as section 23 permits a third party to resort to "immediately necessary and reasonable" acts which are "likely to kill a person" when acting for the protection of "some other person", as set out above.

(iii) The approach adopted in other jurisdictions

8.41 In other jurisdictions, it is possible to identify two approaches to the issue of self-defence to avoid rape or sexual assault. One is the allowance of self-defence only in certain specified situations (a "threshold" test).[76] The second is a more general proportionality or "reasonableness" test, where it is for the jury to decide whether the use of fatal force in the circumstances was reasonably proportionate.

8.42 In *England and Wales,* the law has moved away from a "threshold" approach of entitlement to kill in order to prevent being raped[77] towards a "reasonableness" approach. Two decisions, namely *Palmer v R*[78] in 1971, and *R v Martin*[79] in 2001, cast doubt on the existence of a clear rule that killing in order to prevent rape is permissible in all cases. In *Martin,* the court's observations suggest that where self-defence is pled, all relevant factual circumstances would be considered as part of an overall test in determining whether the response of the defendant was reasonable and therefore justified:

> "A defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property … In judging whether the defendant had only used reasonable force, the jury has to take into account all the circumstances, including the

[73] F Leverick, *Killing in Self-Defence* (2006), at pp 157-158.
[74] *Ibid*, at p 158.
[75] The common law prior to the redefinition of rape in the 2009 Act. Non-consensual sodomy would now be considered rape.
[76] Scots law takes such an approach, as killing in self-defence is allowed only in response to a threat to life or serious injury, and a threat of rape.
[77] See F Leverick, *Killing in Self-defence* (2006) at pp 143-144; *R v Clugstone,* reported in The Times, 1 October 1987, where the trial judge directed the jury to acquit the defendant, on the basis that there was no evidence to contradict her account that she had only killed her victim as he was attempting to rape her; *R v Wheeler* [1967] 1 WLR 1531 at p 1534, where the defendant claimed he had killed only to protect his girlfriend from being raped: the judge directed the jury that "If the attack on [the deceased] was justified and was no more than was reasonably necessary to prevent rape then it would not be an unlawful attack".
[78] [1971] AC 814, a decision of the Privy Council.
[79] [2001] EWCA Crim 2245, a decision of the Appeal Court.

> situation as the defendant honestly believes it to be at the time, when he was defending himself."[80]

8.43 Such an approach would appear to be consistent with some other jurisdictions, for example, South Africa and New Zealand.[81] Some commentators point out that, as a result, the law on the matter is less certain in England and Wales than in Scotland.[82]

8.44 In *Ireland,* existing case law adopts both a "threshold" test and a "reasonableness" requirement. The court in *People (DPP) V Clarke*[83] approved guidance given in *Attorney-General v Dwyer*,[84] namely that " … homicide is not unlawful if the accused believed on reasonable grounds that his life was in danger and that the force used by him was reasonably necessary for his protection". A lesser threat than danger to life has also been recognised.[85] The Law Reform Commission of Ireland (LRCI) has recommended[86] that a person faced with a threat of rape or sexual assault should be able to plead self-defence where they have killed their aggressor. The LRCI observed:

> "Where a person is faced with the threat of rape or sexual assault the person is deprived of calm deliberation and thought and overwhelmed with the need to escape".

8.45 The Commission's recommendation was in the following terms:

> " … lethal defensive force by oneself or in protection of a third party should only be permitted to repel threats of:
>
> - death or serious injury,
> - rape or aggravated sexual assault,
> - false imprisonment by force,
> - and, then only if all the requirements of legitimate defence are made out."[87]

8.46 However the Commission's recommendation has yet to be taken forward in legislation.

8.47 In the *United States of America,* killing in self-defence to prevent rape is expressly permitted by the Model Penal Code (MPC), but "deadly force is not justifiable … unless the actor believes that such force is necessary to protect himself [or herself] against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat …".[88] The NYPC (New York Penal Code) takes a similar approach, allowing fatal self-defence where the

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[80] *Martin,* paras 4-5. Cf *Palmer* at p 831: the test is simply about judging "what is reasonably necessary". In the view of the Law Reform Commission of Ireland, *Legitimate Defence* (LRC CP 41-2006) para 2.16: "any remnants of the traditional threshold rules were swept away by this decision".
[81] See paras 8.48 and 8.50 below.
[82] But such commentary was written before the Sexual Offences (Scotland) Act 2009, and the law in Scotland may be less clear following upon the 2009 Act.
[83] [1994] 3 IR 289 at pp 298-300.
[84] [1972] IR 416 at p 420.
[85] *People (AG) v Keatley* [1954] IR 12 at p 16, regarding as a "legitimate defence" a fatal self-defence effected in order to protect against "some felony involving violence or … some forcible and atrocious crime".
[86] Law Reform Commission of Ireland, *Defences in Criminal Law* (LRC 95-2009) para 2.47.
[87] *Ibid*, para 2.58.
[88] MPC s 3.04(2)(b): a definition narrower than Scots law: see *Lord Advocate's Reference (No 1 of 2001)* 2002 SCCR 435, and the 2009 Act, s 1.

accused "reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery …".[89] The California Penal Code (CPC) has a more detailed provision in section 197, as follows:

> "Homicide is … justifiable … (1) when resisting any attempt to … commit a felony,[90] or to do some great bodily injury upon any person … (3) when committed in the lawful defense of such person, or of a spouse, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished …".

8.48 In *South Africa,* an appeal court decision[91] extended the ambit of self-defence beyond simply threats to life. However, the ambit may not include all killings attempting to prevent rape. Each case has to be determined on its own particular circumstances.[92] In assessing the reasonableness of the manner in which the accused defended himself or herself, account is taken of the relationship between the parties; their respective ages, gender and physical strengths; the location of the incident; the nature, severity and persistence of the attack; the nature of any weapon used in the attack; the nature and severity of any injury or harm likely to be sustained in the attack; the means available to avert the attack; the nature of the means used to offer defence; and the nature and extent of the harm likely to be caused by the defence.[93] There appears to be no case dealing directly with the issue of killing in an attempt to prevent rape. There have been high-profile incidents reported in the press, when it has been noted that it is still unclear whether self-defence may be successfully pled where someone kills to prevent to prevent rape.[94]

8.49 *Australia* gives no clear guidance. The court in *Zecevic v DPP*[95] seemed to suggest that killing to prevent rape might be just permissible,[96] but the majority view was that a threat of death or serious bodily harm is required.[97] In the context of the general defence of self-

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[89] NYPC s 35.15(2)(b). A "forcible" criminal sexual act is a narrower definition than Scots law, and also narrower than the provision in the MPC.
[90] Which includes "rape": cf F Leverick, *Killing in Self-defence* (2006) at p 145 fn 23.
[91] *S v Jackson* 1963 (2) SA 626 (A).
[92] *S v Steyn* (105/09) [2009] ZASCA 152.
[93] *Ibid*, at para 19.
[94] For example, the Lion Mama case where a mother found three men raping her daughter. The mother killed one, and injured the other two. When the mother was charged with murder, there was such public anger that the Director of Public Prosecutions dropped all charges: Gavin Fischer, "Lion Mama: The woman who fought off her daughter's rapists" *BBC News* (31 March 2019) available at: https://www.bbc.co.uk/news/stories-47726967.
[95] (Vic) [1987] HCA 26 Brennan J at para 2 concerning a man killing someone attempting to rape his wife: see commentary by F Leverick, *Killing in Self-defence* (2006) at p 146.
[96] Cf another *obiter* comment in *R v Lane* (1983) 8 A Crim R 182, at p 183 (Lush J) which said killing to prevent rape would be justified.
[97] *Zecevic* para 17, with a more general "reasonableness' approach being adopted. Re the court's use of the term "serious bodily harm", note the argument advanced in F Leverick, *Killing in Self-defence* (2006) at p 152 (and discussed at para 8.39 above) that "we are permitted to kill in self-defence because we have a right to life and therefore a right to defend ourselves from unjust threats to our life. [Where someone causes serious bodily harm but does] not threaten the life of their victims … they do not forfeit their own right to life and we should not, therefore, be permitted to kill them. [The] argument that killing to prevent rape is permissible because the harm of rape is equivalent to serious bodily harm is therefore rejected. Rather … an argument must be constructed that the harm of rape … is equivalent to, or at least approaches, the harm of deprivation of life itself."

defence,[98] different states adopt different approaches. Some adopt a threshold approach.[99] Others adopt a reasonableness test.[100]

8.50 *New Zealand* adopts a reasonableness test. Section 48 of the Crimes Act 1961 is a general self-defence provision, permitting "such force as, in the circumstances as he or she believes them to be, it is reasonable to use."[101] The defence is available in a wide variety of situations.[102]

(iv) Some practitioners' views

8.51 None of the legal practitioners in our informal consultations objected in principle to the availability of the plea of self-defence to a woman who killed in order to prevent being raped, but they pointed out that the plea should be equally available to males who kill to avoid being raped. Otherwise the law would be discriminatory.

(v) Factors which might be taken into account when considering law reform

8.52 We suggest that the following factors might be relevant when assessing whether there should be law reform by, for example, abolishing the exceptional plea of self-defence to avoid being raped, or by making the exceptional plea available to every member of society, or by reformulating the plea, or by adopting some other option.

8.53 *The violation of a human being:* Commentators have suggested that some of the traditional justifications for the exceptional defence are archaic and no longer bear scrutiny in modern society.[103] We would suggest that in today's society there is increasing recognition that a penetrative sexual attack has enormously harmful, destructive, and devastating consequences, with significant and often long-lasting prejudicial effects, whether physical, psychological (self-esteem, outlook, mood, sociability), or other. Whatever the age or gender of the victim, the essence of the offence is the degradation and violation of another human being. Today's society recognises that every individual has human rights, personal dignity and bodily autonomy, justifying self-protection against a rape attack.

8.54 *An adequate alternative plea:* The law could be structured such that, in the event of the abolition of the exceptional plea, a victim of a rape attack could rely upon (i) a general plea of self-defence modelled on the homicide law of England and Wales, South Africa, or New Zealand,[104] with various factors giving a jury material with which to assess the reasonableness of the lethal outcome; or (ii) a general plea of "excessive force in self-defence", if such a partial

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[98] Ie not specifically fending off a rape attack.
[99] Death or grievous bodily harm in Queensland, in its Criminal Code Act 1899, s 271(2); "death or really serious injury" in Victoria, in the Crimes Act 1958, s 322K.
[100] "A reasonable response in the circumstances as he or she perceives them" in New South Wales, in the Crimes Act 1900, s 418(2).
[101] There is no provision expressly concerning the use of lethal self-defence to prevent rape.
[102] As the Court of Appeal affirmed in *R v Kneale* [1998] 2 NZLR 169 at p 178. The New Zealand Law Commission have asked the question "is it reasonable to use deadly force if that is the only way to … prevent a sexual assault that does not amount to serious bodily harm?" see New Zealand Law Commission, *Battered Defendants: Victims of Domestic Violence who Offend* (Preliminary Paper 41, 2000) at para 49. However the question is not answered in the subsequent Report on *Some Criminal Defences with Particular Reference to Battered Defendants* (Report 73, 2001), a report which has not been implemented.
[103] See, for example, J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 3.20; R McPherson, "Fatal Self-defence Against Rape: A Call for Clarification" (2012) 2 Jur Rev 111 at p 112.
[104] See paras 8.42, 8.48, and 8.50 above.

defence had become available;[105] or (iii) the plea of provocation would also be available to the victim of a rape attack. However as both excessive force in self-defence and provocation would be partial pleas, reducing what would otherwise be "murder" to "culpable homicide", some commentators may not consider them to be adequate alternative pleas.

8.55 *Concern about extending the plea to every member of society:* An accusation of rape can often be difficult to prove. In the absence of witnesses, or security camera film, or forensic evidence, and in particular in the absence of the evidence of the deceased, it is possible that the exceptional plea might be used where there had, in fact, been no "rape attack". In other words, the plea might be abused by individuals who have killed for quite different reasons.[106] Statistics show that men kill more frequently than women.[107] The extension of the special plea to all members of society might arguably provide an inappropriate excusal factor for a preponderantly male section of society. Juries might find it difficult to assess what had happened, and might be left with a reasonable doubt about guilt or innocence because of a one-sided version of events based on the special plea and an alleged sexual attack. However a counter-argument to this concern might be that a general plea of self-defence, or a general partial defence of "excessive force in self-defence", is available to all members of society, and might similarly be open to abuse. Further concerns may arise in the context of claimed protection of a third party. Currently, Scots law appears to extend the exceptional plea to anyone who kills in order to prevent a woman being raped.[108] Such a "third party" extension may add to concerns about abuse of the plea where every member of society is vulnerable to rape. While two witnesses should survive to give evidence about what occurred (namely the victim of the rape attack and the "protector"), nevertheless there may be concerns about potential abuse of the plea.

8.56 *Lord Advocate's Reference (No 1 of 2001):* In 2001, the five-judge decision in *Lord Advocate's Reference (No 1 of 2001)*[109] ruled that in Scots law the crime of rape occurs where sexual intercourse took place without consent. The focus of the law moved from forcible rape to non-consensual rape.[110] That change might add to the concern noted in the paragraph above.

8.57 *Section 2: sexual assault by penetration:* As noted in paragraph 8.32 above, section 2 of the Sexual Offences (Scotland) Act 2009 defines an offence of "sexual assault by penetration", which comprises non-consensual vaginal or anal penetration with "any part of [the accused's] body, or with any thing". In some cases, such a sexual assault may prove to be as (or more) devastating and injurious[111] as penetration by a penis. It is arguable that any self-defence provision covering rape attacks should also extend to "section 2"-type attacks.

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[105] See para 8.5 and following paragraphs above.
[106] This was experienced in Victoria, Australia, whereby a defence of "defensive homicide" was introduced in 2005 to help victims of family violence, but was subsequently abolished in 2014 as it had not operated as intended: see below at ch 12, Domestic abuse, para 12.67.
[107] In Scotland in 2017-18, 95% of persons accused of homicide were male: *Homicide in Scotland 2017-18* (Scottish Government, 2018) pp 8-9 available at: https://www.gov.scot/publications/homicide-scotland-2017-18/. In 2018-19 88% of persons accused of homicide were male: *Homicide in Scotland 2018-19* (Scottish Government, 2019) pp 8-9 available at: https://www.gov.scot/publications/homicide-scotland-2018-19/.
[108] See para 8.30 and following paragraphs above.
[109] 2002 SCCR 435.
[110] Later reflected in the 2009 Act.
[111] Physically, emotionally, and psychologically.

8.58 In light of the discussion above, and with a view to assisting in any debate on this issue, we ask the following questions:

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?

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

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?

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)?

Chapter 9 Necessity and coercion

Introduction

9.1 This chapter discusses the closely related but separate defences of necessity and coercion specifically in the context of homicide and asks whether or not they should be recognised as defences to murder. The chapter starts with a brief explanation of the two defences and how they can be distinguished as well as the ways in which they are similar. It goes on to discuss each of the defences in more detail, describing the key requirements of each defence. The chapter then looks at whether the defences currently operate as defences to murder in Scots law and in some other jurisdictions and what has been recommended by law reform bodies and others. Lastly, it discusses some of the arguments for and against accepting them as defences to murder and asks questions in relation to each of them.

Distinguishing the two defences

9.2 In Chapter 7 we discussed briefly how necessity[1] and coercion[2] form part of the family of complete defences (along with self-defence) that all involve the commission of a crime in order to avert harm, and how they can be distinguished from self-defence.[3] In terms of distinguishing each defence, a plea of necessity involves a claim by the accused that it was necessary to act unlawfully because it was the least harmful of two or more alternative courses of action, whereas a plea of coercion involves a claim by the accused that it was essential to act unlawfully to avoid a harm being threatened by a third party. With the defence of necessity, the accused is forced to choose between the lesser of two evils because of natural forces or circumstances rather than by threats from a human third party, as with coercion.

Similarities between the two defences

9.3 Both defences crop up rarely in criminal cases perhaps because the Scottish appeal courts have only recently recognised their existence compared to other more established defences such as self-defence. The case of *Moss v Howdle*[4] in 1997 provided the first confirmation by the appeal court of the existence of the defence of necessity.[5] The case of *Thomson v HM Advocate*[6] in 1983 provided the first confirmation by the appeal court of the existence of the defence of coercion.

9.4 Although the defences can be distinguished conceptually, the appeal court in *Moss v Howdle* stated that the same rules and considerations should govern the two defences:

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[1] Known as "duress of circumstances" in English law.
[2] Known as "duress by threats" in English law.
[3] See para 7.2.
[4] 1997 SCCR 215.
[5] Although *Tudhope v Grubb* 1983 SCCR 350 provided an earlier example of a successful plea of necessity in the sheriff court.
[6] 1983 SCCR 368. However, as this was an armed robbery case, the court reserved its opinion on whether coercion could operate as a defence to a charge of murder.

> "… we consider that, where an accused commits a crime in an endeavour to escape an immediate danger of death or great bodily harm, it makes no difference to the possible availability of any defence that the danger arises from some contingency such as a natural disaster or illness rather than from the deliberate threats of another."[7]

9.5 It has been suggested by academic commentators that both defences can operate either as a justification defence and/or as an excuse.[8] Chalmers and Leverick take the view that both defences can operate as a justification or as an excuse depending on the circumstances in which they are pled. However, in relation to Scots law, they suggest it is difficult to draw any firm conclusions on how the Scottish courts view them as they have tended to avoid theoretical discussions of this nature.[9]

9.6 Another similarity between the two defences is that the Scottish appeal courts have not, as yet, had to decide whether either could ever operate as a defence to murder. We look at this in more detail later in this chapter before raising the question of whether or not they should be recognised defences to murder.

9.7 We now turn to examine the requirements of each defence in more detail.

Necessity

Introduction

9.8 A defence of necessity involves a claim by the accused that it was necessary to act unlawfully because it was the least harmful of two or more possible courses of action.

9.9 As mentioned above, the appeal court first recognised the existence of the defence of necessity in 1997 in the case of *Moss v Howdle*.[10] The case related to a speeding conviction where the appellant had been driving at over 100 miles per hour on a motorway with a passenger he believed to be seriously ill after the passenger shouted out in pain without explaining the cause of his pain. The appellant drove at excessive speed to the nearest service station around three quarters of a mile away where the passenger was only then able to tell the driver that he was suffering from cramp. The sheriff rejected an attempt to plead the defence of necessity at the trial. However, the appeal court recognised the defence of necessity stating that they could see no reason to exclude it when the defence of coercion was accepted.[11]

9.10 Following the appeal court's decision in *Moss v Howdle* the defence has been considered further in two subsequent cases, notably in *Dawson v Dickson*[12] and *Lord Advocate's Reference (No 1 of 2000)*.[13] The *Lord Advocate's Reference* case involved three accused facing several charges of malicious damage (or alternatively theft) in relation to their actions on board a naval vessel on Loch Goil which was involved with submarines carrying

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[7] 1997 SCCR 215 at p 222.
[8] See J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 4.03 (necessity) and paras 5.04 to 5.06 (coercion) for more detail on these theoretical distinctions in relation to the defences.
[9] *Ibid*, para 4.03 and para 5.06. The authors acknowledge that the importance of reaching such a conclusion is, in their view, perhaps overstated.
[10] 1997 SCCR 215.
[11] See quote at para 9.4 above.
[12] 1999 SCCR 698. This case is discussed at para 9.21 below.
[13] 2001 SCCR 296.

Trident nuclear missiles. The accused led a novel argument that the Government's nuclear weapons policy was against customary international law and that the accused's actions, which would otherwise be criminal, were justified by necessity to prevent what they argued were illegal acts of the Government. That argument was ultimately unsuccessful.[14] However, several important issues relating to the defence of necessity were addressed by the court in its judgment.

Requirements of the defence

9.11 It is largely from the judgments in these three leading cases that the main requirements of the defence of necessity in Scots law can be gleaned. These requirements are that:

(a) there must have been an immediate threat of death or serious bodily harm;

(b) there must have been no reasonable alternative courses of action;

(c) the act undertaken by the accused must have had a reasonable prospect of removing the danger; and

(d) the threat must have dominated the mind of the accused at the time they carried out the unlawful act in question.

9.12 We will look at each of these requirements in some more detail in the paragraphs that follow.

Immediate threat of death or serious bodily harm

9.13 In relation to this requirement, the case of *Moss v Howdle* established that, in order to rely on the defence of necessity, the accused must have "acted in the face of immediate danger of death or great bodily harm".[15] The court considered whether any lesser threat would suffice but could find nothing in the authorities referred to them to suggest this. They found that the requirement for immediate danger of death or great bodily harm "is apt to delimit the scope of the defence and to keep it within narrow bounds."[16]

9.14 The *Lord Advocate's Reference* case held that the accused's fear of death or serious injury must have resulted from a reasonable belief as to the circumstances. The case also found that, in addition to the requirement that the threat is of death or serious harm, Scots law contains a subjective proportionality test.[17] The court held that:

[14] Along with several other arguments advanced by the defence.
[15] 1997 SCCR 215 at p 220, linking it to earlier statements made by Hume in relation to the defence of coercion and also the coercion case of *Thomson v HM Advocate*, 1983 SCCR 368.
[16] 1997 SCCR 215 at p 220. Chalmers and Leverick point out in *Criminal Defences and Pleas in Bar of Trial* (2006) para 4.08, that some critics have suggested that the defence should not be limited to cases involving such a serious threat. They suggest that, whilst this restriction may make sense if necessity is viewed as an excuse defence, it makes less obvious sense if necessity is viewed as a justification defence.
[17] The requirement for proportionality is similar to other defences such as provocation and self-defence.

> "As a matter of general principle it appears clear that the conduct carried out must be broadly proportional to the risk. That will always be a question of fact to be determined in the circumstances of the particular case."[18]

9.15 The same case also confirmed that the threat in question does not have to affect the accused or persons already known to or having a relationship with the accused for the defence to apply. The court saw no acceptable basis for restricting the defence in this way and confirmed that the defence could apply where the threat affects "anyone who could reasonably be foreseen to be in danger of harm if action were not taken to prevent the harmful event."[19] Chalmers and Leverick note that the Scots law position on this contrasts with the position in English law, where the equivalent defence of duress of circumstances is restricted to the accused who acts to prevent harm to those for whom he has responsibility or reasonably regarded himself as being responsible.[20]

9.16 The cases of *Moss v Howdle*[21] and the *Lord Advocate's Reference*[22] make clear that the danger of death or great bodily harm must be an immediate one for the defence of necessity to apply. The latter case describes immediacy of danger as "an essential element" of the defence and the court explained the need for this requirement in the same passage:

> "Unless the danger is immediate, in the ordinary sense of the word, there will at least be time to take a non-criminal course, as an alternative to destructive action. A danger which is threatened at a future time, as opposed to immediately impending, might be avoided by informing the owner of the property and so allowing that person to take action to avert the danger, or informing some responsible authority of the perceived need for intervention."[23]

No reasonable alternative courses of action

9.17 Another requirement of the defence of necessity is that there must be no reasonable legal alternative course of action available to the accused. As the court put it in the *Lord Advocate's Reference*:

> "…the defence is available only where there is so pressing a need for action that the actor has no alternative but to do what would otherwise be a criminal act under the compulsion of the circumstances in which he finds himself."[24]

9.18 In the earlier case of *Moss v Howdle* the court made clear that the accused does not have to take just *any* alternative legal course of action, they only have to take any "reasonable legal alternative" available to them.[25]

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[18] *Lord Advocate's Reference (No 1 of 2000*) 2001 SCCR 296 at para [47].
[19] *Ibid* at para [44].
[20] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 4.10 where they refer to the cases of *R v Abdul-Hussain* [1999] Crim LR. 570, at 7 and *R v Shayler* [2001] EWCA Crim 1977 at para [63].
[21] 1997 SCCR 215 at p 220.
[22] 2001 SCCR 296 at para [37].
[23] *Ibid.*
[24] *Ibid* at para [39].
[25] 1997 SCCR 215 at p 223.

The act must have a reasonable prospect of removing danger

9.19 For the defence of necessity to succeed, this requirement (ie that the act must have a reasonable prospect of removing the danger) must also be met in addition to the other requirements outlined so far. This requirement was first outlined in the *Lord Advocate's Reference* where the appeal court agreed with the Crown's contention that the accused "must, at the material time, have reason to think that the acts carried out had some prospect of removing the perceived danger." The court opined:

> "What the defence is concerned with is conduct directly related to the avoidance of a particular danger which would cause harm if the acts of intervention were not carried out. If there were no prospect that the conduct complained of would affect the danger anticipated, the relationship between the danger and the conduct would not be established."[26]

9.20 Chalmers and Leverick suggest that this particular requirement is unlikely to present a problem in the majority of cases in which necessity arises as a potential defence and cite the example of an accused attempting to escape a threat of violence by driving under the influence of alcohol, a factual situation that has arisen in a number of reported cases involving a plea of necessity.[27] However they also point out that, in the *Lord Advocate's Reference*, even if the accused had met all the other requirements of the defence, they would have not have met this requirement, as "damaging a single vessel involved in the UK's nuclear weapons programme was unlikely to change government policy in this area".

The threat must dominate the mind of the accused

9.21 This requirement can be characterised as subjective. The case of *Dawson v Dickson*[28] established that for the defence to succeed the threat must have dominated the mind of the accused at the time of their criminal conduct. *Dawson* was a drink driving case involving an off-duty fireman who attended the scene of an accident and moved a fire engine blocking an ambulance whilst under the influence of alcohol. He then crashed into a police car. The accused pled necessity in defence of his drink driving charge.

9.22 However, in giving evidence, the appellant admitted that he would have driven the fire engine regardless of the emergency situation. The appeal court held that the defence of necessity had not been made out on those facts as:

> "… the defence of necessity only arises when there is a conscious dilemma faced by a person who has to decide between saving life or avoiding serious bodily harm on the one hand and breaking the law on the other hand."[29]

9.23 They go on to say in that same paragraph that the reason the accused drove:

> "…was because it never crossed his mind that he was unfit to drive and he would have driven anyway. In these circumstances it cannot be said that his mind was dominated

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[26] *Lord Advocate's Reference (No 1 of 2000)*, 2001 SCCR 296 at para [46].
[27] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 4.16 where they refer in a footnote to the cases of *Tudhope v Grubb*, 1983 SCCR 350; *Ruxton v Lang*, 1998 SCCR 1; and *Dolan v McLeod*, 1999 JC 32.
[28] 1999 SCCR 698.
[29] *Ibid* at p 703.

> at the time of the act by the extreme urgency of the situation which overrode the normal requirements that a driver should not drive with excess alcohol in his blood."

Other issues

9.24 Beyond setting out the requirements for a defence of necessity, the appeal court in the *Lord Advocate's Reference* also dealt with the issue of the standard against which the accused should be judged in necessity cases. On this issue the appeal court held:

> "The actor must have good cause to fear that death or serious injury *would* result unless he acted; that cause for fear must have resulted from a reasonable belief as to the circumstances; the actor must have been impelled to act as he did by those considerations; and the defence will only be available if a sober person of reasonable firmness, sharing the characteristics of the actor, would have responded as he did."[30]

9.25 Lastly, it is currently unclear in Scots law whether or not the defence of necessity should be denied to the accused who has shown prior fault in creating the circumstances of necessity. On this issue, in the case of *McNab v Guild*[31] the accused pled necessity as a defence to a charge of reckless driving, arguing that he had no choice but to drive as he had done, since his car was being attacked and he was attempting to escape. However, he admitted that, after the initial threats were made and he had left the car park, he had voluntarily returned to the car park, in the knowledge that his assailants were likely to be there. The appeal court, in an *obiter* comment, acknowledged that this in itself did not prevent the accused from relying on a defence of necessity, however, they hinted that a different conclusion might have been reached if the sheriff had found in fact that the accused had returned to the car park specifically to confront those that had attacked him initially.[32]

Necessity as a defence to murder – current position in Scots law and other jurisdictions

9.26 Now that we have considered the requirements of a defence of necessity generally, we turn to consider what the current position is in Scots law and in other jurisdictions as to whether necessity can operate as a defence to murder.[33]

9.27 As can be seen from the earlier discussion, it is only relatively recently[34] that the Scottish courts have formally recognised the defence of necessity.[35] The reported cases so far have generally related to less serious offences such as road traffic cases involving speeding or drink driving and there have not, as yet, been any reported cases involving necessity being successfully pled as a defence to murder.

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[30] *Lord Advocate's Reference (No 1 of 2000)* 2001 SCCR 296 at para [42].
[31] 1989 SCCR 138.
[32] *Ibid* at p 142.
[33] It is not clear whether necessity could be a defence to culpable homicide in Scots homicide law. There is little authority. In PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 21.4.6, the authors note that "[i]n the (unreported) case of *HM Advocate v Anderson* (2006) … the trial judge, Lord Carloway, directed the jury that necessity is 'a complete defence to the charges of murder, culpable homicide and assault' …". However the authors point out that the case did not reach the appeal court, so there was no opportunity for an authoritative ruling.
[34] Compared to more established defences such as self-defence.
[35] *Moss v Howdle* 1997 SCCR 215.

9.28 However, Ferguson and McDiarmid highlight the unreported case of *HM Advocate v Anderson* from 2006:

> "the accused was charged … with murder after having driven his car at, and over, the victim. The trial judge, Lord Carloway, directed the jury that necessity is 'a complete defence to the charges of murder, culpable homicide and assault', and that a person is 'entitled … to use reasonable means to escape from a life-threatening or serious injury-threatening situation, even if he knows that what he has to do to escape might cause serious injury or even potentially death to … someone.'"[36]

9.29 The authors go on to note though that, in *Anderson*, the Crown did not lodge a note of appeal on the point of law and it therefore remains unclear how the appeal court would approach the issue of whether necessity can be a defence to murder.

9.30 Given the Scottish position on necessity as a defence to murder, what are the approaches of other jurisdictions to this issue? As in Scots law, in comparable common law jurisdictions, authoritative cases in this area tend to be few and far between.

9.31 In terms of English law, the case of *R v Dudley and Stephens*,[37] dating back to 1884, held that necessity could not provide a defence to murder. The unusual facts of this case involved three sailors and a cabin boy who were shipwrecked in an open boat at sea with very little food and water. On the 20th day, after deciding that one of the crew had to be killed so that the others could survive, the two accused killed the cabin boy, on the basis that he was the weakest. The three sailors then survived by eating the cabin boy's flesh until they were rescued by a passing ship four days later. The two accused were subsequently found guilty of murder with the defence of necessity being ruled out on the basis of moral and religious arguments about the sanctity of human life.[38] Lord Coleridge held, in particular that "it is not correct … to say that there is any absolute or unqualified necessity to preserve one's life"[39] and that the accused therefore had no such defence.

9.32 However, more recently, in the English case of *Re: A (Children)*,[40] one of three judges in the Court of Appeal, Brooke LJ, took the view that necessity could operate as a defence to murder. In that case, the Court of Appeal had been asked to rule on whether the separation of conjoined twins would be lawful. The twins shared a common artery, which that meant that any operation to separate them would result in only the stronger twin surviving, and the weaker twin dying. On the other hand, if the operation did not take place then both twins would eventually die. The court concluded that the operation would be lawful.

9.33 At least two of the judges characterised the operation as the intentional killing of the weaker twin.[41] As a result, if the doctors performing the operation were not to be found guilty of murder, then a suitable defence would have to be found. Brooke LJ concluded that, in his

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[36] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd ed, 2014), para 21.4.6. The words in quotes appear in correspondence between one of the authors and the lawyer who represented Mr Anderson at trial. They note that the accused was acquitted of all charges.
[37] (1884) 14 QBD 273.
[38] There was also discomfort from the court that it was the weakest member of the party that had been chosen for sacrifice.
[39] (1884) 14 QBD 273 at p 286-287.
[40] [2001] 2 WLR 480.
[41] *Ibid*, at p 531 (Ward LJ) and p 549 (Brooke LJ).

view, the most appropriate defence was one of necessity. However, given that the weaker twin could have lived a further six months if the operation had not taken place, this analysis has been criticised by some, viewing Brooke LJ as having impliedly made an evaluation of the comparative worth of the respective lives of the twins.[42] Chalmers and Leverick conclude that the case may have more appropriately (and convincingly) been categorised as one of self-defence, given that the weaker twin posed a direct threat to the life of the stronger twin.[43] They also take the view that it cannot be concluded from *Re: A* that necessity is a defence to murder in England in anything other than the specific circumstances of the case and that even that is doubtful as only one of the three judges analysed the case in terms of necessity.

9.34 Chalmers and Leverick also look at cases in Canada and Australia which suggest that, although there are no direct authorities in those jurisdictions, the courts in both those countries would be unlikely to take the view that the defence of necessity should be available for murder.[44] By contrast, the German Criminal Code recognises necessity as both a justification[45] and a defence.[46] Section 34 provides that an accused is not deemed to act unlawfully if the degree of a danger[47] which cannot otherwise be averted outweighs the legal interest[48] interfered with. Section 35 provides that an accused faced with a present danger to life, limb or liberty which cannot otherwise be averted, acts without guilt when committing a lawful act to avert the danger from themselves, a relative, or close person.[49]

Necessity as a defence to murder – proposals by law reform bodies and others

9.35 We have noted the current position in Scots law and some other jurisdictions and we now briefly look at what some law reform bodies and others have recommended in relation to whether or not necessity should be a defence to murder.

9.36 In Scotland, the authors of the Draft Criminal Code for Scotland took the view that necessity should be a defence to a charge for murder but only where the lethal act was done to save life: see section 24(3) of the Draft Code.[50] In the commentary to section 24, the authors note that the position at common law in Scotland is uncertain, and that the case of *R v Dudley and Stephens*[51] ruled out the defence in English law. They then give the following view:

> "In principle, however, even the taking of life may be justified by necessity. For example, a driver whose brakes have failed may opt to steer the car towards a pavement with only one or two pedestrians, rather than steer towards a large crowd of

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[42] See J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), paras 4.23 and 4.24 for more detail on the case.
[43] This was the view of Ward LJ in the case. The basis upon which the other judge, Walker LJ, decided the case is unclear.
[44] In Canada, the Supreme Court in *R v Latimer*, 2001 SCC 1, "express[ed] doubts that any factual scenario involving murder could arise in which the proportionality requirement of the defence would be met": J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 4.24. In Australia, the Court of Appeal of the Supreme Court of Victoria, in the case of *R v Japaljarri* (2002) 134 A Crim R 261 at p 270, stated that "it is unlikely that the defence of necessity is available for the crime of murder".
[45] The German Criminal Code s 34.
[46] *Ibid* s 35.
[47] Danger to "life, limb, liberty, honour, property or another legal interest".
[48] Being the legal interest in life, limb, liberty, honour, property or other.
[49] A mistaken assumption of the existence of such a danger would result in a penalty only if the mistake was avoidable.
[50] See Appendix for text of section 24 of the Draft Code.
[51] (1884) 14 QBD 273.

> people. A person may throw a bomb out of a window, averting the deaths of hundreds, but causing the death of someone outside the building".[52]

9.37 The examples that the authors use would suggest that they think that killing in these situations is justified on the grounds of necessity on the basis that there is a net saving of lives.

9.38 The Law Commission of England and Wales (LCEW) specifically looked at the issue of whether duress[53] should be a defence to murder during their project on the law of murder. Initially, the LCEW in their Consultation Paper, *A New Homicide Act for England and Wales?*,[54] provisionally proposed that, in the context of their proposals for a comprehensive re-structuring of murder, duress (in both its forms) should operate as a partial defence, reducing first degree murder to second degree murder.[55] This was on the basis that they sought consistency with the partial defences of provocation and diminished responsibility. They also note that, in pleading duress as a defence to first degree murder, the accused is admitting an intentional killing which is arguably still blameworthy.

9.39 However, the LCEW subsequently departed from this provisional proposal in their final Report[56] which recommended that a complete (rather than a partial) defence of duress should be available in cases of first degree murder, second degree murder and attempted murder.[57] The main reason advanced in support of this recommendation is set out in paragraph 6.43 of the LCEW Report which states:

> "The argument that duress should be a full defence to first degree murder has a moral basis. It is that the law should not stigmatise a person who, on the basis of a genuine and reasonably held belief, intentionally killed in fear of death or life threatening injury in circumstances where a jury is satisfied that an ordinary person of reasonable fortitude might have acted in the same way. If a reasonable person might have acted as D did, then the argument for withholding a complete defence is undermined. In the words of Professor Ormerod, 'if the jury find that the defendant has, within the terms of the defence, acted reasonably, it seems unfair to treat him as a second degree murderer or even a manslaughterer'."[58]

9.40 In Canada, the Law Reform Commission of Canada recommended that the defence of necessity should not be available to anyone who "purposely causes the death of, or seriously harms, another person", on the principle that "no one may put his own well-being before the life and bodily integrity of another innocent person".[59]

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[52] This is a variation of the classic thought-experiment known as the "trolley problem". Imagine a trolley (or train) is on track to crash into a group of people. It is possible to press a switch which would divert the trolley on to a different track, which would cause the trolley to crash into only one person instead. Is it more ethical to omit to act, and allow the trolley to hit the group, or is it more ethical to take deliberate action to sacrifice one person to save the group?

[53] "Duress" as a defence in English law encompasses what Scots law recognises as the separate defences of necessity (duress of circumstances) and coercion (duress by threats).

[54] Law Commission, *A New Homicide Act for England and Wales?* Law Com CP No 177 (2005).

[55] *Ibid*, para 7.31.

[56] L*aw* Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006).

[57] *Ibid*, paras 6.1 to 6.4 and 6.21. Interestingly, para 6.17 notes that a considerable, but not overwhelming, majority of respondents to the Consultation Paper thought that duress should be a partial rather than a complete defence.

[58] Also see paras 6.44 to 6.65 for a fuller exposition of the LCEW's reasons for concluding duress should be a full defence rather than a partial one.

[59] See the Law Reform Commission of Canada, *Recodifying Criminal Law* (1987), pp 35-36.

Should necessity operate as a defence to murder?

9.41 The current position in Scots law is that the Scottish appeal court has not yet had a case where it has had to rule authoritatively as to whether or not necessity can be a defence to murder. It is therefore unclear what approach it would take on this issue.

9.42 Given that one of the Commission's aims is that the law should be as clear as possible, we propose to outline some of the arguments that have been made as to whether or not necessity should ever operate as a defence to murder, and then ask for views.[60]

9.43 Chalmers and Leverick suggest that "the question of whether or not necessity should ever be a defence to murder is a complex one and the answer rests, to a certain extent, on one's moral views about the sanctity of life and whether or not it is ever acceptable to take the life of an innocent human being who was not posing any threat."[61]

9.44 They consider two different scenarios, the first being cases of "self-interest" which involve no net saving of lives. The example they use is that of a person who deflects his car into the path of one (or more) pedestrians rather than facing his own death by crashing into a fallen tree that is blocking the road. In cases such as these, they suggest that "few, if any, would argue that this conduct is *justified* on the basis of necessity".[62] Someone taking an innocent life (or lives) to save his own cannot be said to be choosing a lesser harm in this situation and the innocent pedestrians did not pose a threat to his life and did nothing to merit their own right to life being forfeited.

9.45 The authors then consider whether, in the scenario described above, the accused's conduct could instead be defended as being *excusable* on the grounds of necessity. They point out that those who argue that an excuse form of the defence of necessity should be made available, do so on the basis that "to rule it out as a defence would demand from individuals a standard of behaviour with which the vast majority of people would be unable to comply, such is the instinct for self-preservation." However, it could equally be argued that simply because an accused behaves in a way in which the majority of other people would have behaved in that same situation does not necessarily mean that his conduct is morally blameless and excusable. Chalmers and Leverick conclude that the main argument against allowing even an excuse form of the necessity defence in the "no net saving of lives" scenario is that "the sanctity of human life is such that taking the life of an innocent bystander in order to save one's own life is not only unjustifiable but is also *inexcusable*."[63]

9.46 The next scenario that Chalmers and Leverick consider is where a killing would result in a "net saving of lives". The case of *R v Dudley and Stephens*,[64] discussed earlier, involving the killing of a cabin boy by two shipwrecked sailors, would be an example of this type of scenario. In this case the sailors decided that there was little chance of saving the lives of any of the four people involved other than by killing one of the others.

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[60] For more detail on these arguments see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), paras 4.25 to 4.31.
[61] *Ibid*, para 4.31.
[62] *Ibid*, para 4.26.
[63] *Ibid*, para 4.26.
[64] (1884) 14 QBD 273.

9.47 Whether or not necessity should be a defence to murder in such circumstances largely depends on moral viewpoint. Some may take the view that it is better, in such a situation, for more people to live rather than fewer and so the criminal law should provide a defence of necessity to encourage that result. Alternatively, others may take the view, even in cases where more lives are saved than lost, "that killing violates the Kantian principle that innocent life should never be used as a means to an end," and is always morally wrong.[65]

9.48 Another distinction in these types of cases can be made between those where a victim has to be chosen (as was the case with the cabin boy in *Dudley v Stephens*) and those where the victim or victims are, in effect, self-selected. An example of the latter arose during the *Herald of Free Enterprise* (Zeebrugge) ferry disaster. The inquest into that disaster heard evidence of an incident where a man stood on an escape ladder, paralysed with fear, blocking the path to safety of a number of other passengers, who were in danger of drowning. One of the other passengers pushed the man off the ladder and into the water where he was not seen again and presumed drowned. No criminal proceedings were ever brought in this situation and Chalmers and Leverick conclude that if necessity was ever to be permitted as a defence to murder, it is in this type of situation, where the victim was, in effect, self-selected and the death resulted in a net saving of lives, that the argument for its recognition is strongest.[66]

9.49 Chalmers and Leverick also make the point that the existence of the mandatory life sentence for murder in Scots law makes it difficult to distinguish between a premeditated, cold blooded killing and one where the accused killed only as a last resort to save his own life. They suggest that one potential solution would be to remove the mandatory life sentence for murder so that the difference could be reflected in sentencing.[67] However, matters of sentencing are beyond the scope of this project.[68] The other option that they suggest is to allow necessity to operate as a partial defence (rather than a complete one) so that the effect of a successful defence would be to reduce a charge of murder to a conviction for culpable homicide, in the same way that the defences of provocation and diminished responsibility operate in Scots law.[69]

9.50 In light of the discussion above, we seek views on the following:

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

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?

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[65] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 4.28, citing E Kant (translated by John Ladd), *Metaphysical Elements of Justice* (1965), p 41.
[66] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 4.30.
[67] *Ibid*, para 4.31. However, they suggest that this option would be less palatable to those who believe the accused who kills out of necessity is not sufficiently blameworthy to be labelled a murderer.
[68] See ch 1, para 1.30.
[69] See ch 10 and ch 11 respectively for discussion of those defences.

Coercion

Introduction

9.51 As mentioned earlier, the defence of coercion[70] involves a claim by the accused that it was essential to act unlawfully to avoid a harm being threatened by a third party. In their textbook, Ferguson and McDiarmid give examples to illustrate the defence:

> "… if A holds a gun to B's head and threatens to shoot B if she does not drive to the bank so A can rob it, B may well comply with this request. Likewise if A compels B to punch C, threatening to stab B if B fails to comply, B acts as a result of coercion. In both scenarios, A will be criminally liable, but not B. Coercion is recognised by the law since it is felt that compliance with the other party's demands – that is, violation of the law – is less serious in its consequences than adhering to it."[71]

9.52 Although the defence was addressed centuries ago by Hume,[72] it was not formally recognised in Scots law by the appeal court until the case of *Thomson v HM Advocate*[73] in 1983.

9.53 The four elements as set out by Hume are:

(a) an immediate danger of death or great bodily harm;

(b) an inability to resist the violence;

(c) a backward and inferior part in the perpetration; and

(d) a disclosure of the fact, as well as restitution of the profit, on the first safe and convenient occasion.

9.54 In *Thomson*, the accused was convicted of the armed robbery of a Post Office sorting office (and several other offences) for having driven the getaway van. He claimed that he was forced to participate, since he was threatened with a gun and was indeed injured on the hand. The trial judge (Lord Hunter) left the issue of coercion to be determined by the jury, directing them in accordance with Hume's criteria.

9.55 On appeal, the court in *Thomson* considered the four elements of the defence originally set out by Hume. It held that:

[70] Known in England as "duress by threats" and "compulsion" in some jurisdictions such as Canada and some Australian states.
[71] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd ed, 2014), para 21.2.1.
[72] See Hume, i, 53 - first published in 1797. For more detail on Hume's exposition of the defence see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), paras 5.07 to 5.09.
[73] 1983 SCCR 368. However, as this was an armed robbery case, the court reserved its opinion on whether coercion could operate as a defence to a charge of murder.

> "[t]he first two[74] are conditions to be satisfied before the defence gets off the ground. It is only if it does get off the ground that the other two tests[75] come into play as measures of the accused's credibility and reliability on the issue of the defence."[76]

9.56 It can therefore be seen that the court regarded only the first two elements (as propounded by Hume) as being substantive requirements of the defence, with the latter two elements being factors relevant only to the credibility and reliability of the accused.

9.57 In addition to the leading case of *Thomson*, the appeal court also gave the defence of coercion a detailed consideration in the case of *Cochrane v HM Advocate*.[77] Although *Cochrane* was mainly concerned with the relevance of personal characteristics of the accused to whether the accused's response to threats was reasonable,[78] the appeal court starts its discussion by setting out Hume's four elements.

9.58 There is relatively little case law in Scotland on coercion compared with other defences. The few authorities that exist, such as *Thomson* and *Cochrane*, suggest that its availability as a defence is tightly controlled, and that it is successful only if there was (i) an immediate danger of death or great bodily harm and (ii) an inability to resist the violence, with the extent of the accused's part in the perpetration and their disclosure to the relevant authorities being relevant factors in determining guilt.

9.59 The courts apply the defence in these very limited situations, no doubt mindful of the potential for a coercion defence to be open to abuse without these strict requirements.

9.60 In several cases, in Scotland and elsewhere, the courts have stated that coercion should be approached with caution, as it could become an easy allegation to make. For example, the trial judge (Lord Hunter) in the case of *Thomson* stated that, in his view, "the door of the defence of coercion should not be opened too wide"[79] before quoting Lord Morris of Borth-y-Gest in *DPP for Northern Ireland v Lynch*, who pointed out that "duress[80] must never be allowed to be the easy answer of those who can devise no other explanation of their conduct."[81] Public policy concerns that a defence of coercion or duress could operate as a so called "terrorist's charter" – by allowing terrorist organisations to confer immunity on their members to commit acts of atrocity simply by issuing threats of death to them – have also been articulated in a number of cases.[82] This sort of concern has also been expressed in the Scottish Jury Manual where the following paragraph appears in relation to a possible form of direction on coercion:

> "You should approach the issue of coercion with some caution. There have to be very strict limits on its availability as a defence. It's the sort of claim that is easy to make, and it could be an easy way out for someone charged to say he was coerced into doing

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[74] ie (1) An immediate danger of death or great bodily harm and (2) an inability to resist the violence.
[75] ie (1) A backward and inferior part in the perpetration and (2) a disclosure of the fact as well as restitution of the profit on the first safe and convenient occasion.
[76] 1983 SCCR 368 at p 380.
[77] 2001 SCCR 655.
[78] And we discuss the facts of the case below in that context.
[79] 1983 SCCR 368 at p 373.
[80] The English equivalent of the Scottish defence of coercion.
[81] [1975] AC 653 at p 670.
[82] See again the case of *DPP for Northern Ireland v Lynch* [1975] AC 653 at pp 687 to 688 (Lord Simon) and also the English case of *R v Howe* [1987] AC 417, at pp 443 to 444 (Lord Griffiths) and at p 434 (Lord Hailsham).

> what he did. It would make life simple for criminals, and very difficult for those who enforce the law. It can't be allowed to become an easy answer for those with no real excuse for their actions, or for those who have let themselves be dominated by some criminal threat."[83]

Requirements of the defence

9.61 Hume's four elements for the availability of the defence are set out in paragraph 9.53 above. The modern requirements of the defence, as set out in the leading case of *Thomson v HMA,*[84] are set out at paragraphs 9.55 to 9.56 above. We now examine each of these requirements in more detail in a general context. We then look at the particular issue of coercion as a defence to murder.

Immediate danger of death or great bodily harm

9.62 Hume restricted the availability of the defence to situations involving "an immediate danger of death or great bodily harm".[85] That was approved by the appeal court in *Thomson*.[86] English law restricts the availability of the equivalent defence of duress to cases where the threats were of death or serious bodily harm. Similar limits are placed on the defence in Canada, Australia and New Zealand.[87]

9.63 The leading Scottish cases of *Thomson* and *Cochrane* do not address the issue of whether threats must be directed at the accused himself, but the cases of *Docherty v HM Advocate*[88] and *HM Advocate v McCallum*[89] appear to suggest that the defence of coercion may extend to circumstances where threats are made to members of the accused's family, which is the case in English law.[90]

9.64 The danger of death or great bodily injury must be "immediate."[91] The appeal court in *Thomson* approved this element of Hume's first requirement, stating that:

> "What [Hume] was saying was that it is only where, following threats, there is an immediate danger of violence in whatever form it takes, that the defence of coercion can be entertained … If there is time and opportunity to seek and obtain the shield of the law in a well-regulated society, then recourse should be made to it, and if it is not then the defence of coercion is not open. It is the danger which has to be 'immediate' not just the threat."[92]

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[83] Judicial Institute for Scotland, *Jury Manual*, p 10.3. A similar paragraph appears in the style direction for necessity on page 26.3 of the *Jury Manual*.
[84] 1983 SCCR 368.
[85] Hume, i, 53.
[86] 1983 SCCR 368 at p 372. The case law to date has dealt only with relatively serious offences such as robbery and as yet there have been no cases involving relatively minor offences.
[87] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), paras 5.11 and 5.12 and associated footnotes for further detail.
[88] (1976) SCCR Supp. 146.
[89] (1977) SCCR Supp. 169.
[90] See *R v Ortiz* (1986) 83 Cr App R 173. Chalmers and Leverick go further and suggest that the defence of coercion would also be available when the threats are made to persons who are not members of the accused's family, whether they be friends, acquaintances or indeed complete strangers (see *Criminal Defences and Pleas in Bar of Trial* (2006), para 5.13).
[91] Hume, i, 53.
[92] *Thomson v HM Advocate*, 1983 SCCR 368 at p 380. See also *Trotter v HM Advocate* 2000 SCCR 968 which re-affirmed the requirement for immediate danger.

9.65 In requiring the danger of death or great bodily injury to be "immediate", Scots law takes a stricter line than some other jurisdictions. For example, in England, the case of *R v Hudson and Taylor*[93] held that the defence of duress would not be disallowed only because a threat of harm could not be carried out immediately.[94] Chalmers and Leverick note that a similar stance to England was taken by the United States Court of Appeals for the Sixth Circuit, citing the case of *United States v Riffe*[95] as authority.[96] They also note that the Canadian Supreme Court, in the case of *R v Ruzic*,[97] went as far as declaring the requirement, contained in section 17 of the Canadian Criminal Code, that threats must be of immediate death or bodily harm as unconstitutional.[98]

Inability to resist the violence

9.66 Hume's second requirement was that the accused must be unable "to resist the violence", although he does not elaborate on this requirement any further.[99] The requirement was referred to in *Thomson v HMA*, when the appeal court quoted from the directions of the trial judge, Lord Hunter[100] (which were later approved by the court).[101] The requirement is discussed further in *Cochrane v HM Advocate*[102] when Lord Justice General Rodger explained:

> "… if when threatened with death or great bodily harm the accused is in a position to resist any attack – perhaps because he is stronger or more skilful in combat than the third party – then the defence of coercion cannot apply, since the accused should resist rather than commit the crime."[103]

9.67 Chalmers and Leverick note that the "inability to resist the violence" requirement:

> "appears to play a role similar to the retreat rule in self-defence and means that the defence of coercion will be denied to the accused who fails to pursue a course of action other than compliance."[104]

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[93] [1971] 2 QB 202.
[94] See opinion of Widgery LJ at pp 206 to 207 - "It is essential to the defence of duress that the threat shall be effective at the moment when the crime is committed. The threat must be a 'present' threat in the sense that it is effective to neutralise the will of the accused at that time… threats sufficient to destroy his will ought to provide him with a defence even though the threatened injury may not follow instantly, but after an interval."
[95] 28 F. 3d 565 (1994).
[96] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 5.14.
[97] [2001] 1 SCR 687.
[98] In *Ruzic*, the accused was charged with illegally importing drugs into Canada from Serbia and claimed that a man in Serbia had threatened to harm her family there had she not done so. The man who made the threats lived in Belgrade and did not accompany the accused to Canada with the result that the immediacy requirement, and a related requirement that the threatener be present at the commission of the offence, were not met. The Canadian Supreme Court held that the defence ought to be available to the accused, even though she was not faced with an immediate threat at the time of the offence. The Court declared the immediacy (and presence) requirements of the defence as set out in the Code as unconstitutional on the basis that they infringed the principles of fundamental justice by permitting the conviction of persons whose conduct was "morally involuntary."
[99] Hume, i, 53.
[100] 1983 SCCR 368 per Lord Wheatley at p 378 quoting from Lord Hunter's trial direction.
[101] *Ibid* at p 80.
[102] 2001 SCCR 65.
[103] 2001 SCCR 65 at para [10].
[104] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 5.17. For more on the retreat rule in self-defence see ch 7.

A backward and inferior part in the perpetration

9.68 Hume's third element for the defence was that the accused must play "a backward and inferior part in the perpetration" of the offence.[105] As mentioned earlier, the court in *Thomson v HM Advocate* held that, if the first two of Hume's elements are met, then Hume's third and fourth elements "come into play as measures of the accused's credibility and reliability on the issue of the defence."[106] Earlier in the judgment the court stated:

> "… we consider that the part which is taken in the perpetration, which can take place in a whole variety of ways and degrees, is simply one factor in the amalgam of factors which may point to the accused's voluntary or coerced conduct."[107]

Disclosure of the fact

9.69 Hume's fourth element is that the accused must make " a disclosure of the fact, as well as restitution of the profit, on the first safe and convenient occasion."[108] As with Hume's third element, the court in *Thomson* held this not to be a substantive requirement of the defence:

> "… that is not something which could positively affirm or disprove that the accused was acting under coercion. Rather it is a test of whether such actings are or are not consistent with his proponed defence of coercion."[109]

Personal characteristics of the accused

9.70 In addition to Hume's four elements as set out and approved in *Thomson*, the other main Scottish authority, *Cochrane v HM Advocate*,[110] deals with the issue of the standard against which the accused should be judged in coercion cases.

9.71 In *Cochrane*, the accused was a 17 year old youth convicted of assaulting and robbing an elderly woman. He claimed that his co-accused had threatened to beat him and blow up his house if he did not comply. The accused consequently broke into the lady's house, assaulted and robbed her.

9.72 The accused appealed on the basis that the sheriff at his trial had misdirected the jury in stating that they had to consider whether the threats made against him were such as would have overcome the resolution of an ordinarily constituted person of the same age and sex. Psychological evidence had been led by the defence to the effect that the accused had a very low IQ of 74 (which placed him in the bottom four per cent of the population) and was also in the top 10 per cent in terms of compliance, which made him very susceptible to manipulation by others. It was argued on appeal that these personal traits should have been taken into account by the jury in deciding whether or not the accused should have been expected to resist the threats.

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[105] Hume, i, 53.
[106] 1983 SCCR 368 at p 380.
[107] *Ibid*.
[108] Hume, i, 53.
[109] 1983 SCCR 368 at p 380.
[110] 2001 SCCR 655.

9.73 The appeal court rejected this argument and held that an objective test was part of Scots law and should be applied. The reasoning given by the court was that an objective condition was needed to ensure consistency of approach with other defences in Scots law such as self-defence and also to keep the defence of coercion within fairly strict bounds to prevent it from being open to abuse.[111]

9.74 As such the appeal court in *Cochrane* set out an objective test that a jury should:

> "… consider whether an ordinary sober person of reasonable firmness, sharing the characteristics of the accused, would have responded as the accused did. Therefore, in a case where the accused lacks reasonable firmness, the jury must disregard that particular characteristic but have regard to his other characteristics."[112]

9.75 In terms of which characteristics are relevant the court held that "[t]he test does not … apply a single standard to all cases" before concluding that characteristics such as age, gender and any physical (as opposed to mental) handicap are relevant in deciding what may reasonably be required of ordinary people.[113]

Coercion as a defence to murder – current position in Scots law and other jurisdictions

9.76 Having considered the requirements of a defence of coercion generally, we turn to consider whether coercion can operate as a defence to murder.

9.77 In Scotland, the appeal court has yet to address the issue directly. Hume does not exclude coercion as a valid defence to murder, but in the leading case of *Thomson v HM Advocate*, the appeal court acknowledged that doubts had been expressed, and stated:

> " … [the question whether coercion extends to murder cases] does not arise here and we express no opinion on that point."[114]

9.78 However, the trial judge in the case of *Collins v HM Advocate*[115] did consider the issue and directed the jury that the defence of coercion was not available to a charge of murder. He said:

> "I direct you [that] as a matter of law coercion is not a defence in Scotland to the crime of murder and the reason is quite simple. It is because of the supreme importance that the law affords to the protection of life. It is repugnant that the law should recognise in any individual in any circumstances however extreme the right to choose that one innocent person should be killed rather than any other person including himself."[116]

9.79 As neither accused actually relied on coercion as a defence in this case, these remarks must be treated as *obiter*.[117] The subsequent appeal was based on evidential matters and the

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[111] 2001 SCCR 655 at para [20].
[112] *Ibid*, at para [29].
[113] *Ibid*, at para [21] (Lord Justice General Rodger).
[114] 1983 SCCR 368 at p 381 (Lord Wheatley).
[115] 1991 SCCR 898.
[116] *Ibid*, at p 902 (Lord Allanbridge).
[117] *Obiter dictum* - a Latin term meaning "by the way". Used in the legal context to describe a remark in a judgment that is "said in the passing" and not binding.

appeal court mentioned coercion only in passing and did not comment directly on these remarks in the trial judge's direction to the jury.

9.80 The Jury Manual in Scotland notes in its material on coercion that "there is authority that, as a matter of law, coercion *may* not be a defence in Scotland to the crime of murder" and cites the direction of Lord Allanbridge in *Collins* in support.[118] This would support the conclusion that the matter has not yet been determined authoritatively.

9.81 In England and Wales, the House of Lords case *R v Howe*[119] ruled that duress is not available as a defence to murder. In Ireland, the case of *Attorney-General v Whelan*[120] makes a similar restriction. The courts in some Australian states have ruled out the defence in relation to murder[121] and New Zealand specifically rules out the defence (known as "compulsion") in statute.[122]

9.82 South Africa is an example of a jurisdiction that does allow coercion[123] to operate as a defence to murder. In the case of *S v Goliath*, the court explained:

> "[o]nly they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person."[124]

9.83 Also, in the Australian state of Victoria, duress is now a complete defence to murder following changes made in 2005 to their Crimes Act of 1958.[125]

Coercion as a defence to murder – proposals by law reform bodies and others

9.84 We have noted the current position in Scots law and some other jurisdictions. We now look at what some law reform bodies and others have recommended in relation to whether or not coercion should be a defence to murder.

9.85 In Scotland, the authors of the Draft Criminal Code took the view that coercion should be a defence to all criminal charges, including murder. In the case of murder, the defence would only be available if the killing was done to save life.[126] In the Commentary to section 29, the authors note that the issue of coercion in cases of murder or culpable homicide has not been authoritatively decided in Scotland and refer to the cases of *Thomson* and *Collins* discussed above. They conclude by setting out their view that "[i]n principle, however, there is

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[118] Judicial Institute for Scotland, *Jury Manual*, p 10.1, emphasis added.
[119] [1987] AC 417 and confirmed in *R v Hassan* [2005] UKHL 22 at para [21] (Lord Bingham). The case of *R v Gotts* [1992] 2 AC 412 held that it is also not available in cases of attempted murder.
[120] [1934] IR 518 at p 524.
[121] See *McConnell* [1977] 1 NSWLR (CCA) 714 (New South Wales); *Brown and Morley* [1968] SASR 467 (South Australia).
[122] See Crimes Act 1961, s 24(2)(e).
[123] Or an equivalent defence called compulsion or duress.
[124] See *S v Goliath* 1972 (3) SA 1 (AD) which was applied in the case of *S v Peterson* 1980 (1) SA 938 (A). Notably, this is the opposite conclusion to that reached by the Canadian Law Reform Commission noted at para 9.40 above.
[125] Which was amended by the Crimes (Homicide) Act 2005, s 6 to add a new section 9AG dealing with duress.
[126] Draft Code, s 29(3). For text of section 29 see Appendix.

no reason for not allowing coercion to provide a defence, where the taking of life by the accused was the lesser of two evils in the circumstances."

9.86 As mentioned earlier in this chapter, in England and Wales, the LCEW recommended that duress (which encompasses the Scots law defences of necessity and coercion) should be a complete (rather than a partial) defence available in cases of first degree murder, second degree murder and attempted murder.[127]

9.87 Also, the Irish Law Reform Commission's Consultation Paper, *Duress and Necessity*,[128] asked whether duress should operate *both* as a complete defence to murder (where the accused has chosen the lesser of two evils) *and* as a partial defence to murder, reducing murder to manslaughter, in other circumstances.[129]

9.88 The change to the law in the state of Victoria in Australia, noted in paragraph 9.83 above, was made following a recommendation of the Victorian Law Reform Commission to make duress a complete defence to murder in its report *Defences to Homicide*.[130] The Victorian Law Commission's reasoning was that:

> "[a] person faced with an extraordinary emergency, in which he or she is faced with an agonising choice between evils, should not be criminally liable if he or she acts reasonably. For example, a pilot who must decide whether to cause a small number of deaths by crashlanding his plane, in order to save a much larger number of people if the plane crashed elsewhere, should not be categorised as a murderer".[131]

Should coercion operate as a defence to murder?

9.89 As mentioned earlier, the current position in Scots law is that the Scottish appeal court has not yet had a case where it has had to rule authoritatively as to whether or not coercion can be a defence to murder. We only have the *obiter* jury direction of the trial judge in *Collins v HM Advocate*[132] that coercion is not available as a defence to a charge of murder. It is therefore unclear what approach the appeal court would take on this issue.

9.90 However, as with the defence of necessity,[133] we propose to outline some of the arguments for or against coercion operating as a defence to murder and then ask for views.

9.91 One of the arguments often put forward against accepting coercion as a defence to murder is the special importance that the law affords to the protection of human life, such that it should not condone the killing of an innocent person in order to save one's own life or that of a family member. This is one of the main principled arguments advanced in the English case of *R v Howe*,[134] which ruled out the defence of duress in charges of murder. In that case, Lord Griffith stated:

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[127] For more detail of the LCEW's consideration of this issue see paras 9.38 and 9.39.
[128] Law Reform Commission of Ireland, *Duress and Necessity* (LRC CP 39-2006).
[129] *Ibid*, paras 3.100 to 3.101.
[130] Victorian Law Reform Commission, *Defences to Homicide* (No 94, 2004).
[131] *Ibid*, para 3.513.
[132] 1991 SCCR 898 at p 902.
[133] See paras 9.41 to 9.49 above.
[134] [1987] AC 417.

> "It is based upon the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life at the price of his own or another's life."[135]

9.92 Chalmers and Leverick set out in detail some of the criticisms that have been made of that line of argument.[136] One such criticism is that it is wrong for the law to demand that an individual sacrifice his own life in order to save the life of another, as this "is a standard of behaviour that borders on saintliness and one with which the vast majority of people would be unable to comply." They make the point that the "sanctity of human life" argument may be easier to make in circumstances where the life saved belongs to someone other than the accused. For example, where killing an innocent person leads to a net saving of lives or where the innocent victim would have died anyway, regardless of the actions of the accused.

9.93 However, they point out that "ultimately, the position one takes on the subject depends on the view one has of the value of human life and whether or not it is acceptable to balance one human life against one's own or another (or others)."[137] For some people, the killing of an innocent person in order to save one's own life or the lives of others is always morally inexcusable and human lives should never be used as a means to an end, or weighed in this way.

9.94 Another argument frequently put forward against accepting coercion as a defence to murder is that it would be open to abuse by criminals and it may end up operating as a "terrorist's charter."[138] This public policy type argument was made in *R v Howe,*[139] *DPP for Northern Ireland v Lynch*[140] and in the opinion of the trial judge as reported in *Thomson v HM Advocate*.[141] However, the argument can be countered on the basis that these concerns can be avoided by specifically ruling out the defence whenever accused have voluntarily joined such a criminal or terrorist organisation or have placed themselves in a position where it was reasonably foreseeable that they would be subjected to coercion.[142]

9.95 Another argument made in *R v Howe* was that there is no need to allow for duress as a defence to murder as prosecutorial discretion can deal with those cases where it may be thought to be unfair to convict and/or punish the accused.[143] However, it could be argued that this is unsatisfactory as the evidence against the accused has not been tested and also prosecutorial discretion may lead to different treatment in different cases.

9.96 Chalmers and Leverick set out one other possible argument not covered in *Howe*, namely that there is simply no point in punishing those who kill under coercion/duress as such punishment is unlikely to act as a deterrent because any rational person would choose life imprisonment over virtually certain death.[144] As they point out, however, this argument

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[135] *Ibid*, at p 439.
[136] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), paras 5.29 to 5.31.
[137] *Ibid*, para 5.30.
[138] See paras 9.59 to 9.60 above.
[139] [1987] AC 417 at pp 443-444 (Lord Griffiths) and at p 434 (Lord Hailsham).
[140] [1975] AC 653 at p 688 (Lord Simon).
[141] 1983 SCCR 368 at pp 373-374 (Lord Hunter).
[142] The Draft Criminal Code for Scotland makes such provision at section 29(2)(b). New Zealand also seems to make similar provision in the Crimes Act 1961, s 24(1).
[143] [1987] AC 417 at 433 (Lord Hailsham).
[144] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 5.31.

assumes that one accepts the premise that criminal law can act as a deterrent and the additional assumption that deterrence is the only basis for punishment. Even if one took the view that killings committed under duress are undeterrable, one might argue that it is still appropriate to punish the accused on the basis that they are still morally blameworthy for taking an innocent life to save their own.

9.97 The authors also mention, as they did in the context of necessity,[145] that the mandatory life sentence for murder means that there is only limited opportunity for sentencing to take into account the relative moral blameworthiness of the accused who kills under coercion.[146] One solution they suggest is a compromise whereby the accused is convicted of murder but the mandatory life sentence is removed. However, matters of sentencing are beyond the scope of this project.[147] The other possible solution suggested is to allow necessity to operate as a partial defence (rather than a complete one) so that the effect of a successful defence would be to reduce a conviction for murder to a conviction for culpable homicide. This approach "would allow the law on one hand to recognise and respect the sanctity of human life while, on the other hand, demonstrate compassion for the accused who was placed in the situation of having to choose between sacrificing his own life or killing an innocent human being."[148]

9.98 In light of the discussion above, we seek views on the following:

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

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?

[145] See para 9.49 for further detail.
[146] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 5.31.
[147] See ch 1, para 1.30.
[148] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006), para 5.31.

Chapter 10 Provocation

Introduction

10.1 This chapter focuses on the partial defence of provocation in Scots law. We discuss its origin and current definition; a possible extension of the plea to verbal provocation and third party provocation; the operation of the plea in today's society (with particular reference to (i) the discovery of sexual infidelity and (ii) prolonged abusive behaviour); other jurisdictions' approach to the issue; and finally the advisability or otherwise of abolishing or redefining the Scots law of provocation.

Requirements of the defence

10.2 Provocation is one of the two partial defences in Scots law capable of reducing what would otherwise be murder to culpable homicide[1] (the other being diminished responsibility).[2] The defence was defined in the early 19th century by Hume.[3] In present-day practice the plea is often used as an alternative to self-defence.[4] Provocation may also feature where the accused is charged not with murder, but with a lesser offence such as culpable homicide or assault. The trial judge may put the matter of provocation to the jury, and advise them that a rider of "under provocation" may be added to any verdict of guilt.[5] By adding such a rider, the jury adjudicate on the issue of provocation, and their view is taken into account by the sentencing judge.

10.3 In the context of reducing what would otherwise be murder to culpable homicide, there are four requirements for a successful plea of provocation.[6] These are:

(a) provocative conduct by the victim, in the form of either physical violence[7] or sexual infidelity;[8] in the context of physical violence, the accused "must have been attacked physically, or believed he was about to be attacked and he must have reacted to that";[9]

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[1] See earlier discussions at paras 2.13 and 5.2. As noted, most commentators and practitioners use the concept of "reducing" murder to culpable homicide, despite the doubts expressed by Lord Justice General Rodger in *Drury v HM Advocate* 2001 SCCR 583.
[2] See ch 11, Diminished responsibility, below.
[3] Hume, *Commentaries,* i 248.
[4] See the standard directions given to a jury, set out in ch 8 at para 8.11, and recent illustrations in *McAulay v HM Advocate* 2018 SCCR 338; *Lawson v HM Advocate* 2018 SCCR 76.
[5] See, for example, *McAulay* and *Lawson, ibid*.
[6] See *Copolo v HM Advocate* 2017 SCCR 45, elaborating the definition set out in *Drury v HM Advocate* 2001 SCCR 583 and *Gillon v HM Advocate* 2006 SCCR 561.
[7] Verbal abuse is not sufficient: see para 10.7 below.
[8] In the context of sexual infidelity, an accused may seek to rely on provocation where he or she has killed (i) the person of whom sexual fidelity was expected; and/or (ii) that person's lover. Whether the jury ultimately gives effect to the plea is a matter for them.
[9] *Copolo v HM Advocate* 2017 SCCR 45 at para [25] (Lord Turnbull).

(b) the accused must have lost his temper and self-control as a consequence;[10]

(c) the accused must have retaliated instantly in hot blood, without having time to think;[11]

(d) resulting in either:

(i) in the case of physical violence, a responding violence which is not grossly disproportionate to the provoking act;[12] or

(ii) in the exceptional case of sexual infidelity, a reaction which might have been expected from an ordinary person in the circumstances.[13]

10.4 As was emphasised in Robertson v HM Advocate:[14]

"[T]here must be a reasonably proportionate relationship between the violent conduct offered by the victim and the reaction of the accused … retaliation used by the accused must not be grossly disproportionate to the violence which has constituted the provocation."[15]

10.5 In general an objective test is applied to the facts relied upon in support of a plea of provocation. In particular, the individual characteristics of an accused are not taken into account. On the other hand, the subjective element has to be considered. If, for example, an accused makes a reasonable mistake about the seriousness of the provocation offered to him, he is not necessarily precluded from pleading the defence because, from an objective standpoint, his retaliation is held to have been disproportionate.[16]

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[10] Macdonald, *Criminal Law of Scotland* (5th edn, 1948), p 94: "Being agitated and excited, and alarmed by violence, I lost control over myself, and took life, when my presence of mind had left me, and without thought of what I was doing." – a definition approved in *Cosgrove v HM Advocate* 1990 SCCR 358 at p 360; and *Law v HM Advocate* 1993 SCCR 493 at p 506.

[11] Macdonald at p 94: "Provocation, although great, will not palliate guilt if an interval has elapsed between the provocation and the retaliation"; and Alison, *Principles of the Criminal Law of Scotland* (1832) at p 8: "The defence of provocation will not avail the accused, if the fatal acts are done at such a distance of time after the injury received as should have allowed the mortal resentment to subside". The requirement of immediacy is discussed in *HM Advocate v Hill* 1941 JC 59 (Lord Patrick); *Thomson v HM Advocate* 1985 SCCR 448; *Parr v HM Advocate* 1991 SCCR 180 (Lord Hope); *Drury v HM Advocate* 2001 SCCR 583 (Lord Rodger).

[12] *Copolo v HM Advocate* 2017 SCCR 45 at para [25] (Lord Turnbull); *Gillon v HM Advocate* 2006 SCCR 561 at para [30] (Lord Osborne).

[13] *Drury v HM Advocate* 2001 SCCR 583 at para [29] (Lord Rodger). The court acknowledged that a "proportionality" test could not apply in the sexual infidelity limb of provocation, as a killing could never be regarded as proportionate to infidelity: *Drury,* para [28].

[14] 1994 SCCR 589 at pp 593-594.

[15] The "ordinary man" test applicable in the sexual infidelity branch of provocation does not apply in cases of provocation by violence: see *Gillon v HM Advocate* 2006 SCCR 561, *Drury v HM Advocate* 2001 SCCR 583, particularly paras [19] and [39]. The sexual infidelity branch is regarded as an exceptional form of provocation; see C McDiarmid, "Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) at p 203.

[16] Judicial Institute for Scotland, *Jury Manual*, para 6 of the commentary on Provocation, referring to *Jones v HM Advocate* 1990 JC 160, at p 173, 1989 SCCR 726.

10.6 Where the charge is one of attempted murder, a plea of provocation, if established, results in a verdict of guilty of assault to severe injury under provocation, deleting the words "and did attempt to murder [him/her]".[17]

Verbal provocation

10.7 In Scots law, verbal abuse is insufficient for the plea of provocation. In Hume's words:

> "[N]o provocation of words, the most foul and abusive, or of signs or gestures, how contemptuous or derisive soever, is of sufficient weight in the scale, materially to alleviate the guilt …"[18]

Similarly, Macdonald explained:

> "Words of insult, however strong, or any mere insulting or disgusting conduct, such as jostling, or tossing filth in the face, do not serve to reduce the crime from murder to culpable homicide."[19]

10.8 The exclusion of verbal abuse in the Scots law of provocation can be contrasted with other jurisdictions. For example, in England and Wales it is accepted that the concept of "loss of self-control", introduced by the Coroners and Justice Act 2009 section 55(4), may be caused by verbal abuse. The Act specifically provides:

> "… if [the defendant's] loss of self-control was attributable to a thing or things done or said (or both)."

10.9 The statute places more emphasis on the accused's loss of control than on the nature of the provoking act. Verbal abuse is also recognised in some states in the USA.[20] In New Zealand, the specific defence of provocation was abolished in 2009,[21] but any verbal insults amounting to provocation form part of the whole circumstances taken into account when sentencing.[22]

10.10 Not only is a different approach adopted in the jurisdictions noted above, but commentators in Scotland have criticised the continued exclusion of verbal abuse from the defence of provocation, particularly in the context of prolonged abuse such as domestic abuse.[23] Cairns suggests that "the continued exclusion of words perpetuates a somewhat outdated notion of what counts as abuse".[24] McCall Smith comments:

> " … the acceptance of the possibility of verbal provocation in [*Berry v HM Advocate*][25] and [*Stobbs v HM Advocate*][26] suggests that the question is a live issue. The grounds

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[17] *Copolo v HM Advocate* 2017 SCCR 45 at para [24]; *Brady v HM Advocate* 1986 SCCR 1981.
[18] Hume, *Commentaries,* i, 241, confirmed in *Donnelly v HM Advocate* 2017 SCCR 571.
[19] Macdonald at p 93.
[20] Although the issue is still the subject of debate: see para 10.38 below.
[21] See para 10.40 below.
[22] New Zealand had earlier abolished the mandatory life sentence for murder in 2002 (Sentencing Act 2002, s 165), thus removing the important role played by provocation in reducing what would otherwise be murder (with a mandatory life sentence) to a lesser offence.
[23] See ch 12, Domestic abuse, discussing increasing recognition of non-physical abuse and the harm of coercive control.
[24] I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma" (2014) 4 Jur Rev 237 at p 260.
[25] (1976) SCCR (Supp) 156.
[26] 1983 SCCR 190.

> for admitting verbal provocation are overwhelming. The view that only physical assault can lead to a loss of self-control is untenable; indeed, the level of anger which may be produced by a wounding remark may be considerably more infuriating than physical violence."[27]

10.11 We would welcome views on the following questions:

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?

Third party provocation

10.12 It is not clear whether the partial defence of provocation extends to circumstances where the provocative conduct is directed at another person. The issue of third party provocation by violence arose in *Donnelly v HM Advocate*.[28] The accused claimed that he had retaliated against the victim after the latter had allegedly threatened his friend. The court examined the authorities, and concluded that:

> "It is not immediately obvious that the court should disregard the apparently bald statement that the general rule applies 'only where the deceased assaulted the accused in substantial fashion' [quoting the Lord Justice General in *Drury* at paragraph [26]] … in favour of apparently tacit approval in cases where the matter of provocation had not arisen for discussion."[29]

10.13 The court refrained from expressing an explicit view on the question whether third party provocation should be recognised. The appeal failed on another ground, namely that the provocation was only verbal. However the Crown submission did not exclude the possibility of third party provocation being recognised, noting that:

> " … it would be going too far to say that, regardless of how compelling the circumstances may be, violence directed against a third party in the presence of the accused can never amount to provocation such as to support the conclusion that the accused is guilty of culpable homicide rather than murder."[30]

10.14 Practitioners whom we consulted were of the opinion that, for recognition of such a defence, there would have to be an intimate or very close relationship between the accused and the third party threatened or provoked. Concern was expressed that to permit such an extension of the partial defence of provocation might introduce considerable uncertainty in the law, and might result in a possible danger of vigilantism, where, for example, a parent discovered someone sexually abusing their child.[31]

10.15 The approach adopted by two jurisdictions in Australia may be of interest. In Queensland, "provocation" is defined as:

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[27] A McCall Smith, "Homicide", 7 *The Laws of Scotland (Stair Memorial Encyclopaedia),* para 273.
[28] 2017 SCCR 571.
[29] *Ibid,* para [40].
[30] *Ibid,* para [21].
[31] Cf *ibid*.

> " … any wrongful act of insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person *to another person who is under the person's immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant*, to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered [emphasis added] …"[32]

10.16 In New South Wales, the definition of the partial defence of "extreme provocation" includes the following:

> "(2) An act is done in response to extreme provocation if and only if: (a) the act of the accused that causes death was in response to conduct of the deceased *towards or affecting* the accused [emphasis added]…"[33]

10.17 We would welcome views on the following questions:

29. (a) Should a partial defence of third party provocation be recognised?

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

The operation of the plea of provocation in today's society

10.18 Quite apart from the question as to whether the Scots law defence of provocation should extend to verbal provocation and/or third party provocation, a more fundamental question is whether the defence is operating satisfactorily in the 21st century.

10.19 The plea of provocation appears to operate reasonably satisfactorily in many contexts: for example, as a plea accompanying a plea of self-defence,[34] as a mitigating factor in fights or other aggressive encounters (whether or not resulting in a fatality),[35] and as a potentially viable plea in the context of occupants who are subjected to a housebreaking.[36] However there are at least two contexts which have given rise to concerns that the defence of provocation is not fit for purpose in today's society. First, the context of the discovery of sexual infidelity on the part of an intimate partner; and secondly, the context of a victim of prolonged physical and psychological abuse who ultimately kills the abuser.

Provocation and sexual infidelity

10.20 As mentioned at paragraph 10.3 above, the discovery of an intimate partner's sexual infidelity is a recognised provocation in Scots law, which provides a basis for reducing a murder conviction to one of culpable homicide. This has been part of Scots law for centuries. However, social attitudes have arguably changed. It is doubtful whether "[t]he reasons for the existence, and continuation, of the infidelity exception" are acceptable to today's society.[37]

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[32] Criminal Code Act 1899, s 268. The reduction of what would be murder to manslaughter by reason of provocation is dealt with in s 304.
[33] Crimes Act 1900, s 23.
[34] See paras 8.11 and 10.2 above.
[35] See para 10.2 above.
[36] See paras 8.11 to 8.12 and 8.21 above.
[37] *Donnelly v HM Advocate* 2017 SCCR 571 at para [40]; J Casey, "Commentary on *Drury v HM Advocate*", in S Cowan, C Kennedy and VE Munro (eds), *Scottish Feminist Judgments: (Re)Creating the Law from the Outside In*

Commentators point out that the justification underlying the infidelity limb of the defence is based historically upon the concept of possession and an insult to a man's honour,[38] although a subsequent justification might be found in cases at the time of the Second World War, demonstrating a reluctance to hang a soldier who returned from war to discover his wife's infidelity.[39] The defence may be thought to sit uneasily with modern society's disapproval of "honour killings"[40] and the Scottish Government's campaign against domestic abuse.[41] Moreover, the changing social attitudes towards this defence have been reflected in 21st century judicial commentary: in the English case of *R v Smith*, Lord Hoffman observed that "male possessiveness should not today be an acceptable reason for loss of self-control leading to homicide".[42]

10.21 What follows is a brief outline of the development of the infidelity exception. Criticisms are noted, and views invited.

10.22 Writing in the context of the social practices and morals of the 18th century, Hume envisaged the plea operating in a situation where a man discovers his wife in the actual act of being unfaithful (*in flagrante delicto*).[43] Hume referred to the case of *James Christie*,[44] observing:

> "[James Christie] had stabbed with a sword: but excused the deed on this ground, that he had found the deceased in the act of adultery with his wife … this defence, the Court justly found relevant to restrict the libel to an arbitrary pain."

10.23 In that case, the person killed was the wife's lover. The plea was then extended by decisions of the court to situations where the wife was killed,[45] then both wife and lover,[46] and

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(2019) at p 122; I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma", (2014) 4 Jur Rev 237 at p 239.

[38] I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma", (2014) 4 Jur Rev 237 at pp 239, 241, and 243; C McDiarmid, "Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law", in J Chalmers and F Leverick (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) at p 204. McDiarmid, *op cit,* p 208.

[39] See the war-time cases of *HM Advocate v Hill* 1941 JC 59, and *HM Advocate v Delaney* 1945 JC 138, 1946 SLT 25; and G Gordon's commentary on *Drury v HM Advocate* 2001 SCCR 583 at p 618.

[40] Honour killings have been defined as occurring "when a male family member kills a female family member for bringing dishonour upon the family through sexual activity outside of marriage, although it can be embraced within instances of flirting, refusing to marry a man chosen by their family, or even in instances of rape. This is usually due to either a religious or cultural belief that standardises and inculcates loss of control." See A Clough, "Honour Killings, Partial Defences and the Exclusionary Conduct Model" (2016) J Crim Law 177 at p 181. For an example of an "honour killing" where the accused (unsuccessfully) sought to rely on the provocation defence under English law, see *R v Mohammed (Faqir*) [2005] EWCA Crim 1880, See also NHS Scotland, "Harmful traditional practices: what health workers need to know about gender-based violence" (2009) at pp 3-4. Available at: http://www.healthscotland.scot/media/2100/gbv-harmful-traditional-practices.pdf; Police Scotland, "Honour based violence, forced marriage and female genital mutilation standard operating procedure" (2016) at pp 6-8 and 16-17. Available at: https://www.scotland.police.uk/assets/pdf/151934/184779/honour-based-violence-forced-marriage-female-genital-mutilation-sop.

[41] I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma*"* (2014) 4 Jur Rev 237 at p 242. The Scottish Government's homicide statistics for 2017-18 showed that 95% of those prosecuted for homicide were male, and of female victims, 50% were killed by a partner or ex-partner, with the most common set of circumstances for female victims (1/5) being in a dwelling in a fight with a partner or ex-partner: https://www.gov.scot/Resource/0054/00542535.pdf at pp 2 and 15.

[42] *R v Smith* [2000] 1 AC 146 at p 169.

[43] Hume, i 245-246.

[44] (1731) Maclaurin 625.

[45] *HM Advocate v McWilliam,* High Court at Edinburgh, November 5 1940, unreported: see *The Times*, 6 November 1940, at p 9, referred to in J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) p 205.

[46] *HM Advocate v Hill* 1941 JC 59.

also to situations where the accused was told of, or learned in some way of, the infidelity, rather than witnessing it.[47] The plea was further extended to include intimate partners, heterosexual or other, who were not married.[48] The relevant test outlined in 2001 was whether "an ordinary man, having been thus provoked, would have been liable to react as he did".[49] It can be seen therefore that the scope of the defence, which started as a narrowly defined passage in Hume, came to be widened considerably over the years.

10.24 Questions have arisen concerning the definition and characteristics of the "ordinary man" in such a context. Tadros argues that the ordinary person test is conceptually difficult, as it is hard to imagine an ordinary person killing in response to provocation at all.[50] The issue was not considered in *Drury* (as the appellant had no particular characteristics that would have had any impact on his response to the provocation),[51] but it is a matter that has caused difficulties in other jurisdictions.[52]

10.25 One notable example of such difficulties is the English case of *R v Smith (Morgan)*.[53] In this case the House of Lords – by a majority of three to two – quashed the accused's murder conviction on the basis that the trial judge had misdirected the jury by refusing to allow the accused's clinical depression to be considered in assessing whether his response to provocation was one that could be expected from a "reasonable man".

10.26 Further problems identified include the fact that the value attached to sexual fidelity varies from one relationship to another. The defence also appears to suffer from an inherent gender-bias: although both men and women commit adultery at broadly comparable rates,[54] men are disproportionately more likely to kill in response to a discovery of adultery. This point was noted by Lord Nimmo Smith in *Drury*, when he observed: "[w]hile expressing no view about it, I recognise that a serious criticism that may be made of the law relating to this category is that … most often it is a man who is the killer and a woman who is the victim." [55] Thus, this partial defence is gender-biased in that it (partially) implicitly excuses and sanctions a violent and aggressive response to the discovery of adultery, when it is typically only men who respond in this way. Arguably, the continued availability of the provocation by infidelity defence signifies that society deems it acceptable that men continue to kill on the discovery of

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[47] See for example *HM Advocate v Hill* 1941 JC 59, where a soldier returning from service killed his wife and another man on the basis of an admission that they were having an affair; cf *Drury v HM Advocate* 2001 SCCR 583. This could also be seen as an example of verbal provocation: see para 10.7 and following paras.
[48] *McDermott v HM Advocate* 1973 JC 8, at p 11; *McKay v HM Advocate* 1991 SCCR 364, at p 367; *HM Advocate v McKean* 1996 SCCR 402; *Rutherford v HM Advocate* 1997 SCCR 711 at pp 718-719; *Drury v HM Advocate* 2001 SCCR 583.
[49] *Drury v HM Advocate* 2001 SCCR 583.
[50] V Tadros, "The Scots Law of Murder" in J Horder (ed), *Homicide Law in Comparative Perspective* (2007) at p 204.
[51] *Drury v HM Advocate* 2001 SCCR 583 at para [29].
[52] For example, *R v Smith (Morgan)* [2001] 1 AC 146 (England and Wales); *R v Rongonui* [2000] 2 NZLR 385 (New Zealand); *Luc Thiet Thuan v The Queen* [1997] AC 131 (Hong Kong).
[53] [2001] 1 AC 146.
[54] Reliable statistics concerning adultery and infidelity are (perhaps unsurprisingly) difficult to come by. However, most studies report that slightly higher numbers of men commit adultery compared with women, and the rates appear to be reported at around 20-25% for men and 15-20% for women: KP Mark, E Janssen and RR Milhausen, "Infidelity in Heterosexual Couples: Demographic, Interpersonal, and Personality-Related Predictors of Extra-Dyadic Sex" (2011) 40 Arch Sex Behav 971-982. YouGov statistics for the UK from 2015 show that 20% of men have had an affair compared with 19% of women: https://yougov.co.uk/topics/lifestyle/articles-reports/2015/05/27/one-five-british-adults-admit-affair.
[55] *Drury*, para 9. The reported cases to date bear this out: see ch 12, fn 4.

infidelity, thereby perpetuating patriarchal notions of men having rights over women and their bodies.

10.27 Commentators seek to have the law changed. Casey points to an "ongoing uneasiness about the recognition of sexual infidelity in provocation cases".[56] McDiarmid suggests that:

> " … [provocation] is illogical because there is no especially good reason to prioritise violence and sexual infidelity as provoking acts. It is not that these are not provocative. It is, rather, that they do not stand out from all the variety of possible provocations which could impact on any individual, and that sexual infidelity is disproportionately available to men".[57]

10.28 Tadros agrees with such an approach, and questions why discovery of a partner's infidelity is considered any more provocative than finding out something else from the victim.[58] Clough also questions why –

> " … sexual infidelity was made an example of, above and beyond categories of cases for which we are generally less sympathetic …"[59]

10.29 The majority of practitioners in our informal consultations[60] criticised the current law as an unacceptable and archaic approach arising from out-dated concepts of male honour and sexual possession. Some commented that such cases rarely arise. One practitioner noted that his only experience of this defence was the case of a female accused who murdered her female partner.

10.30 In the light of the discussion above, we would welcome views on the following questions:

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?

Provocation and abused partners

10.31 The second context in which the classic partial defence of provocation may not operate satisfactorily is that where a victim of prolonged physical and/or psychological abuse ultimately

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[56] J Casey, "Commentary on *Drury v HM Advocate*", in S Cowan, C Kennedy and VE Munro (eds), *Scottish Feminist Judgments: (Re)Creating the Law from the Outside In* (2019) at p 122.
[57] C McDiarmid, "Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law", in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) at p 216.
[58] V Tadros, "The Scots Law of Murder" in J Horder (ed) *Homicide Law in Comparative Perspective* (2007) at p 202.
[59] A Clough, "Honour Killings, Partial Defences and the Exclusionary Conduct Model" (2016) J Crim Law 177 at p 179.
[60] See Chapter 1, Introduction, para 1.44.

kills their abuser.[61] An offence of "abusive behaviour" is created in section 1 of the Domestic Abuse (Scotland) Act 2018 ("the 2018 Act"). This is a new crime, a course of abusive behaviour, constituting physical or psychological abuse.

10.32 For the purposes of the 2018 Act, abusive behaviour need not be associated with violence, whether physical or sexual. The concept is essentially one of systematic control. The *mens rea* of the offence can be intentional or reckless. References to "psychological harm" include fear, alarm and distress.[62] The definition of "abusive behaviour" in section 2 of the 2018 Act includes behaviour which is "violent, threatening or intimidating" or which has as its purpose or likely to have the effects of, amongst other things, making someone dependent or subordinate; isolating them from friends or family; controlling, regulating or monitoring their day-to-day activities; depriving or restricting their freedom of action; and frightening, humiliating, degrading or punishing them.

10.33 It is generally recognised by psychologists and psychiatrists[63] that the effect of coercive and controlling behaviour can be profound. Feelings of helplessness, terror, depression, and post-traumatic stress disorder have been identified.

10.34 Against that background, the classic partial defence of provocation does not fit well. The key features (namely an initial act of physical violence, causing an immediate loss of control and impulsive acting "in hot blood", with any answering violence not being grossly disproportionate to the provoking act) are often difficult to satisfy. In particular, the "immediacy" requirement often does not fit the circumstances of a person who has suffered protracted and cumulative abuse over a considerable period of time.

10.35 This issue is further discussed in Chapter 12, Domestic abuse, where a question (whether there should be a new "domestic abuse" defence) is posed.

Provocation in other jurisdictions

10.36 It may be helpful to consider the approach to provocation taken in some other jurisdictions.

10.37 *South Africa:* The Supreme Court of Appeal in South Africa has adopted a restrictive approach to provocation and loss of self-control.[64] As a result, it is thought that the defence is probably only available where the provocation led to automatism, or affected the accused's capacity to appreciate wrongfulness.[65] One consequence is that what is referred to as the

[61] See, for example, SSM Edwards, "'Loss of self-control': The cultural lag of sexual infidelity and the transformative promise of the fear defence" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: a Research Companion* (2019) at p 82.
[62] S 1(3) of the 2018 Act.
[63] See, for example, K Trevellion *et al*, "Experiences of Domestic Violence and Mental Disorders: A Systematic Review and Meta-Analysis", (2012) 7(12) PLOS ONE e51740; and M A Pico-Alfonso *et al*, "The Impact of Physical, Psychological, and Sexual Intimate Male Partner Violence on Women's Mental Health: Depressive Symptoms, Posttraumatic Stress Disorder, State Anxiety, and Suicide" (2006) 15(5) J Women's Health 599.
[64] *S v Eadie* 2002 (3) SA 719 (SCA).
[65] G Kemp, "South Africa" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 195 at p 211.

"battered woman syndrome" is probably not available as a complete defence to a charge of murder, although evidence of spousal abuse may be a mitigating factor in sentencing.[66]

10.38 *United States of America:* The majority of the US jurisdictions recognise the doctrine of provocation or heat of passion as a partial defence to homicide, resulting in a conviction for manslaughter.[67] As Bergelson explains,[68] the criteria vary from jurisdiction to jurisdiction, but traditionally include "(i) adequate provocation (i.e., such that would cause a reasonable person to lose self-control); (ii) a passion such as fear, terror, anger, rage, or resentment; (iii) the homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and (iv) a causal connection between the provocation, passion and homicide". More modern statutes[69] use broader language: murder is mitigated to manslaughter if the homicide is "committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse". Bergelson considers that the law of provocation is far from settled, with questions concerning a "reasonable" person; an emotion built up over time, contrasted with a "sudden" passion; and "mere words" rather than actions. She comments:

> "One of the most contentious issues in the law of provocation is whether the reasonableness of the defendant's loss of control should be considered from the entirely objective perspective, and if not – if some features of the actual defendant are to be included in that consideration – what should be included and what excluded."[70]

10.39 *Germany:* The German Criminal Code recognises provocation as a partial defence to voluntary manslaughter.[71] The test requires the defendant to have been "provoked to rage by a physical or psychological mistreatment or a (objectively) serious insult. The provoking act can be directed against the defendant himself, or a relative, eg, the spouse or the same sex partner".

10.40 *New Zealand:* The partial defence of provocation, reducing what would otherwise be murder to manslaughter,[72] was abolished in December 2009.[73] Some argued that the defence should not have been abolished altogether, but should be modified so as to remain available to primary victims who killed their abusive partners in circumstances where self-defence was not available.[74] Despite its abolition, juries continue to reflect what they consider to be justice

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[66] *S v Ferreira* 2004 (2) SACR 454 (SCA).
[67] V Bergelson, "United States of America" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: a Research Companion* (2019) 216 at pp 236-237.
[68] *Ibid,* at p 236-237, paraphrased, with quotations.
[69] Based on the Model Penal Code: MPC s 210.3(1)(b).
[70] V Bergelson, "United States of America" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 216 at pp 237-238. Thus it is not clear whether a low IQ, depression, post-traumatic stress disorder, or a history of domestic abuse, should be taken into account. In *Vigilante,* 608 A.2d at 429-30, a history of ill treatment was acknowledged to be relevant.
[71] German Criminal Code, s 213; K Ambos and S Bock, "Germany" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 245 at p 260.
[72] Crimes Act 1961, s 169.
[73] The Crimes (Provocation Repeal) Amendment Act 2009, following upon a public outcry against a narcissistic killer who gave evidence over several days in an attempt to excuse calling at his ex-girlfriend's house and stabbing her 216 times (the *Weatherston* case).
[74] Cf *R v Rihia* [2012] NZHC 2720.

by convicting of manslaughter, even in cases where it was difficult to see how the defendant could have lacked the *mens rea* for murder.[75]

10.41 *Australia:* Certain Australian states, namely Tasmania, Victoria and Western Australia, have also abolished provocation as a defence. However, Queensland,[76] New South Wales,[77] the Northern Territory[78] and the Australian Capital Territory[79] have codified the circumstances in which a homicide may properly be categorised as manslaughter as a result of provocation.

England and Wales: The approach to provocation adopted in England and Wales is considered below.

Abolition of provocation?

10.42 Some commentators have called for the abolition of the Scots law partial defence of provocation altogether.[80] One of the arguments in favour of its abolition is that the defence privileges anger over other emotional states such as fear. McDiarmid is of the view that "anger, even if justified, should be neutral in relation to criminal liability", that individuals should be expected to control their anger, and ultimately argues that if that proposition is accepted, the defence of provocation ought to be abolished.[81] Another argument in favour of abolition is that the defence suffers from an inherent gender bias,[82] with women being less likely to satisfy the restrictive criteria of "immediacy" and "loss of self-control".[83]

10.43 England and Wales abolished the provocation defence in 2009,[84] but replaced it with a statutory loss of control defence as defined in sections 54 and 55 of the Coroners and Justice Act 2009:

> "**54 Partial defence to murder: loss of control**
>
> (1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if –
>
> (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
>
> (b) The loss of self-control had a qualifying trigger, and

[75] J Tolmie, "New Zealand" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: a Research Companion* (2019) 216 at p 281.
[76] Criminal Code Act 1899, s 304.
[77] Crimes Act 1900, s 23.
[78] Criminal Code Act 1983, s 158.
[79] Crimes Act 1900, s 13.
[80] J Casey, "Commentary on *Drury v HM Advocate*" in S Cowan, C Kennedy and VE Munro (eds), *Scottish Feminist Judgments: (Re)Creating the Law from the Outside In* (2019) at p 125; C Wells, "Provocation: The Case for Abolition" in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (2000) in the context of English law. See also the summary of calls for abolition in other jurisdictions: J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 10.01.
[81] C McDiarmid, "Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010).
[82] I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma" (2014) 4 Jur Rev 237.
[83] New Zealand Law Commission, *Battered Defendants: Victims of Domestic Violence Who Offend* (Preliminary Paper 41) para 94.
[84] Coroners and Justice Act 2009, s 56.

(c) A person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

(3) In subsection (1)(c) the reference to 'the circumstances of D' is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

55 Meaning of "qualifying trigger"

(1) This section applies for the purposes of section 54.

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which –

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger –

(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;

(b) A sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c) The fact that a thing done or said constitutes sexual infidelity is to be disregarded.

(7) In this section references to "D" and "V" are to be construed in accordance with section 54."

10.44 Significant features of the new statutory defence of loss of control include recognition of a fear of serious violence;[85] the removal of the "immediacy" requirement;[86] the exclusion of sexual infidelity as a thing done or said qualifying as an excusing trigger;[87] the use of the calibration of "normal" characteristics of a person;[88] the express exclusion of revenge as an excusing trigger;[89] and a re-focusing away from the provoking act or words (and thus away from a focus on the victim) with greater scrutiny of the accused, thus reducing the potential for victim-blaming when the deceased cannot provide the other side of the story.

10.45 In Scotland, abolition of the partial defence of provocation without any replacement defence (such as a statutory "loss of control") might cause difficulties. If juries did not have the guidance provided by such a partial defence,[90] and had to choose between murder and culpable homicide on the basis of, for example, "all the circumstances of the case", there might be a serious risk of miscarriages of justice. Such a risk was envisaged by critics of the court's analysis of murder in *Drury v HM Advocate.*[91] Commentators noted that if, as the court's comments suggested, provocation is a negation of *mens rea* rather than a free-standing defence which "reduces" murder to culpable homicide, and is therefore simply one of the factors determining the accused's state of mind, the jury would be able to reject the presence of provocation, but nevertheless come to the conclusion that the accused did not act "wickedly".[92] Another type of risk might be the one apparently experienced in New Zealand, namely a dislocation between the law and what jurors considered to be justice: for example, jurors being directed that, in law, what had occurred could not be anything other than "murder",

[85] S 55(3).
[86] S 54(2).
[87] S 55(6)(c). However in *R v Clinton, Parker and Evans* [2012] EWCA Crim 2 at para [31], the Court of Appeal in England held that sexual infidelity could be taken into account as one of several factors causing loss of control. Only where it constitutes the sole qualifying triggering factor is it to be left out of account.
[88] S 54(1)(c).
[89] S 54(4).
[90] See the current requirements in Scots common law, set out in para 10.3 above, and the specific statutory provisions in England (Coroners and Justice Act 2009, ss 54-55).
[91] 2001 SCCR 583.
[92] J Chalmers, "Collapsing the Structure of Criminal Law", 2001 SLT (News) 241 at p 244.

whereas their own view was that culpable homicide caused by provocation would be the proper verdict.

10.46 We have reached the provisional view that if the Scots common law partial defence of provocation is to be abolished, it should be replaced with a statutory defence.[93]

10.47 We invite responses to the following questions:

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?

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?

[93] Cf the observation in *Drury v HM Advocate* 2001 SCCR 583 at para [27] (Lord Justice General Rodger): " … whatever the policy arguments [concerning provocation] may be one way or the other, they must be for consideration by the legislature …".

Chapter 11 Diminished responsibility

Introduction

11.1 In this chapter we focus on the partial defence of diminished responsibility which, if successful, reduces what would otherwise be murder to culpable homicide. We refer to the burden of proof, and certain conditions which might satisfy the defence (including two particular types of condition, namely psychopathic personality disorders and voluntary intoxication). We discuss the evidence required for a successful defence, and the approaches adopted in other jurisdictions. Finally, certain questions are posed, including questions concerning the related defences of mental disorder and automatism. It is worth noting at the outset of this chapter that the partial defence of diminished responsibility is distinct from the complete defence of mental disorder.[1]

A statutory partial defence

11.2 Diminished responsibility is one of the two Scots law partial defences to a charge of murder.[2] Originally a common law plea,[3] the defence is now statutory, and is defined in section 51B of the Criminal Procedure (Scotland) Act 1995.[4]

11.3 Section 51B provides:

> "(1) A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.
>
> (2) For the avoidance of doubt, the reference in subsection (1) to abnormality of mind includes mental disorder.[5]
>
> (3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself –
>
> (a) constitute abnormality of mind for the purposes of subsection (1), or

[1] For an overview of the defence of mental disorder, see paras 11.39 to 11.41 below.
[2] The other being provocation: see ch 10, Provocation.
[3] Authoritatively defined in *Galbraith v HM Advocate* 2001 SCCR 551. The defence of diminished responsibility can be traced back to the mid-19th century: *Alexander Dingwall* 1867 5 Irv 466.
[4] Inserted by the Criminal Justice and Licensing (Scotland) Act 2010, s 168, following recommendations in our Report on *Insanity and Diminished Responsibility*, Scot Law Com No 195 (2004).
[5] "Mental disorder" in s 51B has the meaning given by the Mental Health (Care and Treatment) (Scotland) Act 2003, s 328: see s 307 of the Criminal Procedure (Scotland) Act 1995. "Mental disorder" covers mental illness, personality disorder, and learning disability; but s 328 specifically provides that a person is not mentally disordered by reason only of, among other things, use of alcohol or drugs; behaviour that causes harassment, alarm or distress to any other person; and acting as no prudent person would act.

(b) prevent such abnormality from being established for those purposes.

(4) It is for the person charged with murder to establish, on the balance of probabilities, that the condition set out in subsection (1) is satisfied.

(5) In this section, 'conduct' includes acts and omissions."

Burden of proof

11.4 In a criminal trial, the burden of proof rests on the Crown. It is for the Crown to prove "beyond reasonable doubt" that a crime was committed, and that the accused committed it. As a general rule, the accused has to prove nothing.

11.5 The partial defence of diminished responsibility is an exception to that rule. The burden of proof is on the accused to prove, on the balance of probabilities,[6] the elements of the defence.[7] Thus at the outset, the Crown has to prove that the accused is, on the face of it, liable for murder and that the requirements of the *actus reus* and *mens rea* for the offence are satisfied. The accused then has to prove, not that he is "innocent", but rather that his responsibility for the killing was diminished by reason of an abnormality of mind.[8]

"Abnormality of mind"

11.6 "Abnormality of mind" reflects the wider concept developed by the criminal appeal court in *Galbraith v HM Advocate,*[9] replacing the previous narrower and stricter definition of an aberration or weakness of mind, some form of mental unsoundness, a state of mind bordering on but not amounting to insanity, and some form of mental disease.[10]

11.7 What conditions are included in "abnormality of mind"? Must the abnormality be a "recognised" abnormality in the sense of being recognised by professionals in the particular field? Must the condition or state of mind be defined in professional textbooks[11] and/or journals? Should more be done to align the law with the policy aims of combatting domestic abuse?[12] These are some of the questions which have arisen, and which attract a range of views.

11.8 In *Galbraith,* Lord Justice General Rodger made the following observations:

"[51] The inadequacy or abnormality to which … society responds may take a number of forms … The abnormality may mean, for example, that the individual perceives

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[6] A lesser standard of proof than "beyond reasonable doubt": cf *Lilburn v HM Advocate* 2012 JC 150.
[7] Criminal Procedure (Scotland) Act 1995, s 51B(4).
[8] It was on that basis that the European Court of Human Rights rejected a challenge under the European Convention on Human Rights, Article 6(2) ("Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law"): see *Robinson v United Kingdom*, App. No 20858/92, unreported, 5 May 1993.
[9] 2001 SCCR 551.
[10] *Savage v HM Advocate* 1923 JC 49, at p 51.
[11] Established textbooks 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)).
[12] Particularly given the circumstances of two of the leading cases involving diminished responsibility: *Galbraith v HM Advocate* 2001 SCCR 551 and *Graham v HM Advocate* 2018 SCCR 347. Some have suggested that there should be a separate defence for domestic abuse victims: see ch 12, Domestic abuse.

> physical acts and matters differently from a normal person. In some cases he may suffer from delusions. Or else it may affect his ability to form a rational judgment as to whether a particular act is right or wrong or to decide whether to perform it … The law responds in this way … because it recognises that the individual is to be pitied since, at the relevant time, he was not as normal people are. There was unfortunately something far wrong with him, which affected the way he acted …
>
> [52] Abnormality of mind can spring from a variety of causes … Suggested causes for the accused's abnormality of mind include, for instance, sunstroke, chronic drinking bringing on delirium tremens, low intelligence and depression. But these are merely examples … many organic disorders in some way affect the operation of the brain and so lead to some mental abnormality which could be of relevance in the present context. For instance, head injuries and brain tumours … Strokes … Disorders of the thyroid … hypoglycaemia [making someone disinhibited and aggressive] … drugs administered for therapeutic purposes … recognised conditions such as schizophrenia and certain kinds of depression …"

11.9 In para [53] the Lord Justice General also referred to "a recognised abnormality caused by sexual or other abuse inflicted on the accused".

Psychopathic personality disorders and voluntary intoxication

11.10 The statutory definition in section 51B differs from the common law definition in *Galbraith v HM Advocate*[13] in two respects: first, concerning psychopathic personality disorders; and secondly, concerning voluntary intoxication.

Psychopathic personality disorders

11.11 In Scots common law, psychopathic personality disorders were not recognised as a valid basis for a plea of diminished responsibility.[14] However the exclusion of such disorders was questioned by commentators[15] and in our *Report on Insanity and Diminished Responsibility.*[16] Many jurisdictions do not exclude psychopathic personality disorders from the defence of diminished responsibility: see, for example, England and Wales,[17] Ireland,[18] and certain Australian states.[19]

11.12 Section 51B altered the Scots law position. Psychopathic personality disorders are no longer excluded. "Abnormality of mind" is defined as including "mental disorder" which is broad enough to encompass certain psychopathic personality disorders.

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[13] 2001 SCCR 551.
[14] *Carraher v HM Advocate* 1946 JC 108, referred to in *Galbraith v HM Advocate* 2001 SCCR 551, particularly at para [54] sixth conclusion.
[15] J Chalmers, "Abnormality and Anglicisation: first thoughts on *Galbraith v HM Advocate (No 2)*" (2002) Edin LR 108 at pp 115-116.
[16] Scot Law Com No 195 (2004) para 3.26, where *Carraher* is described as "a doubtful source for ascertaining the policy basis for excluding psychopathic personality disorder from the plea".
[17] Coroners and Justice Act 2009, s 52(1), amending the Homicide Act 1957, s 2. See too Scot Law Com No 195 (2004) para 3.28.
[18] The Criminal Law (Insanity) Act 2006, s 6, quoted in para 11.31 below.
[19] See the table in: Law Commission, *Partial Defences to Murder*, Law Com CP No 173 (2003) at pp 157-159.

Voluntary intoxication

11.13 Prior to the landmark decision on automatism in *Ross v HM Advocate*,[20] it was established in *Brennan v HM Advocate*[21] that voluntary intoxication could not operate as a defence to a criminal act. It was held that, by becoming acutely intoxicated, "the accused must be assumed to have intended the natural consequences of his act".[22] It was therefore immaterial that the accused did not satisfy the *mens rea* of the specific offence.[23] The accused behaved recklessly by becoming acutely intoxicated, and could be liable for an offence simply by satisfying the *actus reus*.[24] When reconciling this decision with that in *Ross*, Lord Justice General Hope characterised the rule in *Brennan* as an "exception based on public policy where the condition which has resulted in an absence of *mens rea* is self-induced."[25]

11.14 What is the position where there is a combination of abnormality of mind and voluntary intoxication? On the one hand, section 51B(3) provides that an abnormality of mind is not constituted solely by being under the influence of alcohol or drugs. On the other hand, the section provides that the influence of alcohol or drugs does not "prevent such abnormality from being established for those purposes". Guidance has been given in *Rodgers v HM Advocate,*[26] where the appeal court held that a plea of diminished responsibility could succeed despite the accused's voluntary intoxication, but it was necessary to establish that the abnormality of mind was an "operative or substantial cause" of the accused's inability to control their conduct at the time of the offence.[27]

What evidence is required?

11.15 What evidence is necessary to prove the condition/state of mind? Would it be sufficient for witnesses, whether professional or other, to give evidence about the accused's state of mind, demeanour, and behaviour at the time of, and/or leading up to, and/or following upon, the killing? Would the evidence of a clinical psychologist[28] be admissible and/or sufficient? Could the evidence of a clinical psychologist be preferred to that of a psychiatrist?[29]

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[20] 1991 SCCR 823; see para 11.43 below.
[21] 1977 JC 38.
[22] *Ibid*, at p 46 (Lord Justice General Emslie).
[23] In *Brennan,* the offence charged was murder.
[24] See Plaxton's comment that convicting individuals who had been voluntarily intoxicated without proof of the *mens rea* necessary for murder represents "a particularly brutal form of constructive murder": M Plaxton, "Foreseeing the Consequences of *Purcell*" 2008 SLT (News) 21 at p 23.
[25] *Ross v HM Advocate* 1991 SCCR 823 at p 829.
[26] 2019 SCCR 230 at para [33].
[27] Reference was made to the English House of Lords decision in *R v Dietschmann* [2003] 1 AC 1209. See too Scot Law Com No 195 (2004) paras 3.35-3.43. Ultimately the appeal failed, as there had been no expert evidence led by the defence concerning the accused's mental state.
[28] Who, unlike a psychiatrist, has no medical qualifications.
[29] In *Graham v HM Advocate* 2018 SCCR 347, the Crown led psychiatric evidence at the trial in 2008 that the effect of intoxication outweighed any effects on the accused's state of mind from a personality disorder. In 2017 the case was referred to the High Court on the basis of fresh evidence, consisting primarily of evidence from a chartered criminal psychologist to the effect that at the time of the offence the appellant would not have had the capacity to think rationally, having been driven by years of abuse to act on impulse in a moment of feeling overwhelmed, which could be considered an impairment of mind.

The Galbraith decision

11.16 In *Galbraith v HM Advocate,*[30] decided in 2001, Lord Justice General Rodger made the following observations:

> "[41] … [I]t is not the function of the witnesses lay, psychological, medical or psychiatric, to say whether an accused's responsibility can properly be regarded as diminished. Rather they give evidence as to the accused's mental state. It is then for the judge to decide whether, at its highest, this evidence discloses a basis upon which the law could regard the accused's responsibility as being diminished."

11.17 Having set out different forms and causes of abnormality,[31] the Lord Justice General continued:

> "[53] … we can see no reason in principle why a recognised abnormality caused by sexual or other abuse inflicted on the accused might not also be relevant … we again see no reason in principle why evidence of such a condition could not be given by those, such as psychologists, having the appropriate professional expertise, even though they were not medically qualified."

11.18 Many of those who participated in our informal consultations agreed with those propositions. In particular, counsel experienced in homicide trials, and representatives of support groups,[32] were strongly of the view that evidence from a wide range of witnesses – for example, friends, relatives, neighbours, school teachers, as well as psychologists and those medically qualified (such as general practitioners, consultants and psychiatrists) – should be admissible when the defence sought to establish the partial defence of diminished responsibility. That view is also reflected in the conclusion reached by the Law Reform Commission of Western Australia (LRCWA):[33]

> "Although medical evidence is essential to raising a defence of diminished responsibility and satisfying the second element [namely, a specified cause for the abnormality of mind],[34] it is not definitive of a finding of diminished responsibility. It is the jury's role, having regard to the entire body of evidence, to determine the first and third elements of the defence. That is, whether the accused was suffering from an abnormality of mind at the time of the offence and, if so, whether the abnormality of mind substantially impaired the accused's capacity to understand the nature of the act, know that the act was wrong or control the act. The jury are required to consider all of the evidence put before them including the accused's acts, statements and demeanour; the nature of the killing; the accused's conduct before, at the time of, and after the killing; and any history of mental disorder. They are also entitled to reject the medical evidence 'if there is other evidence before them which, in their good judgment, conflicts with it and outweighs it'.

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[30] 2001 SCCR 551.
[31] Paras [51] and [52] quoted in para 11.8 above.
[32] Such as Victim Support Scotland, Rape Crisis Scotland, and Scottish Women's Aid.
[33] *Final Report: Review of the Law of Homicide* (2007) ch 5 Mental Impairment Defences at pp 254-255.
[34] The LRCWA summarise three elements of diminished responsibility common to many jurisdictions as being (read short) (1) abnormality of mind; (2) arising from a specified cause; and (3) substantially impairing the accused's understanding or capacity to control the act.

> The jury's task is therefore said to be one of 'moral assessment … reflecting community standards … and not a question which medical experts can properly answer' …"[35]

11.19 Currently, where evidence is to be led from professionals such as psychiatrists, psychologists, general practitioners, consultants, behavioural scientists and others, it is necessary that the professional's qualifications and experience are established at the outset of his or her evidence, to satisfy the trial judge that the witness is truly skilled and experienced in the relevant area.[36] Circumstances may arise where the court rules the evidence inadmissible.[37] Trial judges are guided in making these decisions by the Supreme Court in *Kennedy v Cordia,*[38] where it was observed that four considerations govern the admissibility of skilled evidence: (i) whether the proposed skilled evidence will assist the court; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.[39]

The Graham decision

11.20 In *Graham v HM Advocate,*[40] decided in 2018, Lord Carloway pointed out that Lord Rodger's comments quoted in paragraphs 11.16 and 11.17 above were *obiter.* He posed the following questions:

> "[114] … First, although the evidence of a psychologist (or indeed a lay person …) may be admissible in order to demonstrate to the jury that an accused suffers from a recognised disorder, can there be a sufficiency of evidence of a 'mental abnormality' in the absence of any medical evidence? If there is medical evidence, in the form of a psychiatric opinion, that an accused did not suffer from a mental abnormality … can that evidence be contradicted and discounted on the basis of psychological or other testimony? In a case where the effects of long and short term alcohol and drug abuse are in play, is a psychologist qualified to give opinion evidence on these effects and their interaction with other mind altering factors?
>
> [115] … The *dicta* in Galbraith v HM Advocate (supra) creates a wide window for the introduction of testimony from many professional disciplines, and even from lay witnesses, on the mental state of an accused at the time of the incident under consideration; leaving it to the jury to answer the ultimate question of whether the accused's mental responsibility had been diminished. However, at least in relation to opinion evidence from whatever discipline, it remains important that the court ensures

[35] The LRCWA ultimately decided not to recommend a partial defence of diminished responsibility (see para 11.36 below) but it is crucial to note that there is no mandatory life sentence for the crime of murder in Western Australia.
[36] In Scottish courts, this is known as "setting up" the witness, and is carried out by lodging the witness's *curriculum vitae,* and leading evidence from the witness about his or her qualifications, experience, publications, and particular expertise.
[37] The question whether medical qualifications may be necessary in the context of diminished responsibility is a live issue: see the observations of Lord Justice General Carloway in *Graham v HM Advocate* 2018 SCCR 347, quoted in paras 11.20 and 11.21 below. For example, should psychiatric (medically-qualified) opinion that the accused did not suffer from a mental abnormality be capable of being contradicted and discounted by the evidence of a (non-medically-qualified) psychologist?
[38] 2016 SC (UKSC) 59; 2016 SLT 209; 2016 SCLR 203.
[39] *Ibid,* para [44].
[40] 2018 SCCR 347.

> that the witnesses … have the appropriate qualifications, by training and experience, to give expert evidence …
>
> [116] … the common law test for diminished responsibility … [involved] '… [an] abnormality … *recognised by the appropriate science*'. The test is now contained in s 51B … which followed upon the SLC Report. … It is assumed that the abnormality *must be a recognised one* in terms of *Galbraith,* notwithstanding the absence of any statutory provision to that effect (see SLC Report para 3.15). There would thus, at least, have to be opinion evidence from a skilled witness that the accused suffered from such an abnormality. This leaves a question as to the nature of the expert's skills; whether medical, such as psychiatric, or other, including clinical psychological analysis [emphases added] …"

11.21 Lord Carloway reviewed the law relating to diminished responsibility in several jurisdictions, including England and Wales, Ireland, South Africa, and Australia, and concluded:

> "[123] In some jurisdictions, then, there is a clear requirement for the relevant evidence of mental abnormality to be given by a psychiatrist. In others, it may be given by a clinical psychologist. At present in Scotland, provided that the test in *Kennedy v Cordia (Services)*[41] is met, there is no prohibition on persons, who are not psychiatrists (ie not having a formal medical degree), expressing an opinion on whether a person suffers from an abnormality of mind and whether this was present at the time of a relevant incident. There may be great value in hearing testimony from a clinical psychologist on, for example, whether an accused suffers from a recognised personality disorder, especially if clinical tests, accepted as valid by the profession, support that conclusion.
>
> [124] … it might be a different matter if the psychologist is being asked to give evidence about the interaction of alcohol, and more especially certain drugs, with the disorder. The same may apply where the psychologist purports to speak … to organic changes, which have not been vouched by scanning, in a person's brain. It may be that the SLC, in its current review of the law of homicide (see Tenth Programme of Law Reform (February 2018)), can give consideration to this matter and make appropriate recommendations on the qualifications which should be demanded by the court before a witness is asked to give evidence on what can be a very important matter in the context of a murder trial."

11.22 Thus this area of homicide law is complex and disputed both in Scotland and in other jurisdictions. This complexity, coupled with Lord Carloway's reference to the SLC, has prompted us to consider these issues in detail when reviewing the partial defence of diminished responsibility.

Diminished responsibility in other jurisdictions

11.23 Certain jurisdictions do not have a partial defence of diminished responsibility.

11.24 *New Zealand:* In New Zealand, there is no mandatory life sentence for murder, and no partial defences of diminished responsibility and provocation. The mandatory life sentence

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[41] 2016 SC (UKSC) 59; 2016 SLT 209; 2016 SCLR 203, a case concerning the need to establish the qualifications and experience of a witness in a particular field before permitting that witness to give evidence as an expert in that field: see para 11.19 above.

was abolished in 2002, and was replaced by a rebuttable presumption that a life sentence should be imposed unless it would be "manifestly unjust" to do so.[42] The relevant provision is section 102 of the Sentencing Act 2002:

> "An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust."

11.25 Circumstances in which life imprisonment might be deemed "manifestly unjust" include mercy killings, failed suicide pacts, and "battered defendants" who had been subjected to "prolonged and severe abuse".[43] Written reasons are required if a life sentence is not imposed. To date, it appears that few cases have qualified for the exemption.[44]

11.26 *South Africa:* There is no substantive defence of diminished responsibility in South African law.[45] Section 78(7) of the Criminal Procedure Act 1977 provides that if an accused's capacity to appreciate the wrongfulness of the act was diminished by reason of mental illness or intellectual disability, the court may take the fact of such diminished responsibility into account when sentencing the accused. The court may request a report from a panel of at least two psychiatrists, with a possible third member being a clinical psychologist.[46]

11.27 *England and Wales:* There is a partial defence of diminished responsibility in the law of England and Wales. In terms of section 2(1)(a) of the Homicide Act 1957,[47] the requirements for the partial defence are: (a) "abnormality of mental functioning" (b) arising from a "recognised medical condition" (c) that "substantially impaired [the defendant's] ability" to "understand the nature of [his or her] conduct",[48] and/or "form a rational judgment", and/or "exercise self-control", thus providing "an explanation for [the defendant's] acts and omissions in doing or being a party to the killing".[49] Successful proof by the accused of the requirements to the standard "on a balance of probabilities" reduces what would otherwise be murder to manslaughter. Medical evidence is generally considered to be necessary.[50] Fortson states that "expert testimony" may be appropriate, but adds:

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[42] Sentencing Act 2002, s 165, replacing the Crimes Act 1961, s 172.
[43] R Chhana, P Spier, S Roberts and C Hurd, "The Sentencing Act 2002: Monitoring the First Year" (2004) pp 13-14 available at: https://www.justice.govt.nz/assets/Documents/Publications/sentencing-act-year-1.pdf.
[44] New Zealand Law Commission, *Understanding Family Violence; Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016).
[45] G Kemp, "South Africa" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 196.
[46] Criminal Procedure Act 1977, s 79; cf *Graham v HM Advocate* 2018 SCCR 347 at para [121] (Lord Justice General Carloway).
[47] As amended by the Coroners and Justice Act 2009, s 52(1).
[48] Cf *Galbraith v HM Advocate* 2001 SCCR 551, at para [51], cited in para 11.8 above; and see too the example given in: Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) para 5.121, namely, a 10-year-old boy, having played very violent video games, killed the victim believing that he would be able to revive the victim as had happened in the games that he had been playing continually.
[49] Which it will do only "if it causes, or is a significant contributing factor in causing [the defendant] to carry out that conduct": s 52(1B). See R Fortson QC, "Diminished Responsibility: A Limited Partial Defence to Murder" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 102 at pp 113-115.
[50] *R v Bunch* [2013] EWCA Crim 2498, applying *Byrne* [1960] 2 QB 396 and *Dix* [1982] 74 Cr App R 306; *R v Golds* [2016] 1 WLR 5231, [2017] 1 Cr App R 18; *Graham v HM Advocate* 2018 SCCR 347 at paras [118] to [119] (Lord Justice General Carloway). Thus courts in England expect to hear evidence from doctors and psychiatrists.

> "… the issue is not exclusively a medical one, and it will be for the courts to decide whether a particular condition is capable of being a 'recognised medical condition' in law (see, for example, *R v Lindo* [2016] EWCA Crim 1940)."[51]

11.28 There may be cases where voluntary intoxication triggers a "recognised medical condition" such as psychosis, bringing the defendant within the statutory test.[52] Fortson notes that, during parliamentary debates, the Government took the view that it would be open to the defence to call a "recognised specialist who has had their work peer-reviewed, although it has not quite got on the list", leaving it to the jury to decide whether the evidence met the partial defence requirements.[53]

11.29 Commenting on the perception that there may be a "benign conspiracy" involving psychiatrists, the defence, the prosecution, and the court, seeking to bring cases within the defence of diminished responsibility, Fortson suggests that:

> "[t]he use of discretion, exercised judiciously, is … apt to deal with borderline cases (for example, some 'mercy killing' cases, or where a jury is likely to be sympathetic to a defendant in any event, for example, the battered spouse who was suffering from post-traumatic stress disorder, or depression). The so-called 'benign conspiracy' is capable of bringing about a just and sensible conclusion to cases that warrant neither the label 'murder' nor a mandatory life sentence of imprisonment."[54]

11.30 The ultimate decision-makers on the success of a plea of diminished responsibility are juries, working on the basis of expert evidence which they accept.[55]

11.31 *Ireland:* The defence of diminished responsibility is set out in section 6 of the Criminal Law (Insanity) Act 2006 as follows:

> "6(1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person –
>
> (a) did the act alleged,
>
> (b) was at the time suffering from a mental disorder, and
>
> (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,

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[51] R Fortson QC, "Diminished Responsibility: A Limited Partial Defence to Murder" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) at pp 109 to 110.
[52] *R v Joyce and Kay* [2017] EWCA Crim 647 at para [16] (Hallett LJ) concerning a psychotic state (schizophrenia) triggered by voluntary intoxication.
[53] R Fortson QC, "Diminished Responsibility: A Limited Partial Defence to Murder" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 102 at p 110, citing Coroners and Justice Bill Deb 3 March 2009 col 413.
[54] R Fortson QC, "Diminished Responsibility: A Limited Partial Defence to Murder" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 102 at p 115.
[55] If there is undisputed expert evidence pointing to diminished responsibility, the Supreme Court has emphasised that the Crown must offer the jury a reason or reasons why that expert evidence should not be accepted: *R v Golds* [2016] 1 WLR 5231, [2017] 1 Cr App R 18.

the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility."

11.32 In terms of section 5, the necessary evidence must be that of a "consultant psychiatrist".[56]

11.33 *United States of America:* Bergelson[57] notes that some jurisdictions in the USA have a doctrine of diminished responsibility, whereby a mental inadequacy not amounting to legal insanity may establish reduced ability to form malice aforethought, deliberation, or premeditation. It is generally a partial defence, although one state (New Jersey) has treated it as a complete defence. The Model Penal Code provides that what would otherwise be murder is manslaughter if committed under "extreme mental or emotional disturbance for which there is a reasonable explanation or excuse".[58]

11.34 *Australia:* Diminished responsibility is available as a partial defence to murder in four Australian states. The onus of proof is on the accused. As noted in *Graham v HM Advocate,*[59] the expectation is that medical evidence should be led. "The problem of disagreements arising between psychiatrists and psychologists was raised in a review carried out by the New South Wales Law Commission in 1997, but this did not lead to any specific statutory provision."[60]

11.35 Each state has its own definition of the defence, some including specific evidential provisions. In the *Australian Capital Territory*, section 14 of the Crimes Act 1900 defines diminished responsibility as "an abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent cause or whether it was induced by disease or injury) that substantially impaired his or her mental responsibility for the act or omission". In *New South Wales*, section 23A of the Crimes Act 1900 focuses on whether "the person's capacity to understand events, or to judge whether … actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and … the impairment was so substantial as to warrant liability for murder being reduced to manslaughter". In the *Northern Territory*, section 159 of the Criminal Code Act 1983 provides for a "mental capacity … substantially impaired at the time of the conduct … the impairment [arising] wholly or partly from an underlying condition".[61] Section 159(2) provides that "[e]xpert *and other* evidence may be admissible to enable or assist the tribunal of fact to determine the extent of the defendant's impairment at the time of the conduct causing death [emphasis added]". Section 159(6) defines "mental capacity" as capacity to "(a) understand events; or (b) judge whether his or her actions are right or wrong; or (c) exercise self-control". In *Queensland*, section 304A of the Criminal Code Act 1899 refers to "such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair a person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do

[56] See too *DPP v Hefferman* [2017] IESC 5, referred to in *Graham v HM Advocate* 2018 SCCR 347 at para [120].
[57] V Bergelson, "United States of America" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 216 at p 236.
[58] S 210.3.
[59] 2018 SCCR 347 at para [122] (Lord Justice General Carloway).
[60] *Ibid* para [122].
[61] "Underlying condition" means a pre-existing mental or physiological condition other than of a transitory kind: section 159(6).

the act or make the omission." In Queensland, the question whether an accused was suffering from diminished responsibility may be referred to the Mental Health Court, consisting of a judge and two clinicians (psychiatrists, or experts in the care of those with intellectual disability).[62]

11.36 At least two Australian states (Victoria and Western Australia) have decided not to have a defence of diminished responsibility. In their Report *Defences to Homicide: Final Report* (2004), the Victorian Law Reform Commission did not recommend a defence of diminished responsibility, adding that a mental disorder should continue to have a mitigating effect in sentencing.[63] In their *Final Report*: *Review of the Law of Homicide* (2007), the Law Reform Commission of Western Australia concluded[64] that:

> " … the existence of substantial impairment by mental abnormality does not always accurately reflect the culpability of the accused or the seriousness of the offence … In the absence of mandatory life imprisonment for murder, the Commission believes that partial defences are not justified unless the circumstances giving rise to the defence always demonstrate a significant reduction in moral culpability. Diminished responsibility does not stand up to this analysis … In the Commission's opinion the sentencing process is flexible enough to assess the culpability of the accused and at the same time take into account other equally relevant considerations, such as the dangerousness of the accused and the objective seriousness of the offence."

11.37 In the light of the above discussion, we invite views on the following matters:

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?[65]

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*?[66]

35. Are the questions raised by Lord Carloway in *Graham v HM Advocate*[67] so fundamental that some guidance (whether by statute or practice note) is required to assist trial judges?

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[62] *Graham v HM Advocate* 2018 SCCR 347 at para [122] (Lord Justice General Carloway).
[63] Para 5.38 of that Report.
[64] In ch 5 Diminished responsibility at p 259.
[65] 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)).
[66] 2016 SC (UKSC) 59; 2016 SLT 209; 2016 SCLR 203. For a summary of the guidance in this case, see para 11.19 above.
[67] 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?

Two related defences: mental disorder and automatism

11.38 Two related defences, namely mental disorder[68] and automatism (each a complete defence, leading to acquittal),[69] may require a separate Discussion Paper compiled with the assistance of an Advisory Group including some or all of the following: a psychiatrist; a clinical psychologist; a mental health nurse; a legal practitioner with expertise in mental health; an academic with a similar expertise; and possibly others. At this stage, we confine ourselves to giving basic definitions and seeking responses to the questions set out below. Much will depend on the responses to those questions.

Mental disorder

11.39 Mental disorder is a complete defence to a charge of homicide. The accused is acquitted and held not to be criminally liable. The verdict is "not guilty by reason of mental disorder". This may lead to an order being made under s 58 of the Criminal Procedure (Scotland) Act 1995.[70]

11.40 The relevant definition of the defence is to be found in section 51A of the Criminal Procedure (Scotland) Act 1995[71], as follows:

> "(1) A person is not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder[72] to appreciate the nature or wrongfulness of the conduct.
>
> (2) But a person does not lack criminal responsibility for such conduct if the mental disorder in question consists only of a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.
>
> (3) The defence set out in subsection (1) is a special defence.[73]
>
> (4) The special defence may be stated only by the person charged with the offence and it is for that person to establish it on the balance of probabilities.
>
> (5) In this section, 'conduct' includes acts and omissions."

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[68] See our statement in the Report on *Insanity and Diminished Responsibility* at para 3.18 that: "In many situations there will be an overlap between the defence based on mental disorder and the plea of diminished responsibility. Many, if not all, cases of the defence will fall within the test for diminished responsibility".

[69] See ch 6, Defences – an introduction, para 6.4 and following paragraphs.

[70] Eg a compulsion order, which authorises that a person be detained in hospital.

[71] Inserted by the Criminal Justice and Licensing (Scotland) Act 2010, s 168, following the recommendations in our Report on *Insanity and Diminished Responsibility*, Scot Law Com No 195 (2004). The former common law defence of insanity was abolished.

[72] "Mental disorder" in s 51A has the meaning set out in the Mental Health (Care and Treatment) (Scotland) Act 2003, s 328, and covers mental illness, personality disorder, and learning disability; but s 328 specifically provides that a person is not mentally disordered by reason only of, among other things, use of alcohol or drugs; behaviour that causes harassment, alarm or distress to any other person; and acting as no prudent person would act.

[73] A "special defence" is a procedural requirement: Criminal Procedure (Scotland) Act 1995, s 78(1). The accused must give both the court and the prosecution advance written notice of the intention to plead the defence.

11.41 The statutory definition of mental disorder may be narrower than the former common law defence of insanity.[74] Although section 51A does not require "total alienation of reason", there are neurological conditions and other medical conditions affecting the functioning of the brain which arguably result in an absence of *mens rea*, but which appear not to qualify in terms of the statute.

11.42 We welcome the views of consultees on the following questions:

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?

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

Automatism

11.43 While there has been reform of the law relating to mental disorder and diminished responsibility, the complete defence of automatism has not been examined by the Scottish Law Commission.[75] The defence has developed entirely at common law. The leading case is *Ross v HM Advocate*.[76]

11.44 In *Ross*, Lord Hope set out three requirements for a successful defence, namely the accused:

(a) must have suffered a total alienation of reason;

(b) caused by an external factor; and

(c) which was not self-induced or foreseeable to the accused.[77]

11.45 One key difference between the defences of automatism and mental disorder is the cause of the incapacity. The defence of automatism requires the condition to have been caused by an external factor (for example, drugs or toxic fumes), whereas mental disorder is simply a "recognised mental disorder".[78] Automatism caused by an internal factor[79] is neither a mental disorder, nor can it be said to satisfy the definition in *Ross.* This may lead to difficulties.

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[74] The common law defence of insanity was available to an accused who, as a result of mental illness, mental disease or defect or unsoundness of mind, suffered a total alienation of reason. That appeared to include neurological or other medical conditions affecting the functioning of the brain, such as parasomnia (where someone acts in his sleep as a result of a neurological disorder: *Simon Fraser* (1878) 4 Coup 70), whereas such conditions do not qualify as "mental disorder".

[75] Discussion Paper on *Insanity and Diminished Responsibility*, Scot Law Com DP No 122 (2003) paras 1.13-1.14. For criticism of this exclusion see J Chalmers, "Insanity and automatism: notes from over the border and across the boundary" (2014) NILQ 205 at p 208; E Shaw, "Automatism and mental disorder in Scots criminal law" (2015) Edin LR 210 at p 211.

[76] 1991 SCCR 823.

[77] *Ibid,* at p 837.

[78] For a detailed examination of how these defences interact with one another, see E Shaw, "Automatism and mental disorder in Scots criminal law", (2015) Edin LR 210.

[79] Such as hypoglycaemia, or epilepsy, or a predisposition to blackouts.

11.46 We welcome the views of consultees on the following questions:

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

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

Chapter 12 Domestic abuse

Domestic abuse and homicide

12.1 There are two ways in which domestic abuse may result in a homicide occurring. First, a victim of domestic abuse may be killed by their abusive partner. This would be consistent with the statistical picture outlined in paragraph 12.3 below. Secondly, a victim of domestic abuse may react by killing their abusive partner (for example, *June Greig*,[1] *Kim Galbraith*,[2] *Wendy Graham*[3]). This could be an immediate reaction to a particular instance of abuse, or it could be following a prolonged period of abuse and an accumulation of abusive acts. This chapter will primarily focus on the latter cases.

12.2 The chapter begins with some background to domestic abuse, charting developments in social and legal responses to such conduct, and culminating in a discussion of the recently introduced Domestic Abuse (Scotland) Act 2018. There is then a discussion concerning the recognised defences outlined in previous chapters, examining their effectiveness in providing some legal protection to domestic abuse victims who kill their abusive partners. The final section of the chapter will question, first, whether in light of the strict requirements of these defences and the difficulties faced by an accused who has suffered abuse when relying on them, a new defence is needed that deals with this particular type of homicide; secondly, if so, what would the essential elements be.

12.3 The most recent official crime statistics show that there are clear differences in reported trends in domestic abuse-related homicides as compared with other homicides. Female victims are more likely to be killed by a partner or ex-partner,[4] in contrast to male victims who are more likely to be killed by an "acquaintance".[5] It is against this backdrop that we seek to examine whether changes should be made to the current criminal defences that are available in these situations.

Domestic abuse background

12.4 There have been significant social and legal developments in this area since the mid-1970s.[6]

Social developments

12.5 In terms of social developments, two have been of particular significance.

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[1] Unreported, 1979.
[2] *Galbraith v HM Advocate* 2001 SCCR 551.
[3] *Graham v HM Advocate* 2018 SCCR 347.
[4] 37% of female victims in 2019-20 were killed by a partner or ex-partner. See *Homicide in Scotland 2019-20* (Scottish Government, 2020) p 2, available at:https://www.gov.scot/publications/homicide-scotland-2019-2020/.
[5] 43% of male victims in 2019-20 were killed by an acquaintance. See *Homicide in Scotland 2019-20* (Scottish Government, 2020) p 2.
[6] R McPherson, "Legal change and legal inertia: understanding and contextualising Scottish cases in which women kill their abusers" (2021) JGBV.

12.6 The first is that attitudes of individuals and public bodies have changed. Domestic abuse is no longer viewed as a private matter between spouses. Forbes notes that until the mid-1970s, domestic abuse was "barely recognised".[7] Cases were previously trivialised by law enforcement bodies as being "just a domestic" and not an issue that the state should interfere with. This is no longer the case following what Connelly describes as a "knowledge explosion",[8] which has led to domestic abuse being regarded as a serious and pervasive problem in society. It is for this reason that it has been treated as a priority by the Scottish Government, and the focus of a number of important pieces of legislation.

12.7 Secondly, although the majority of cases involve male-on-female domestic abuse,[9] the conduct is no longer regarded as being limited to such abuse.[10] There is a greater appreciation of female-on-male abuse, and also abuse in same-sex relationships.[11] Furthermore, the impact of domestic abuse on children, both directly and indirectly, is better understood.[12] Any legislative response should seek to balance the need to tackle the gendered nature of domestic abuse with the need to offer protection to all those individuals affected by it.

12.8 There have also been legal developments in this area.

Legal developments

12.9 There has been growing appreciation about the effect which years of abuse may have upon an individual. The greater understanding is reflected in changes in the law in a number of areas, civil and criminal, including the following:

- *Matrimonial Homes (Family Protection) (Scotland) Act 1981* - Giving a non-entitled spouse (a spouse who has no legal right to occupy the house in her own right, for example as an owner or tenant) or cohabitee a right to occupy the matrimonial or cohabitation home.[13]

- *Protection from Harassment Act 1997* - A UK Act, sections 8 to 11 of which apply to Scotland and concern the prevention of harassment (including domestic abuse) and related civil remedies of interdict, damages, and non-harassment orders (breach of which could result in imprisonment or a fine or both).

- *Protection from Abuse (Scotland) Act 2001* - Enabling the courts to attach a power of arrest to an interdict in certain situations, and requiring the court to attach a

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[7] E Forbes, "The Domestic Abuse (Scotland) Act 2018: The Whole Story?" (2018) Edin LR 406 at p 408.
[8] C Connelly, "Domestic Abuse" (2008) SCL 642.
[9] 82% in 2018-19: *Domestic Abuse: Statistics 2018-19* (Scottish Government, 2019) p 3. Available at: https://www.gov.scot/publications/domestic-abuse-scotland-2018-2019-statistics/.
[10] 16% involved a female accused and a male victim; 2% involved an accused and victim who were the same gender: *ibid*.
[11] See B Dempsey, "Gender Neutral Laws and Heterocentric Policies: 'Domestic Abuse as Gender-based Abuse' and Same-sex Couples" (2011) 15(3) Edin LR 381; A Waugh, "Male Victims of Domestic Abuse" (2010) SCOLAG 213.
[12] For example, see the Children (Scotland) Act 1995, s 11(7A)-(7E), placing a duty on the court to consider the need to protect a child from abuse when making an order in respect of parental rights and responsibilities; see also the Children's Hearings (Scotland) Act 2011, s 67(2)(f), restating rules relating to children's hearings and providing as a ground of referral where "the child has, or is likely to have, a close connection with a person who has carried out domestic abuse". See RW Whitecross, "Section 11 orders and the 'abuse' provisions: family lawyers' experience and understanding of section 11(7A)-(7E)" (2017) 21(2) Edin LR 269.
[13] Matrimonial Homes (Family Protection) (Scotland) Act 1981, ss 1 and 18.

power of arrest to an interdict ancillary to an exclusion order or interim order concerning spouses[14] or civil partners,[15] such that any person breaching the interdict could be arrested and detained for up to 2 days in addition to the period the person is in custody between being arrested and appearing in court.[16]

- *Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011* - Providing for "forced marriage protection orders" (preventing a forced marriage without consent) and giving sheriff courts jurisdiction to declare marriages null.[17]

- Domestic *Abuse (Scotland) Act 2011* - Creating a new criminal offence, namely a breach of a civil interdict relating to domestic abuse with a power of arrest attached.[18] Such a breach is punishable by imprisonment or a fine or both.[19]

- Abusive *Behaviour and Sexual Harm (Scotland) Act 2016* - Dealt with in paragraph 12.13 and following paragraphs below. *Domestic Abuse (Scotland) Act 2018* - Dealt with in paragraph 12.17 and following paragraphs below.

12.10 Our focus is on the criminal law. At the outset, we consider three key developments, namely the recognition of marital rape, the introduction of a statutory domestic abuse aggravation,[20] and the recent creation of a specific domestic abuse offence.

12.11 *Recognition of marital rape*: One of the earliest criminal law developments in terms of domestic abuse was the recognition of marital rape in *S v HM Advocate*.[21] Prior to this decision, a man could not be convicted of raping his wife.[22] This archaic rule was criticised by the appeal court when Lord Justice General Emslie, delivering the opinion of the court, stated that:

> "[a] live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances."[23]

12.12 This was an important milestone in terms of changing attitudes towards domestic abuse, with the law no longer sending a signal that a wife was the sexual "property" of her husband.

12.13 *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*: This statute has had a twofold impact on domestic abuse through the creation of a domestic abuse aggravation, and a statutory offence of disclosing, or threatening to disclose, an intimate photograph or film.

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[14] Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 4.
[15] Civil Partnership Act 2004, s 104.
[16] Protection from Abuse (Scotland) Act 2001, s 1.
[17] Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, ss 1 and 15.
[18] Domestic Abuse (Scotland) Act 2011, s 2(2).
[19] *Ibid* s 2(3).
[20] An aggravation is a circumstance in a criminal case which adds to the seriousness of the case, eg the existence of a previous conviction, or the circumstances or purpose of an assault.
[21] 1989 SCCR 248.
[22] Hume, i, 305-306 ; Burnett, 102; Alison, 215.
[23] *S v HM Advocate* 1989 SCCR 248 at p 254.

12.14 Section 1 creates an aggravation for offences that are libelled as involving abuse of the partner or ex-partner of the perpetrator where that feature is proved.[24] An offence would be so aggravated where the perpetrator "intends to cause the partner or ex-partner to suffer physical or psychological harm, or in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm."[25]

12.15 What is the impact of the aggravation? Section 1(5) sets out that the court must state on conviction that the offence is aggravated in terms of section 1(1),[26] record the conviction in a way that shows that the offence is so aggravated,[27] take the aggravation into account in determining the appropriate sentence,[28] and state where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference,[29] or otherwise, the reasons for there being no such difference.[30] This therefore gives the courts a powerful tool in disposing of cases involving domestic abuse, and in labelling the accused's offending as comprising an element of domestic abuse, the latter being of particular significance where this would not otherwise be disclosed by the accused's criminal record.

12.16 Section 2 of the Act introduces a new statutory offence of disclosing or threatening to disclose an intimate image or film. This offence was created to combat the growing problem of "image based abuse", or what is colloquially referred to as "revenge porn".[31] In discussing the equivalent offence under English law[32] Pegg notes the "recognised links between revenge pornography and domestic abuse"[33] and observed that the offence "was introduced after a review into the legal framework governing domestic abuse".[34] The link to domestic abuse is that a threat to release such intimate images for viewing by others proved to be a potent method by which perpetrators of domestic abuse could coerce their victims into remaining in abusive relationships; it was also a means of increasing control over their victims while in these relationships.

12.17 *Domestic Abuse (Scotland) Act 2018*: From 1 April 2019, section 1 of the 2018 Act criminalises abusive behaviour in the context of an intimate personal relationship.[35] The meaning of "domestic" for the purpose of this offence is different to that adopted in England and Wales. In Scotland, the offence applies to abusive behaviour directed at a partner or ex-partner of the accused.[36] The terms "partner" and "ex-partner" are defined in the statute as being where the accused and victim are spouses or civil partners of each other,[37] living

[24] Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 1(1).
[25] *Ibid* s 1(2).
[26] *Ibid* s 1(5)(a).
[27] *Ibid* s 1(5)(b).
[28] *Ibid* s 1(5)(c).
[29] *Ibid* s 1(5)(d)(i).
[30] *Ibid* s 1(5)(d)(ii).
[31] C McGlynn, E Rackley and R Houghton, "Beyond 'Revenge Porn': The Continuum of Image-based Sexual Abuse" (2017) Fem LS 25.
[32] Criminal Justice and Courts Act 2015, s 33.
[33] S Pegg, "A Matter of Privacy or Abuse? Revenge Porn in the Law" (2018) 7 Crim LR 512 at p 523.
[34] *Ibid* at p 518.
[35] The equivalent provision in England is the Serious Crimes Act 2015, s 76.
[36] Domestic Abuse (Scotland) Act 2018 s 1(1)(a).
[37] *Ibid* s 11(2)(a).

together as if spouses of each other,[38] or in an intimate personal relationship with each other.[39] On the question whether individuals are ex-partners, the statute simply states that this is to be "determined accordingly".[40] The definition is consistent with that in the Domestic Abuse (Scotland) Act 2011[41] and in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016[42] (in the respective contexts of domestic abuse interdicts, the domestic abuse aggravation, and the non-consensual distribution of intimate images).

12.18 The 2018 Act lists examples of abusive behaviour, including (i) isolating the victim from friends, family and other sources of support; (ii) controlling and regulating the victim's day-to-day activities; (iii) depriving the victim of freedom of action; and (iv) frightening, humiliating and degrading the victim.[43] It is highly significant that the detrimental effect of these behaviours has been recognised and criminalised, signalling a major change in societal attitudes. In particular the 2018 Act recognises that (a) the impact of psychological abuse can be just as damaging as physical abuse;[44] (b) there may be a "course of conduct"[45] rather than one easily identifiable abusive event; and (c) domestic abuse (whether involving overt physical violence or not) is no longer regarded as something to be dealt with privately between partners.[46] These developments signal that, in the context of homicide involving an accused with a history of being abused, traditional defences such self-defence, provocation, and diminished responsibility may require reconsideration.

12.19 The change in societal attitudes towards domestic abuse is occurring throughout Great Britain. In England and Wales, the offence of "controlling or coercive behaviour in an intimate or family relationship" in the Serious Crime Act 2015[47] recognises non-physical conduct as being capable of constituting domestic abuse.

12.20 These developments were seen as having an impact on the operation of criminal defences in homicide in England and Wales. In the high profile *Sally Challen* appeal in England,[48] new evidence concerning decades of psychological abuse resulted in the quashing of her conviction for murder.[49] While the Court of Appeal ordered a retrial, the Crown accepted a plea of guilty to manslaughter by reason of diminished responsibility.

12.21 *New Domestic Abuse Bill*: Domestic abuse continues to be at the forefront of government policy, and a new Domestic Abuse Bill for England and Wales is currently making

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[38] *Ibid* s 11(2)(b).
[39] *Ibid* s 11(2)(c).
[40] *Ibid* s 11(3).
[41] Domestic Abuse (Scotland) Act 2011, s 3(2).
[42] Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 1(6).
[43] S 2(3)(a)-(e).
[44] Cf studies such as MA Pico-Alfonso *et al*, "The Impact of Physical, Psychological, and Sexual Intimate Male Partner Violence on Women's Mental Health: Depressive Symptoms, Posttraumatic Stress Disorder, State Anxiety, and Suicide" (2006) 15(5) J Women's Health 599, where findings indicated that "psychological intimate male partner violence [IPV] is as detrimental as physical [IPV]".
[45] Which in some cases may be subtle and insidious, undermining the individual's autonomy and ability to act as a normal adult.
[46] Justice Secretary Michael Matheson, quoted in "New Domestic Abuse Law 'Could Change Scotland'", *BBC News* (1 February 2018) available at: https://www.bbc.com/news/uk-scotland-42890990.
[47] Serious Crime Act 2015, s 76.
[48] *R v Challen* [2019] EWCA Crim 916.
[49] A previous plea of diminished responsibility had been unsuccessful: *R v Challen* [2012] 2 Cr App R (S) 20. For a commentary on the decision, see C Davies, "Sally Challen Wins Appeal Against Conviction for Murdering Husband", *The Guardian* (28 February 2019). Available at: https://www.theguardian.com/law/2019/feb/28/sally-challen-wins-appeal-against-conviction-for-murdering-husband.

its way through Parliament.[50] The bill introduces, amongst other things, a statutory definition of domestic abuse, a Domestic Abuse Commissioner, a new Domestic Abuse Protection Notice and Domestic Abuse Protection Order, and provides increased protection in the criminal justice system for victims.[51]

12.22 The UK Government has also introduced a provision in this Bill prohibiting the use of a "rough sex" defence by defendants in murder trials. This issue is considered in more detail at paragraph 12.81 and following paragraphs below.

Recognised defences in the context of domestic abuse

12.23 There has been increasing recognition of the fact that a course of abusive behaviour may have a profound effect upon the abused person.[52] Critics contend that the traditionally-recognised defences of provocation, diminished responsibility, and self-defence, shaped by a culture and values of a past era,[53] are inadequate in the context of an abused person, particularly in the light of the Scottish Government's campaign against domestic abuse.

12.24 In particular, the Domestic Abuse (Scotland) Act 2018 may have an effect on the complete defence of self-defence and the partial defences of provocation and diminished responsibility, as the Act defines abuse more broadly and places psychological abuse and coercive control on a par with physical abuse.

12.25 This section will now examine each of these three defences and will assess their suitability in dealing with cases where an abused person kills their abusive partner.

Self-defence

12.26 The complete defence of self-defence is rarely seen as being of assistance to an accused who has suffered a prolonged course of abusive behaviour. There are a number of reasons.

12.27 First, the requirement that the accused must have killed in the face of imminent danger to life or great bodily injury does not fit easily with an abused person's circumstances. As Lady Scott pointed out in her address to the United Kingdom Association of Women Judges (UKAWJ) seminar "Women who kill" in November 2019:

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[50] See para 12.79 and following paragraphs below.

[51] Home Office, "Domestic Abuse Bill 2020: Overarching Factsheet" (3 March 2020). Available at: https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-bill-2020-overarching-factsheet.

[52] See, for example, J Casey, "Diminished Responsibility and Battered Women Who Kill" 2001 SLT (News) 311; J Casey, "Legal Defences and Expert Testimony on the Battered Woman Syndrome: A Focus on Self Defence" 2003 SLT (News) 247; J Casey, "*Gillon v HM Advocate*: Provocation, Proportionality and the Ordinary Person" 2006 SLT (News) 193; E Kenny, "Battered Women Who Kill: The Fight Against Patriarchy" (2007) UCL Juris Rev 13, at pp 17-36; S Edwards "Coercion and Compulsion – Re-imagining Crimes and Defences" (2016) 12 Crim LR, 876-899; R McPherson, "Battered Woman Syndrome, Diminished Responsibility and Women Who Kill: Insights from Scottish Case Law" (2019) 83(5) J Crim Law 381-393; and an address by Lady Scott (High Court judge) followed by a dialogue with Professor Sharon Cowan (University of Edinburgh Law School) at the UKAWJ seminar "Women who kill", Court of Session, Edinburgh, 28 November 2019. The address is referred to in this chapter as: Lady Scott, "Women who kill" (2019). A printed version of the address is available from the Supreme Courts Library, Court of Session, Edinburgh.

[53] Identified by many as a patriarchy with concepts of possession of a wife and insults to a man's honour.

> "The abused woman who kills does not fit with the fear of imminent violence in self-defence. For her own protection she is much more likely to choose a time where the abuser is passive and objectively poses no threat and after careful planning. To [do] otherwise might be foolhardy."[54]

12.28 Secondly, the requirement that there should be no reasonable option of escape or other solution, again, does not fit easily with an abused person's circumstances. The ability to leave an abusive relationship is often hampered by psychological or economic or family reasons, or alternatively by a fear[55] that the abuser will simply follow and that the abusive behaviour will continue and possibly escalate. Again, as Lady Scott highlighted in her address in November 2019, a means of escape is "rarely believed to exist as a result of the effect of her abuse. It does not fit in with the likely 'slow burn' reaction by women in this context of ongoing violence or abuse – a reaction that is now well documented."[56]

12.29 A further difficulty in applying this defence is that in Scots law the accused must have used no more than a reasonable amount of force for self-protection. As with provocation's need for proportionality, this requirement may not fit the circumstances of an accused who had suffered a course of abusive behaviour and had chosen a time when the abuser was offering no threat.

12.30 In her UKAWJ address,[57] Lady Scott posed the question whether there may be scope to develop self-defence in a way in which the concept of "imminence" can be expanded[58] or possibly by assessing "reasonableness" by having regard to the subjective characteristics of the abused woman's perception and that of women in her position. After noting that any objective test which attaches subjective characteristics is generally resisted in Scots law and is often complex, she concludes that it is "difficult to envisage adaption of the existing defence" to fit the particular needs of the situation of the woman who kills following a prolonged period of abuse.

12.31 Whatever resolution is envisaged in the context of an abused accused, consultees may consider that the gravity of the offence of homicide is such that any defence based on a history of abuse should be a partial one[59], rather than a complete defence resulting in acquittal.[60]

Provocation

12.32 While provocation may, on the face of it, appear to be applicable in domestic abuse cases, there are certain aspects of the defence that make it difficult for the plea to be successful.

12.33 One shortcoming of the defence in these circumstances is its limitation to violent provocation. This is inconsistent with society's increasing understanding of domestic abuse,

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[54] Lady Scott, "Women who kill" (2019) p 19.
[55] Often well-founded.
[56] Lady Scott, "Women who kill" (2019) p 19.
[57] *Ibid.*
[58] Where, for example, the woman perceives it coming by the signs from her experience of previous abuse.
[59] Reducing what would otherwise be murder to culpable homicide.
[60] But see views to the contrary expressed in relation to legislation in Queensland, Australia, referred to in fn 103 below, where commentators argue for a complete defence leading to acquittal.

particularly in light of the definition provided in the Domestic Abuse (Scotland) Act 2018.[61] While provocation requires a violent provoking act (with the exception of the discovery of sexual infidelity[62]) domestic abuse may take many forms. The defence would not be available to a victim of undermining psychological abuse, who finally snaps and kills their abuser after suffering years of abusive conduct, unless this was in response to a particular violent act. Cairns is critical of provocation in its current form, stating that "the exclusion of words perpetuates a somewhat outdated notion of what counts as abuse".[63]

12.34 Linked to this is the requirement that the accused's violent response is not grossly disproportionate to the provoking act.[64] Where domestic abuse victims do not face a violent provoking act, the requirement of proportionality is a major hurdle to a successful defence of provocation.

12.35 A further requirement is that the accused must have suffered an *immediate* loss of self-control. The "immediacy" requirement is one of the most significant barriers to a domestic abuse victim relying on this defence, and is one reason why cases such as June Greig, Kim Galbraith and Wendy Graham could not succeed on the provocation ground. In each case the abused person was driven to kill their abusive partner at a time when their partner was in a passive state or asleep. In these circumstances some time may have passed between the accused suffering an abusive act and their fatal response, with the accused waiting for an opportunity to kill their abuser without fear of a violent confrontation.

12.36 A final issue with the defence is the continued existence of the sexual infidelity exception. In some cases, the exception would appear to excuse anger stemming from little more than jealousy. *Drury*[65] might be thought to be an example of such a case, where the victim was killed by a former partner who seemed motivated by jealousy because of the victim's relationship with another man.

> Cairns considers that the sexual infidelity exception suffers from an inherent gender bias:
>
> "… it is by virtue of the fact that the sexual infidelity provocation trigger is, by its nature, tied to partner homicides, and because partner homicides disproportionately involve a male perpetrator and female victim in a domestic setting, that the sexual infidelity trigger in Scots law assumes a gendered dimension and attracts feminist attention."[66]

12.37 More generally, the defence of provocation is rooted in an 18th century patriarchal society where men were expected to defend their honour, and yet had a duty to control their emotions. The concept underlying the defence is one of loss of control, "hot blood", impulsive reaction and inability to control one's rage. The qualifying features of the defence are criticised

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[61] See para 12.18. The Act lists examples of abusive behaviour, including (i) isolating the victim from friends, family and other sources of support; (ii) controlling and regulating the victim's day-to-day activities; (iii) depriving the victim of freedom of action; and (iv) frightening, humiliating and degrading the victim.
[62] See ch 10, Provocation.
[63] I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma", (2014) 4 Jur Rev 237 at p 260. See also ch 10, Provocation, at para 10.7 and following paragraphs.
[64] *Gillon v HM Advocate* 2006 SCCR 561.
[65] *Drury v HM Advocate* 2001 SCCR 583.
[66] I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma", (2014) 4 Jur Rev 237 at p 243.

as being based on male values and male behaviour models. Hume stated that the defence would apply where:

> " … [the accused] has a mortal purpose, and yet is not in the first degree of guilt as a murderer; Because he is not actuated by wickedness of heart, or hatred of the deceased, but by the sudden impulse of resentment, excited by high and real injuries, and accompanied with terror and agitation of spirits … we cannot as men be insensible to the wide difference between that homicide which has no incentive but wickedness of heart, and that which is in retaliation only of grievous and alarming injuries suffered upon the spot, and has thus the double excuse of bodily smart, and perturbation of spirits …"[67]

12.38 However, while such a sudden outburst of anger may have been excusable at the time when Hume was writing, it is arguably less excusable now.[68] The defence of provocation on the basis of sexual infidelity might, in the 21st century, be thought to be a thinly-veiled licence for rage, jealousy, and domestic abuse, without the need to limit the response to something which is "proportionate" (unlike the operation of provocation in response to initiating violence, where the response must not be grossly proportionate).

12.39 McDiarmid is of the opinion that "the two provoking acts imply some level of wrongdoing against the accused on the deceased's part—at least enough to justify the anger and consequent loss of self-control."[69] This is particularly problematic in respect of the sexual infidelity trigger, with it being unclear why someone ought to be excused for killing their partner in circumstances which, but for this exception, the law would otherwise treat as murder. This is something that Cairns views as being in stark contrast to the Scottish Government's aim of combatting violence against women.[70]

12.40 English criminal law no longer has the traditional plea of provocation, its replacement being "loss of control"[71] with the trigger of discovering sexual infidelity expressly excluded,[72] and there being no need for an immediate reaction. However, there are concerns that the "loss of control" element has not been clearly defined, and recent case law appears to accept that the discovery of sexual infidelity by an intimate partner may be a factor which can be taken into account.[73]

12.41 The question whether the existing defence of provocation should be altered to a loss of self-control[74] was raised in our informal consultations, and was met with a mixed response. In particular, some were concerned that such a change would inappropriately widen the defence by excusing killings in a broader set of circumstances than at present.

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[67] Hume, i, 233.
[68] Lady Scott, "Women Who Kill" (2019); SSM Edwards, "Loss of self-control: The cultural lag of sexual infidelity and the transformative promise of the fear defence" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) at p 82.
[69] C McDiarmid, "Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) at p 212.
[70] I Cairns, "Feminising Provocation in Scotland: The Expansion Dilemma", (2014) Jur Rev 237 at pp 242-243.
[71] See paras 10.43 and following paragraphs.
[72] Coroners and Justice Act 2009, ss 54-56, and particularly s 55(6)(c), implementing the recommendations made by the Law Commission in *Murder, Manslaughter and Infanticide,* Law Com No 304 (2006).
[73] See, for example, *R v Clinton* [2013] QB 1, [2013] 3 WLR 515, and the discussion in ch 10, Provocation, paras 10.20 and 10.44 and following paragraphs.
[74] Similar to the development of English homicide law.

12.42 In summary, a plea of provocation is unlikely to succeed where the homicide is in response to a course of abusive behaviour from a partner or ex-partner which would be an offence under the Domestic Abuse (Scotland) Act 2018. A strict application of the accepted test would require an abused partner to prove that (i) at the relevant time, he or she was being physically attacked by the deceased, or was in danger of being physically attacked; (ii) he or she suffered an immediate loss of self-control; and (iii) there was no gross disproportion in the response compared with the initial violence. For the reasons set out above, these requirements are unlikely to be met in the majority of cases considered in this chapter.

Diminished responsibility

12.43 While there are clear limits to the application of self-defence and provocation in the types of cases considered in this chapter, diminished responsibility has been successfully pled by some who have been driven to kill their abusive partners. Connelly has commented that "post *Galbraith,* diminished responsibility had become the vehicle for women who kill their abusers to avoid murder convictions in Scotland."[75]

12.44 However, as with provocation and self-defence, problems may arise when applying the partial defence of diminished responsibility[76] in the case of a person who has suffered a course of abusive behaviour as envisaged in the Domestic Abuse (Scotland) Act 2018.

12.45 One problem is that the defence places too much emphasis on "abnormality of mind", rather than on the abusive conduct itself.[77] This is particularly so in England and Wales where medical evidence is an essential prerequisite given that the abnormality of mind must arise from a recognised medical condition.[78]

12.46 This leads to the question of whether medical evidence is essential in Scots law. Chalmers and Leverick refer to the "medicalisation" of the defence following *Galbraith v HM Advocate*[79] and comment that "in modern practice it is difficult to envisage any scenario where the defence could be successfully pled in the absence of expert evidence."[80]

12.47 Some have emphasised that an abnormality of mind might stem from a variety of sources – including a low IQ, an illness, PTSD caused by controlling and coercive behaviour – all as recognised by an appropriate "science" (albeit not necessarily "medical"). As was envisaged in *Galbraith v HM Advocate*:

> " … we can see no reason in principle why a recognised abnormality caused by sexual or other abuse inflicted on the accused might not also be relevant for [the purpose of diminished responsibility]. We stress, of course, that the abuse must result in some recognised mental abnormality. Subject to that important qualification, we again see no reason in principle why evidence of such a condition could not be given by those,

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[75] C Connelly, "Women Who Kill Violent Men" (Sir Gerald Gordon Seminar on Criminal Law, University of Glasgow, 2011) cited by R McPherson, "Battered Woman Syndrome, Diminished Responsibility and Women Who Kill: Insights from Scottish Case Law" (2019) J Crim Law 381 at p 389.
[76] As set out in the Criminal Procedure (Scotland) Act 1995, s 51B.
[77] See discussion at para 11.6 and 11.16 and following paras.
[78] Homicide Act 1957, s 2(1)(a), as amended by the Coroners and Justice Act 2009, s 52(1). R McPherson, "Battered Woman Syndrome, Diminished Responsibility and Women Who Kill: Insights from Scottish Case Law" (2019) J Crim Law 381.
[79] 2001 SCCR 551.
[80] J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) para 11.15.

> such as psychologists, having the appropriate professional expertise, even though they were not medically qualified … the abnormality of mind may take various forms. It may mean that the individual perceives physical acts and matters differently from a normal person. Or else it may affect his ability to form a rational judgment as to whether a particular act is right or wrong or to decide whether to perform it … The abnormality must be one that is recognised by the appropriate science. But it may be congenital or derive from an organic condition, from some psychotic illness, such as schizophrenia or severe depression, or from the psychological effects of severe trauma. In every case, in colloquial terms, there must, unfortunately, have been something far wrong with the accused, which affected the way he acted [excluding always voluntary intoxication and psychopathic personality disorder]".[81]

12.48 In terms of evidence, as explained in Chapter 11, the appeal court in *Graham v HM Advocate*[82] left open the questions (i) whether there could be sufficient evidence of an "abnormality of mind" without medical evidence; and (ii) if medical evidence stated that there was no abnormality of mind, whether that position could be discounted by psychological or other evidence (such as the evidence of family, friends, or neighbours).

12.49 During our informal consultations we found some support for a broader approach to evidencing such an abnormality, which may include hearing evidence not only from medically qualified experts, but also from psychologists, social/support workers, family members, friends, and neighbours.[83] A broader approach was permitted in England in the *Challen* case, with the accused's family members giving evidence of the depression that she suffered.

12.50 A further problem with the defence is that it can be seen as stigmatising those who rely on it. As Lord Rodger noted in *Galbraith*, in order for the defence to apply, "in colloquial terms, there must unfortunately, have been something far wrong with the accused, which affected the way he acted."[84] A number of cases involve a claim by the accused that they were suffering from Battered Woman's Syndrome (BWS) or Battered Person's Syndrome (BPS) as it was referred to by the court in *Graham*. Although BWS was not expressly referred to in *Galbraith*, Ferguson and McDiarmid credit the case with "opening the door" to such a condition grounding a diminished responsibility plea.[85] The term "BWS" was pioneered by Lenore Walker, and her summary of it is found in a number of leading works on diminished responsibility. Walker explains that:

> "Women who are repeatedly exposed to painful stimuli over which they have no control and from which there is no apparent escape, respond with the classic symptoms of learned helplessness. They become passive, lose their motivation to respond, and come to believe that nothing they do will alter or affect any outcome."[86]

12.51 However, BWS may now be thought to be too stereotypical a category. Domestic abuse is not limited to physical violence and "battered" women: it extends to psychological

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[81] *Galbraith v HM Advocate* 2001 SCCR 551 at paras [53] and [54] (Lord Justice General Rodger).
[82] 2018 SCCR 347.
[83] Representatives from Victim Support Scotland and Scottish Women's Aid, and some defence QCs, were involved in our informal consultations.
[84] *Galbraith v HM Advocate* 2001 SCCR 551 at para [54].
[85] PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn, 2014) para 20.11.7.
[86] LE Walker, *The Battered Woman* (1979) at p 49.

abuse and coercive control which can have just as damaging an impact (and in some cases more damaging) on victims.[87]

12.52 BWS also has the effect of victimising the accused by labelling them as suffering from a "syndrome", and as a result, masks the real reason why they have killed their partner, namely the abuse they have suffered.[88] McPherson is critical of the use of BWS/BPS in these cases arguing that "the syndrome pathologises women, placing them at the centre of the failings which have taken place in the relationship".[89] Evidence may be led with a view to proving the condition (as is required by the defence)[90] but without the court necessarily having the opportunity to consider the wider factual context in which the killing took place.

12.53 While this problem may be somewhat mitigated by widening the types of evidence that may be heard, the accused would still have to show that they suffered from a "mental abnormality", thereby unavoidably characterising the killing as resulting from the accused's mental state, rather than the victim's abusive conduct. For these reasons, it is questionable whether diminished responsibility is an appropriate defence for dealing with such killings, or whether it is simply the "least worst" option out of the defences available to the accused.

A new "domestic abuse" defence?

12.54 We now consider whether, in light of the perceived deficiencies of the existing defences noted above, a new domestic abuse defence should be introduced.

12.55 Amongst those practitioners, academics and support organisations we met, there was support for the view that the current traditional defences of self-defence, provocation, and diminished responsibility were ill-suited in the context of a killing attributable to the effects of years of domestic abuse. It was suggested that a new domestic abuse defence would more appropriately label the actions of the accused and communicate to the wider public why they acted as they did.

12.56 Some of those who participated in our informal consultations suggested that there is a need for the creation of a new independent defence for domestic abuse victims. This was a view echoed by Lady Scott in her presentation at the UKAWJ seminar "Women who kill" in November 2019. There was a call for:

> "[a] defence specifically designed to meet the circumstances of abused women who kill their abuser. Not a defence … which is gender specific – of course different partnerships can give rise to this kind of abusive behaviour – but a defence which is effective and comprehends the experiences and reality of June Greig and the other abused women."[91]

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[87] Cf studies such as MA Pico-Alfonso *et al*, "The Impact of Physical, Psychological, and Sexual Intimate Male Partner Violence on Women's Mental Health: Depressive Symptoms, Posttraumatic Stress Disorder, State Anxiety, and Suicide" (2006) 15(5) J Women's Health, 599, where findings indicated that "psychological intimate male partner violence [IPV] is as detrimental as physical [IPV]".
[88] Lady Scott, "Women who kill" (2019).
[89] R McPherson, "Battered Woman Syndrome, Diminished Responsibility and Women Who Kill: Insights from Scottish Case Law" (2019) J Crim Law 381 at p 386.
[90] Criminal Procedure (Scotland) Act 1995, s 51B(4).
[91] Lady Scott, "Women Who Kill" (2019) at p 20.

12.57 How would such a defence be defined? We examine, first, certain reforms adopted in other jurisdictions. Secondly, we discuss the possible advantages and disadvantages which a specific domestic abuse defence might offer in the Scots law of homicide. We then note legislative developments relating to domestic abuse currently underway in the Scottish Parliament and the UK Parliament. Finally we mention one aspect of intimate partner abuse, which takes the form of a homicide followed by the "rough sex" defence, currently the subject of debate in the UK Parliament.[92]

Domestic abuse law reforms in other jurisdictions

12.58 A multi-jurisdictional study in 2016 by Linklaters LLP for Penal Reform International[93] provides a useful analysis of different jurisdictions where domestic abuse is advanced as a mitigating factor in homicide. While the study focuses on female victims, it is equally relevant for any victim of sustained intimate partner abuse.

12.59 Two global psychological phenomena are described in the executive summary:[94] first, the "battered woman syndrome" describing the psychological mind-set and emotional state of female victims of abuse, explaining, amongst other things, why women often stay in abusive relationships; and secondly, the "slow burn reaction", where women in a situation of abuse may not react instantly, partly for psychological reasons, and partly because the physical mismatch between abuser and victim may make any instant response futile or dangerous.

12.60 In Linklaters' overview of findings, a wide variety of approaches to law reform were identified. The authors found that:

> "[i]n many jurisdictions, existing defences have proved ill-adapted to the situation of a woman suffering from battered woman syndrome or the slow burn reaction.
>
> In a small number of the jurisdictions considered, most notably in a number of Australian states, there have been legislative amendments to the criminal law to facilitate more lenient treatment of women who commit violent crimes against their abusers. These amendments take various forms, from introduction of new defences specifically available to victims of abuse (for example, in Queensland, Australia), to the amendment of existing defences so that they are better adapted to dealing with victims of abuse (for example, in Victoria, Australia).
>
> While some legal systems have been willing to adapt the existing law or even create new law to deal with victims of abuse, other systems appear reticent to expand beyond the traditionally established parameters …
>
> … only some jurisdictions' laws explicitly confer a right to adduce … evidence [of a history of abuse] … in US courts, defendants are able to refer to expert testimony to help juries understand the behavioural pattern of abused women and how that abuse may affect the defendant's actions and conduct; in the Australian state of Queensland,

[92] See para 12.79 and para 12.81 and following paragraphs.
[93] Linklaters LLP for Penal Reform International, "Women who kill in response to domestic violence: How do criminal justice systems respond?" (2016) available at https://www.penalreform.org/resource/women-who-kill-in-response-to-domestic-violence/. Jurisdictions studied were Australia, Brazil, Hong Kong, India, Japan, Mexico, Poland, Spain, and the United States.
[94] What follows is a paraphrase of the summary.

> a specific partial defence to a charge of murder has been introduced [namely 'killing for preservation in an abusive domestic relationship]."

12.61 The study then examines aspects of the law in the nine jurisdictions selected.[95] The Australian state of Victoria introduced legislation to allow for the introduction of "social framework evidence" that permits evidence of the nature and dynamics of domestic violence to be adduced. In the United States, self-defence is the main defence, while some states regard a history of abuse as relevant when establishing a defence of duress. In India and Hong Kong, provocation is the defence relied upon, with the courts recognising a history of abuse, including "slow burn/sustained provocation" incidents, as being relevant to that defence. In Poland, there is no established practice, but self-defence and insanity have been relied upon by female offenders who have suffered a history of abuse.

12.62 Relevant legislation has been enacted in certain Australian states, and in New Zealand, legislation has been recommended but not enacted.[96]

12.63 *Queensland, Australia:* Section 304B of the Criminal Code 1899,[97] entitled "Killing for preservation in an abusive domestic relationship",[98] provides:

> "(1) A person who unlawfully kills another (the deceased) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if –
>
> (a) the deceased has committed acts of serious domestic violence[99] against the person in the course of an abusive domestic relationship; and
>
> (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
>
> (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case."

12.64 The introduction of this new defence attracted considerable criticism from legal stakeholders and academics.[100] The criticism arose in the context of the Queensland complete

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[95] Reference should be made to the study itself for more detail.
[96] Para 12.70 below.
[97] Inserted by the Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010, s 3.
[98] An abusive domestic relationship is defined in s 304B(2) as "a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other."
[99] For "domestic violence", s 304(7) refers to the Domestic and Family Violence Protection Act 2012, s 8. A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation (s 304B(3)).
[100] See K Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective*, 2014; Boe, "Domestic violence in the courts: re-victimising or protecting the victims?" (Paper presented at the National Access to Justice and Pro Bono Conference, Brisbane, 27-28 August 2010); M Edgely and E Marchetti, "Women who kill their abusers: How Queensland's new abusive domestic relationships defence continues to ignore reality" (2011) 13 FLJ 125; P Easteal and A Hopkins, "Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland" (2010) 35(3) Alt LJ 132; E Sheehy, J Stubbs and J Tolmie, "Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand, (2012) 34 Sydney LR 467.

defence of self-defence,[101] which requires a "triggering assault", although no longer requiring elements of lack of escape and proportionality of responding violence.[102] One concern was that only self-defence could lead to an acquittal: a section 304B defence would lead to a conviction for manslaughter, which some commentators feel is unjust.[103] Another concern was that juries, having heard directions about both self-defence and section 304B, might choose the apparently "tailor-made" section 304B domestic abuse defence,[104] selecting that defence rather than self-defence because it seemed to fit the particular circumstances, even although those circumstances would justify self-defence resulting in total acquittal. However, in view of the different structure of self-defence in Scots law, it may be that such concerns would not apply with equal vigour in Scotland.

12.65 *Western Australia:* Sections 299 and 300 of the Criminal Code,[105] and other enactments relating to sentencing and bail, make detailed provision for domestic abuse and its repercussions. Key concepts include "designated family relationship", "intimate personal relationship", "act of family violence", "persistent family violence", and "serious family violence offender". In the context of a charge of homicide, sections 38 and 39 of the Evidence Act 1906[106] define what may constitute evidence of family violence, including the evidence of an expert on the subject of family violence.[107] Section 39B, entitled "Evidence of family violence – self-defence", provides:

> "39B Without limiting any other evidence that may be adduced, in criminal proceedings in which self-defence in response to family violence is an issue, evidence of family violence may be relevant to determining whether –
>
> (a) a person has a belief that an act was necessary to defend the person or another person from a harmful act, including a harmful act that was not imminent; or
>
> (b) a person's act was a reasonable response by the person in the circumstances as the person believed them to be; or
>
> (c) there are reasonable grounds for a particular belief by the person."

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[101] A defence frequently run in tandem with a s 304B defence.

[102] Contrast with the Scots law defence of self-defence, which still requires a lack of escape and a proportionate response: see para 7.5.

[103] See for example M Edgely and E Marchetti, "Women who kill their abusers: How Queensland's new abuse domestic relationships defence continues to ignore reality" (2011) 13 FLJ 125 at pp 129, 140-141: "We argue that in cases involving a history of extreme abuse, a woman who intentionally kills her abuser because she fears for her life has a reasonably-grounded belief that there is no other way to protect herself is morally justified in doing so, even if the killing was during a non-confrontational moment … she should be entitled to acquittal … On the face of the law … it seems that the opportunity to strive for an acquittal as opposed to facing a manslaughter conviction is predicated on that triggering assault …". See too A Hopkins and P Easteal, "Walking in her shoes: battered women who kill in Victoria, Western Australia and Queensland" (2010) 35(3) Alt LJ 132: " … [section 304B] will do nothing to increase the prospect of acquittal for battered women, [although increasing the prospect of convictions for manslaughter rather than murder] and may even jeopardise their claims of justified self-defence."

[104] A partial defence, which if successful would result in a conviction for manslaughter, in contrast with the complete defence of self-defence, which if successful results in acquittal.

[105] Criminal Code Act Compilation Act 1913, as amended by the Family Violence Legislation Reform Act 2020.

[106] As amended by the Family Violence Legislation Reform Act 2020.

[107] Defined as including "a person who can demonstrate specialised knowledge, gained by training, study or experience, of any matter that may constitute evidence of family violence": s 39(4).

12.66 In criminal proceedings in which self-defence in response to family violence is an issue, defence counsel may request the trial judge to direct the jury accordingly.[108] Detailed guidance is given about the content of such a judge's direction: for example, explaining that family violence is not limited to physical abuse, but includes sexual, psychological, or financial abuse;[109] reactions to family violence may vary, including remaining with an abusive partner, failing to report violence, and fearing that leaving or seeking help may increase the risk of harm;[110] and a decision about what to do may be affected by social, cultural, and economic inequities,[111] by family or community responses, by the person's perceptions of how realistic "safety options" might be, and by further violence or the threat of further violence to prevent any help-seeking behaviour or use of safety options.

12.67 *Victoria, Australia:* In 2005, the offence of "defensive homicide" was introduced, while the partial defence of provocation was abolished. There was felt to be a need to offer a "halfway" homicide category for persons who kill in response to prolonged family violence. The offence applied where an accused killed, believing the conduct to be necessary to defend himself or herself or another from the infliction of death or serious injury, but where he or she did not have reasonable grounds for that belief. A few years later, however, the Victorian Department of Justice acknowledged that the offence had not operated as intended. Analysis of convictions for defensive homicide revealed that most cases since 2005 had involved male defendants who had killed a male victim outside the context of family violence. Attorney General Robert Clark commented that the law was "supposed to help family violence victims, but instead it's been hijacked by violent men who've been able to get away with murder".[112] Further problems identified were too great a similarity to the partial defence of provocation, and an increased risk of compromise verdicts. Abolition was recommended.[113] The offence was then abolished by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 as part of a suite of reforms which included simpler tests for self-defence and new jury directions on family violence.

12.68 *South Australia:* A bill introduced in South Australia in 2017, namely the Criminal Law Consolidation (Defences – Domestic Abuse Context) Amendment Bill 2017, sought to insert new sections in the Criminal Law Consolidation Act 1935 as follows:

> "**15D – Domestic abuse and self defence**
>
> (1) … in proceedings for an offence in circumstances where self-defence in the context of domestic abuse is in issue, a person may genuinely believe that the person's conduct is necessary and reasonable for a defensive purpose, and the conduct

[108] S 39C.
[109] S 39F(1)(a): examples are outlined in s 39F(2) such as placing a person in a dependent relationship; isolating a person; controlling day-to-day activities; restricting freedom of movement or action; and humiliating a person.
[110] S 39F(1)(b).
[111] Including race, poverty, gender, disability or age.
[112] "Defensive homicide law to be dumped in Victoria after violent men 'allowed to get away with murder'" *ABC News* (22 June 2014) available at: https://www.abc.net.au/news/2014-06-22/vic-dumps-law-that-allowed-men-to-27get-away-with-murder27/5541670.
[113] *Defensive Homicide: Proposals for Legislative Reform* (Consultation Paper, September 2013) xi, 35 [2.9.2] (Proposal 1).

may be reasonably proportionate to the threat that the person genuinely believes to exist,[114] even if –

(a) the person is responding to a threat that is not immediate or imminent; or

(b) the response involves the use of force in excess of the force involved in the harm or threatened harm.

15E – Domestic abuse and the common law defence of duress

(1) … in proceedings for an offence in circumstances where the common law defence of duress is in issue, evidence of domestic abuse may be relevant in determining whether a person has carried out conduct under duress and, as such, may enliven[115] the defence where it might not otherwise have been enlivened in the absence of that evidence."

12.69 It would appear, however, that the bill did not become law.[116] More recently, in December 2020, a new "coercive control" bill was introduced in the South Australian Parliament. The bill seeks to criminalise a range of intimidating, controlling and threatening behaviours.[117] Provisions deal with emotional abuse, isolation, sexual coercion, financial abuse, cyber-stalking and various types of intimidation.[118]

12.70 *New Zealand:* In 2001, the New Zealand Law Commission suggested replacing the "imminence" requirement of self-defence with the concept of an "inevitable" attack.[119] However, in 2007 the Commission changed its mind, attracting a degree of criticism.[120] Sheehy *et al* commented:

> "But in 2007, the [New Zealand Law Commission] inexplicably reversed its position, commenting that:
>
> '[i]n its subsequent consideration of this issue, the Ministry of Justice concluded that the amendment to section 48 of the Crimes Act 1961 [self-defence] was not required to meet the needs of battered defendants and might be undesirable in light of the fact that the section is generally regarded as working well. The Ministry reviewed recent case law, which tended to suggest that problems previously encountered were being ironed out in the courts: it thus concluded that the real problem previously was one of

[114] In this context, s 15D(2) permits evidence of domestic abuse, including the history of the relationship; the cumulative effect (including psychological effect); social, cultural or economic factors impacting on the person; the general nature and dynamics of relationships, including consequences of separation; the psychological effect of abuse; and social and economic factors impacting on people in relationships affected by domestic abuse.
[115] Understood to mean "make live".
[116] It seems that the bill was abandoned on the basis of inadequate consultation and what was perceived to be poor drafting.
[117] "Labor looks to outlaw coercive behaviour", *Newcastle Herald* (2 December 2020).
[118] Described as overwhelmingly perpetrated against women by a current or former intimate partner with the effect of removing their sense of self-worth, and often preceding other forms of domestic abuse. The article notes that "similar legislation has been introduced in Ireland, Scotland and the UK while Tasmania has included some offences in its criminal code. Queensland, Victoria and NSW [are] also introducing or considering bills."
[119] New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (Wellington: NZLC R73, 2001) at pp 9-12.
[120] EA Sheehy, J Stubbs and JR Tolmie, "Defences to homicide for battered women: a comparative analysis of laws in Australia, Canada and New Zealand" (2012) 34 Sydney LR 467.

> social awareness, rather than of law. The Ministry found that overwhelmingly stakeholders were comfortable with letting matters take their course.'
>
> The Ministry of Justice report is not, however, publicly available and so one is left wondering which cases were reviewed by the Ministry. Were members of the public invited to make submissions to that body in respect of this reference, as they did to the Law Commission in respect of its 2001 report that *did* recommend law reform? Exactly who is it who holds the body of opinion that self-defence is 'working well' in New Zealand? In other words, who are the 'stakeholders' referred to in this process? There is no material on the public record that provides answers to these questions."[121]

12.71 The authors also refer to Queensland's section 304B defence, make the same criticisms as those outlined in paragraph 12.64 above, and suggest that legislators may not fully appreciate the ability of juries to deal discriminatingly and appropriately with these kinds of cases.[122]

Possible advantages and disadvantages arising from the introduction of a specific "domestic abuse" defence in Scots homicide law

12.72 A specific domestic abuse defence could take potentially the form of an additional section inserted in the Criminal Procedure (Scotland) Act 1995.[123] The drafting of the relevant section could reflect up-to-date psychiatric and psychological knowledge about the issue of long-term domestic abuse, and could attempt to avoid the problems encountered by abused partners seeking to rely upon the traditional defences of self-defence, provocation and diminished responsibility.[124] In particular, the defence could extend beyond the "immediacy" of the threat of harm; it need not be gender-specific; and it could act as a partial defence resulting in a conviction for culpable homicide, rather than murder.[125]

12.73 Allowing evidence to be led from a broader range of sources might enable the court to look at the wider context and history of abuse. Further, if proof of a specific medical condition at the relevant time was not essential to the defence, one consequence might be a greater focus of the court's inquiry into the nature and effect of any abusive conduct.

12.74 Despite being generally supportive of a possible "domestic abuse" or "intimate partner abuse" defence, concern was expressed by representatives of support groups[126] about the potential for such a defence to be exploited by abusers. They suggested that some abusers might see the defence as an opportunity to kill their partners, and then to construct a narrative in which they claimed to be the victim of domestic abuse. Concerns were also expressed by some practitioners and academics that the defence could be exploited by some victims of domestic abuse who would view it as a "licence to kill" their abusive partners where that might not otherwise be a justifiable course of action. All parties therefore agreed that such a defence would require to be tightly framed and that the relevant test would have to be a high one.

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[121] *Ibid* p 477.
[122] *Ibid* at pp 480-481, the authors refer *R v Falls* (unreported, 2010) where a jury brought back a verdict of acquittal of a wife had drugged her abusive husband (who had said that he was going to execute the parties' child on a particular day) and then shot him twice in the head while he was unconscious.
[123] Cf Queensland, where s 304B was inserted in 2010 into the Criminal Code Act 1899.
[124] See para 12.23 above and following paragraphs.
[125] A partial defence is suggested because of the gravity of any homicide: but see the different views expressed in Queensland, Australia, fn 103 above.
[126] Including Victim Support Scotland and Scottish Women's Aid.

Parties were also agreed that (a) the burden of proof should rest on the defence, albeit at a standard "on the balance of probabilities"; and (b) the defence should be a partial one, reducing what would otherwise be murder to culpable homicide.[127]

12.75 Another potential objection to the creation of a possible "domestic abuse" defence might be found in the public policy rationale behind the strict framing of the defence of coercion: the law should encourage citizens to employ non-violent and lawful means of responding to difficult, or even dangerous, situations. A "domestic abuse" or "intimate partner abuse" defence might be easy to claim and, in the absence of a living victim to give evidence to the contrary, potentially difficult to disprove. Moreover, murder is the most "heinous" of crimes,[128] particularly when planned in advance. This is so even in planned killings by abused persons, where the killer was *not* suffering from mental disorder. It is arguable that it should not suffice for a "domestic abuse" defence that the intention to kill was merely "caused" by a course of conduct which may have occurred long before the killing, and during which time there may have been opportunities to pursue lawful remedies against the alleged abuser, but which were not taken up.

12.76 A possible alternative to such a defence, or to accompany the defence, might be specific directions in the trial judge's charge outlining the social/psychological/behavioural context of an abused partner and the effect on such a partner. An example of such an approach can be found in the legislation enacted in Western Australia.[129] Similar legislative provisions can be found in the Criminal Procedure (Scotland) Act 1995, sections 288DA and 288DB.[130] The policy behind, and operation of, these provisions have been summarised by Thomas Ross QC:

> " … In the case of *Donegan*[131] in 2019, the Scottish Appeal Court noted that 'in recent years, in line with the approach in other jurisdictions, notable steps have been taken in Scotland seeking to address and demystify for court users various supposed 'myths' associated with the reporting of and the reliability of rape allegations … most notably section 288DA [of the Criminal Procedure (Scotland) Act 1995].'
>
> This section requires a judge, in certain circumstances, to direct the jury that there can be good reason why a complainer may delay in reporting a sexual crime, with the result that such delay does not necessarily mean that the allegation is false. A similar provision (288DB) requires a judge, in certain circumstances, to direct the jury that the absence of physical resistance or physical force does not necessarily mean that the allegation is false."[132]

12.77 However, as reported in the same article, there is research to suggest that these provisions – albeit in the context of addressing "rape myths" in sexual offence trials – are

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[127] In contrast with the contention in M Edgely and E Marchetti, "Women who kill their abusers: How Queensland's new abuse domestic relationships defence continues to ignore reality" (2011) 13 FLJ 125 at pp 129, 140-141, where the authors argue strongly for a complete defence resulting in acquittal: see fn 103 above.
[128] G Maher, "'The Most Heinous of All Crimes': Reflections on the Structure of Homicide in Scots Law" in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010).
[129] See paras 12.65 and 12.66 above.
[130] Inserted by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 6.
[131] *Donegan v HM Advocate* 2019 SCCR 106 at para [56].
[132] K Summan, "New research finds jurors do not subscribe to rape myths and casts doubt on mock jury studies" *Scottish Legal News* (1 December 2020) available at: https://www.scottishlegal.com/article/new-research-finds-jurors-do-not-subscribe-to-rape-myths-and-casts-doubt-on-mock-jury-studies.

unnecessary and ineffective.[133] Ross argues that any law reform should instead be grounded in "an evidence-based approach, free of hyperbole, to address [the] difficult task of ensuring a fair hearing for accused persons and complainers".[134] There is therefore some debate as to whether the section 288 provisions provide a good model for homicide law reform.

Developments in the Scottish Parliament and the UK Parliament

12.78 At the time of writing this Discussion Paper, the following developments were taking place in the Scottish Parliament:

On 17 March 2021, the Scottish Parliament passed the Domestic Abuse (Protection) (Scotland) Bill. The Bill became the Domestic Abuse (Protection) Act 2021[135] on receiving Royal Assent on 5 May 2021. The Act creates new types of protection orders and notices, namely "domestic abuse protection notices" (DAPNs),[136] and "domestic abuse protection orders" (DAPOs). The Act is "trying to fill a gap by allowing immediate protection for a person experiencing domestic abuse" and also offer "protection to people in social housing who experience domestic abuse".[137] The Policy Memorandum[138] for the Bill which became the Act explains that a suspected perpetrator of domestic abuse can be removed from a home they share with a person at risk, and prohibited from contacting or otherwise abusing the person at risk. With the aim of enabling the victim to remain in the family home, a tenancy can be transferred to the victim of domestic abuse and/or the perpetrator's interest in the tenancy can be terminated. The DAPNs and DAPOs are short-term measures, giving a person at risk of abuse time and space to consider longer-term steps. "The new powers are therefore intended to fill a 'gap' in that where someone is in a coercive and controlling relationship and experiencing domestic abuse, they are likely to lack the freedom of action to pursue, for example, a civil court process to remove a suspected perpetrator from a shared home".[139] The immediate measures are independent of any criminal investigation.[140] The background to the Bill which became the Act, including certain evidential hearings during the passage of the Domestic Abuse (Scotland) Act 2018, is set out in the Policy Memorandum, as is the approach taken in other jurisdictions,[141] possible alternative approaches,[142] and public consultation undertaken.[143]

12.79 The following developments were taking place in the UK Parliament. They apply only in England and Wales (save in relation to the extension of extra-territorial jurisdiction):

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[133] A view challenged in: J Chalmers, F Leverick and V Munro, "The Dorrian Review and Juries in Rape Cases: Myths about Myths?" available at: https://www.uofgschooloflaw.com/blog/2021/3/18/the-dorrian-review-and-juries-in-rape-cases-myths-about-myths. See also R Ormston, J Chalmers, F Leverick, V Munro and L Murray, *Scottish jury research: findings from a large-scale mock jury study* (Scottish Government 2019).
[134] *Ibid.*
[135] Which can be accessed at: https://www.legislation.gov.uk/asp/2021/16/contents/enacted.
[136] Which can be made by senior members of the police, before any application is made to a court.
[137] See material entitled "Why the Bill was created" at the webpage for the bill (which later became the Act), which can be accessed at: https://beta.parliament.scot/bills/domestic-abuse-protection-scotland-bill.
[138] Which can be accessed at: https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/domestic-abuse-protection-scotland-bill/introduced/policy-memorandum-domestic-abuse-protection-scotland-bill.pdf.
[139] Policy Memorandum, para 9.
[140] *Ibid* para 11.
[141] Including the Netherlands, Austria, England and Wales, and Bulgaria.
[142] Policy Memorandum, para 70 and following paragraphs.
[143] *Ibid* para 80 and following paragraphs.

The Domestic Abuse Act 2021[144] was passed in the Westminster Parliament on 26 April 2021 and received Royal Assent on 29 April 2021. Part 1 of the Act contains definitions. Part 2 creates a Domestic Abuse Commissioner with certain powers and functions; Part 3 is entitled "Powers for dealing with domestic abuse", including domestic abuse protection notices, domestic abuse protection orders, special measures for witnesses, electronic monitoring, and related matters; Part 4 relates to local authority support; Part 5 concerns protection for victims and witnesses in court, including prohibition of cross-examination in person by the alleged abuser; Part 6 sets out offences involving violent or abusive behaviour, including section 71 which provides that "consent to serious harm for sexual gratification [is] not a defence" (the so-called "rough sex" defence, relating to circumstances where one partner dies during a sexual encounter, and the surviving partner defends a charge of homicide by describing an accidental death in the course of consensual violent behaviour).[145] Part 7, Miscellaneous and General, includes section 78 entitled "Homelessness: victims of domestic abuse", which gives those who are eligible and are homeless as a result of fleeing domestic abuse "priority need" status for accommodation secured by the local authority.[146]

12.80 In light of the discussion above, we ask the following questions:

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?

"Rough sex defence"

12.81 As already noted,[147] the UK Domestic Abuse Act 2021 seeks to provide for what has been referred to in recent years as the "rough sex defence". This involves a claim by the accused that the victim died accidentally as a result of either a consensual sex game gone wrong, or consensual rough sex.[148]

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[144] Which can be accessed at: https://www.legislation.gov.uk/ukpga/2021/17/contents/enacted.
[145] See para 12.81 and following paragraphs.
[146] A different approach from that adopted by the Scottish Government, which aims to have the alleged abuser removed from the house: see para 12.78 above.
[147] See para 12.79 above. These provisions would not apply in Scotland.
[148] A "rough sex defence" is not a recognised criminal defence. It is a "failure of proof" defence: see ch 6, Defences: an introduction, para 6.3 fn 3. The accused offers an alternative version of events which does not involve the *mens rea* for murder. See generally H Bows and J Herring, "Getting Away With Murder? A Review of the 'Rough Sex Defence'", (2020) J Criminal Law 1.

12.82 The defence has attracted criticism, leading to calls in England and Wales to ban the use of the defence,[149] particularly following the death of Grace Millane, a British backpacker who was murdered in New Zealand.[150] During a high profile trial, the accused, who under New Zealand law remained anonymous throughout the proceedings, claimed that he killed her accidentally while engaged in consensual rough sex.

12.83 The campaign group "We Can't Consent To This" has gathered data showing that since 1972 there have been 60 cases of women in the UK who have been killed during "sex games gone wrong".[151] In the majority of those cases, the accused was in fact convicted.

12.84 As a result, the UK Government committed to including a provision to this effect in the Domestic Abuse Act 2021.[152] Section 71 of the 2021 Act provides:

> "**71 Consent to serious harm for sexual gratification not a defence**
>
> (1) This section applies for the purposes of determining whether a person ("D") who inflicts serious harm on another person ("V") is guilty of a relevant offence.
>
> (2) It is not a defence that V consented to the infliction of the serious harm for the purposes of obtaining sexual gratification (but see subsection (4)).
>
> (3) In this section—
>
> "relevant offence" means an offence under section 18, 20 or 47 of the Offences Against the Person Act 1861 ("the 1861 Act");
>
> "serious harm" means—
>
> (a) grievous bodily harm, within the meaning of section 18 of the 1861 Act,
>
> (b) wounding, within the meaning of that section, or
>
> (c) actual bodily harm, within the meaning of section 47 of the 1861 Act.
>
> (4) Subsection (2) does not apply in the case of an offence under section 20 or 47 of the 1861 Act where—
>
> (a) the serious harm consists of, or is a result of, the infection of V with a sexually transmitted infection in the course of sexual activity, and

[149] In the media (Joan Smith, "The Rough Sex Defence is Indefensible" *The Guardian* (22 November 2019)) from MPs (in particular, Labour MPs Harriet Harman and Jess Phillips, and Conservative MPs Mark Garnier and Laura Farris) and from support organisations (We Can't Consent To This).

[150] "Grace Millane murder: Man guilty of killing backpacker in New Zealand" *BBC News* (22 November 2019), available at: https://www.bbc.co.uk/news/uk-england-essex-50512163.

[151] "Domestic Abuse Bill: MPs Back Ban on 'Chilling Rough Sex Defence'", *BBC News* (6 July 2020). Available at: https://www.bbc.co.uk/news/uk-53311652; We Can't Consent To This, "What Can be Consented to? Briefing on the Use of 'Rough Sex' Defences to Violence" (2019), available at: https://wecantconsenttothis.uk/.

[152] As noted, the Domestic Abuse Act 2021 applies only to England and Wales.

(b) V consented to the sexual activity in the knowledge or belief that D had the sexually transmitted infection.

(5) For the purposes of this section it does not matter whether the harm was inflicted for the purposes of obtaining sexual gratification for D, V or some other person.

(6) Nothing in this section affects any enactment or rule of law relating to other circumstances in which a person's consent to the infliction of serious harm may, or may not, be a defence to a relevant offence."

12.85 During the passage of the Domestic Abuse Bill through Parliament, the explanatory statement for the clause leading to section 71 was as follows:

> "This clause restates in statute law the general proposition (established in the case of R. v. Brown [1993] 2 WLR 556) that a person may not consent to the infliction of serious harm and, by extension, is unable to consent to their own death ... [The clause] provides that … it is not a defence that another person consented to the infliction of the serious harm for the purposes of obtaining sexual gratification".[153]

12.86 The existing common law is thereby placed on a statutory footing.

12.87 It is unclear what impact this may have in practice. At present in England and Wales it is not a defence to a charge of murder (or even a defence to actual or grievous bodily harm) to claim that the victim consented (see *R v Brown*).[154] However, it is open to the accused when charged with murder to show that they did not have the necessary *mens rea* (intent to kill or to cause grievous bodily harm). Some argue that the proposed statutory provision does not alter that position. Others point out that the statutory provision would not prevent an accused giving or leading evidence that the victim did not consent to serious harm, but did consent to a lower level of harm which accidentally led to more serious harm.

12.88 We therefore ask:

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?

[153] See HL Bill 124 Explanatory Notes, paras 287, 289 which can be accessed at: https://publications.parliament.uk/pa/bills/lbill/58-01/124/5801124en.pdf .

[154] [1993] 2 WLR 556. In Scotland, it was held in *HM Advocate v Rutherford* 1947 JC 1 that consent cannot be a defence to murder.

Chapter 13 Overview

13.1 In Chapter 1, Introduction, at paragraph 1.35, we noted that reform of the law relating to the mental element in homicide would require legislation to implement any changes recommended. We pointed out that there may be a number of potential advantages and disadvantages arising from legislating to reform the law in this area. The possible consequences of statutory reform have been mentioned in several parts of the Discussion Paper. For example, some potential advantages are referred to in paragraph 1.36, and in Chapter 5, Culpable homicide, at paragraph 5.17 and following paragraphs. Some potential disadvantages are referred to in paragraph 1.37, and in Chapters 2, 3, 4 and 5.

13.2 As a final overview, based on all the preceding chapters, we would welcome responses to the following questions:

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

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?

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?

Chapter 14 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)

2. If so, which aspects, and why?

(Paragraph 1.33)

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)

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)

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)

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)

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 life[1]
- 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 taken[5]
- exposing someone to the risk of serious harm[6]

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[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.

- 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)

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

(Paragraph 4.56)

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)

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)

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)

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)

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)

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

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)

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)

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)

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

(Paragraph 8.14)

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

(Paragraph 8.14)

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)

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)

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

(Paragraph 8.58)

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)

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)

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

(Paragraph 9.50)

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)

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

(Paragraph 9.98)

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)

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)

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)

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)

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)

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)

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)

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)

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)

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

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[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.

(Paragraph 11.37)

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)

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

(Paragraph 11.42)

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

(Paragraph 11.46)

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

(Paragraph 11.46)

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)

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)

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)

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)

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)

APPENDIX: RELEVANT PROVISIONS AND COMMENTARY FROM THE DRAFT CRIMINAL CODE FOR SCOTLAND

Contents

Section 7 - Aggravated offences

(1) An offence may be aggravated by the intent or motivation with which it is committed, by the manner or circumstances in which it is committed, by the serious nature of the effects produced, by the special vulnerability of the victim; or by the abuse of a special relationship between the perpetrator and the victim, and may be charged and tried accordingly.

(2) An offence under this Act may, in particular, be aggravated–

(a) if committed with intent to commit another offence;

(b) if motivated by hatred or contempt for, or malice or ill-will towards, a group of persons defined by reference to race, colour, religion, gender, sexual orientation, nationality, citizenship or ethnic or national origins;

(c) if accompanied by expressions of abuse or ill-will based on the victim's membership or supposed membership of any such group;

(d) if committed in circumstances involving an invasion of the victim's home or privacy;

(e) if committed against an officer of the law carrying out official duties by a person who knows, or could reasonably be expected to know, those circumstances;

(f) if committed against a child under the age of 16 years;

(g) if committed by a person who has, to that person's knowledge, a position of trust or authority in relation to the victim; or

(h) if it results in danger to life or serious personal injury or impairment.

(3) An offence is not aggravated by a factor if that factor is already specified as an ingredient of the offence.

(4) For the purposes of this section a group of persons is defined by reference to religion if it is defined by reference to their—

(a) religious belief or lack of it;

(b) membership of, or adherence to, a church or religious organisation;

(c) support for the culture and traditions of a church or religious organisation; or

(d) participation in activities associated with such a culture or such traditions.

COMMENTARY

This section makes it clear that an offence can be aggravated by intent, motivation, circumstances, relationship or effect. Such an aggravated offence may attract a more severe

penalty.[1] Certain aggravated offences may also have other consequences. For example assault with intent to rape and abduction with intent to rape count as sexual offences for the purposes of the Sex Offenders Act 1997 and conviction may thus result in the accused's particulars being entered on the register of sex offenders. The list in section 7(2) is for purposes of illustration and is not intended to be exhaustive.

The current law recognises various nominate aggravated offences such as assault with intent to ravish, assault with intent to rob, racially aggravated harassment,[2] hamesucken[3] and deforcement.[4] More generally, an assault or other offence might be libelled as aggravated by a particular intent or circumstances.[5] The general rule in section 7 replaces the aggravated common law offences and section 74 of the Criminal Justice (Scotland) Act 2003 which deals with offences aggravated by religious prejudice. That section can accordingly be repealed.[6]

Section 8 - General rules on state of mind required

(1) The general rule is that a person is criminally liable–

(a) for an act, only if the person intended to perform that act;

(b) for causing a result, only if the person intended to cause that result.

(2) The enactment defining an offence may, however, provide in relation to the offence or any element of it that recklessness or some other state of mind suffices or that no particular state of mind is required.

(3) Unless otherwise provided, knowledge of any circumstance forming part of the definition of an offence is required for guilt of that offence.

COMMENTARY

As a general rule, crimes comprise at least two elements: (1) some prohibited conduct, and (2) a legally blameworthy state of mind. In other words, it is not sufficient, in order to establish criminal responsibility, that an accused person has engaged in conduct prohibited by the criminal law. It is necessary also to show that that conduct was accompanied by a state of mind which the law regards as being appropriate for the attribution of criminal responsibility. So, for example, while it is an offence to destroy or damage property belonging to another person without that person's consent,[7] it is only an offence where that damage is done

[1] See s.32.
[2] This was introduced by s.33 of the Crime and Disorder Act 1998 and inserted into the Criminal Law (Consolidation) (Scotland) Act 1995 as s.50A.
[3] Hamesucken is constituted by invading a person's home and assaulting him or her there.
[4] This is constituted by assaulting or resisting a messenger-at-arms or other officer of the law in the exercise of his or her duties.
[5] See the Criminal Procedure (Scotland) Act 1995, sch. 3 paras. 7 and 9(3).
[6] See s.113 and sch. 3 of this Act.
[7] See below, s.81 (Criminal damage to property).

"intentionally" or "recklessly". If, in a given situation, property is damaged accidentally,[8] or even negligently,[9] that is not an offence.

This section introduces three concepts used in the Act to describe a person's state of mind for various purposes – namely "intention", "recklessness" and "knowledge". These terms are further defined in the following sections. Section 8 provides that, as a general rule, intention will be required. It also provides, however, that in certain cases recklessness may, by statute, be a sufficient state of mind for criminal responsibility. It also introduces the possibility of offences of strict liability by providing that an enactment defining an offence may provide that "no particular state of mind is required" in order to establish criminal responsibility. Section 8 recognises the legality of existing statutory offences which impose strict liability, and recognises the right of the legislature to create such offences in future.

The imposition of strict liability is controversial, since it involves imposing criminal responsibility on a person who did not intend to cause harm, and was not reckless or even aware that there was any risk of harm in what he or she was doing. It may, indeed, result in imposing liability on those who have in good faith sought to avoid committing an offence. For reasons such as these, the courts have, in general, insisted that that there is a presumption against strict liability,[10] and the onus is on the Crown to show that the statute creating the offence is intended to impose this form of criminal liability.[11]

Strict liability may at first sight appear to be inconsistent with the presumption of innocence.[12] This matter has been discussed on a number of occasions by the European Court of Human rights which takes the view that it is not, in general terms, incompatible with the presumption of innocence set out in article 6(2) of the Convention.[13] However, the imposition of strict liability does represent a departure from the basic principle set out in article 6(2), and as such should be confined "within reasonable limits which take into account the importance of what is at stake".[14] In other words, strict liability is subject to an over-riding rule of proportionality.

Section 8(3) makes it clear that, unless otherwise provided, knowledge of any circumstance forming part of the definition of an offence is required for guilt of that offence. This is one approach to the question of knowledge. Another approach, not generally favoured in modern statutes, is to make liability strict in this respect, subject to the availability of the defence of error. For strong policy reasons, this stricter approach is followed in this Act in relation to knowledge of the age of the victim in certain sexual offences.[15] It should also be noted that in

[8] That is, without fault on anyone's part.
[9] That is, by failure to exercise reasonable care.
[10] *Sweet v Parsley* [1970] AC 132; *Warner v MPC* [1969] 2 AC 256; [1968] 2 WLR 1303; [1968] 2 All ER 356; *Gammon v A-G of Hong Kong* [1985] AC 1; [1984] 3 WLR 437; [1984] 2 All ER 503; *B (a minor) v DPP* [2000] 2 AC 428; [2000] 2 WLR 452; [2000] 1 All ER 833.
[11] *Mitchell v Morrison* 1938 JC 64; 1938 SLT 201; *Duguid v Fraser* 1942 JC 1.
[12] See s.4, above.
[13] *Salabiaku v France* (1991) 13 EHRR 379, para. 27.
[14] *Salabiaku v France* (1991) 13 EHRR 379, para. 28.
[15] See s.73 (Knowledge of age not required).

several offences (such as rape)[16] recklessness as to the existence or non-existence of a circumstance, such as the victim's consent, suffices.

Section 9 - Intention

(1) For the purposes of criminal liability, and without restricting the ordinary meaning of intention–

(a) a person is treated as intending a result of his or her act if, at the time of the act, the person foresees that the result is certain or almost certain to occur;

(b) a person who intends to harm a person and harms another person instead is treated as intending to harm the other person; and

(c) a person who intends to damage property and damages other property instead is treated as intending to damage the other property.

(2) Subject to subsection (1), there is no rule or presumption that a person intends the natural and probable results of that person's acts.

COMMENTARY

This section provides a slightly extended definition of intention for the purposes of criminal liability. It does this by building upon, rather than replacing, the ordinary meaning of the word "intention".

Providing a generally accepted definition of intention has proved to be problematic in other jurisdictions.[17]62 It has also been a fruitful source of academic dispute. Generally speaking, however, the Scottish courts have avoided detailed discussion of this term. Somewhat exceptionally, in *Sayer and Others v H.M. Advocate*[18] Lord Ross adopted the definition of intention offered by Asquith LJ in *Cunliffe v Goodman*.[19] The definition was in the following terms:

> "An 'intention' to my mind connotes a state of affairs which the party 'intending' … does more than merely contemplate, it connotes a state of affairs which, on the contrary, he has a reasonable prospect of being able to bring about, by his own act of volition."

As a definition of intention this is not very satisfactory, partly because intention is a state of mind rather than a state of affairs. It has not been adopted by other judges in the Scottish courts.

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[16] S.61.
[17] See, for example, the difficulties encountered by the English Courts in *R v Hancock and Shankland* [1986] AC 455; *R v Moloney* [1985] AC 905; [1985] 2 WLR 648; [1985] 1 All ER 1025; and *R v Nedrick* [1986] 3 All ER. 63 1981 JC 98; 1981 SCCR 312; 1982 SLT 220.
[18] 1981 JC 98; 1981 SCCR 312; 1982 SLT 220.
[19] [1950] 2 KB 237.

The opening words of subsection (1) make it clear that intention should, in general, be given its ordinary meaning.[20] Attempts to define the ordinary word "intention" by reference to other ordinary words such as "aim", "purpose", "foresight coupled with desire", or "wanting" or "meaning" to do something, generally give rise to more difficulties than they resolve.

Subsection (1)(a) does, however, provide what might be described as an extended definition of intention. It is based on the consideration that there may be cases where it is entirely just to describe the consequences which an accused has brought about as intended, without those being the accused's aim or purpose in acting. Section 9(1)(a) therefore extends the definition of intention to the case where the accused foresees that his or her conduct is certain or almost certain to give rise to a particular result and nevertheless pursues the course of conduct which leads to that result.

For example, a man attempting to escape pursuit may deliberately drive a car through a fence. He might argue that damaging the fence was not his intention. His intention was to escape and the fence was just in the way. He would have preferred it not to be there. The effect of subsection (1)(a) is that this argument will not work. He is treated as intending to damage the fence.

It is important to note that section 9(1)(a) only applies where the accused foresaw that the result was "certain or almost certain to occur". Two points arise here.

(i) The first is that the Crown must show that *the actor* was aware of the likely consequences of his or her conduct. It would not be sufficient, in order to prove intention, for the Crown to show that any reasonable person would have realised that this was the case.

(ii) The second is that a high degree of probability is required before this form of intention can be attributed to the accused. It is not enough, for example, for the Crown to show that the accused knew that a particular result was "likely" or "highly likely". Consider, in this regard, the circumstances of the English case of *Hyam v DPP*.[21] In that case the accused, wishing to frighten another woman into ending her association with the accused's former boyfriend, put petrol and paper through her rival's letterbox, setting fire to the house. In the ensuing conflagration two children, asleep in an upstairs bedroom, were killed. The accused was unaware of the presence of the children. Notwithstanding the highly dangerous nature of A's actions, it cannot be said that A "intended" the deaths of the children. This was not something that she wished to occur, and it cannot be said that death was "certain or almost certain to occur".

Subsections (1)(b) and (c) apply the doctrine of transferred intent to offences against the person and property generally. The separate treatment of the two categories of offence makes it clear that the doctrine does not apply between different categories of crime. The doctrine

[20] Cf the views of the House of Lords in the English case of *R v Hancock and Shankland* [1986] AC 455; [1986] 2 WLR 357 and those of the Court of Appeal in *Nedrick* [1986] 3 All ER 1.
[21] [1975] AC 55.

does not, therefore, apply where, for example, A intends to cause harm to another person, but in fact causes damage to property.

The common law adopts a rather inconsistent approach to the question of transferred intent. It recognises the doctrine in the context of murder[22] and assault.[23] The doctrine may apply also to offences of criminal damage, but in *Byrne v H.M. Advocate*[24] the High Court held that it did not apply to the crime of wilful fire-raising.

Subsection (2) makes it clear that there is no general rule or presumption that a person intends the natural and probable consequences of his or her acts.[25]

Section 10 - Recklessness

For the purposes of criminal liability –

(a) something is caused recklessly if the person causing the result is, or ought to be, aware of an obvious and serious risk that acting will bring about the result but nonetheless acts where no reasonable person would do so;

(b) a person is reckless as to a circumstance, or as to a possible result of an act, if the person is, or ought to be, aware of an obvious and serious risk that the circumstance exists, or that the result will follow, but nonetheless acts where no reasonable person would do so;

(c) a person acts recklessly if the person is, or ought to be, aware of an obvious and serious risk of dangers or of possible harmful results in so acting but nonetheless acts where no reasonable person would do so.

COMMENTARY

Recklessness is accepted as a sufficient state of mind for a number of offences under this Act. As section 10 recognises, a person may be reckless with regard to conduct, the consequences or possible consequences of conduct, and surrounding circumstances. Thus a person might discharge a gun recklessly, in the sense that the action creates an obvious and serious risk of injury to others or damage to property, without actually causing any such injury or damage;[26] a person might, by reckless conduct injure others or damage property;[27] and a person might have sexual intercourse with another person without that person's consent, being reckless as to whether there is consent or not.

Recklessness connotes risk-taking, and in this sense may take two forms. As a concept it embraces the deliberate risk-taker, the person who knows that his or her conduct presents

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[22] See Hume, 1, 22-23.
[23] See *Roberts v Hamilton* 1989 JC 91; 1989 SCCR 240; 1989 SLT 399 and *Connor v Jessop* 1988 SCCR 624.
[24] 2000 SCCR 77.
[25] See the Commentary to s.5(5).
[26] Cf *David Smith and William McNeil* (1842) 1 Broun 240; *Normand v Robinson* 1994 SLT 558; 1993 SCR 1119 and *Cameron v Maguire* 1999 JC 63; 1999 SLT 883; 1999 SCCR 44.
[27] Cf *RHW v H.M. Advocate* 1982 SLT 420; 1982 SCCR 152.

certain risks, or is aware that certain circumstances may be present. But it also embraces the person who is not aware of the risks, but who, judged by certain objective standards, ought to be aware. For that reason, section 10 refers, throughout, not only to the person who is aware of the risks, but also to the person who ought to be aware of the risks.

There is a danger, however, that punishing those who fail to appreciate risks places the threshold of criminal liability too low. It comes close to holding persons criminally responsible for negligent conduct. For that reason, section 10 refers to a failure to appreciate "an obvious and serious risk". This is intended to demonstrate that a person is not reckless merely because of a failure to meet the standard of care that can be expected of ordinary reasonable people. The requirement in section 10 that the accused fail to appreciate "an obvious and serious risk", reflects the common law.[28]

The precise effect of applying the concept of recklessness in relation to any offence depends on the wording of the provision creating that offence. Often the wording will specify the particular results or circumstances as to which the person must be reckless. Sometimes, however, the wording may refer to doing an act "recklessly" without more.[29] Paragraph (c) is intended to provide a default rule for interpreting such references. A statute creating an offence involving recklessness could provide its own definition of recklessness.[30] In the absence of any such special meaning a reference to acting recklessly will be construed under paragraph (c) as including an implied reference to recklessness as to the dangers or possible harmful results of acting in the specified way. This is broadly in line with the existing law. In relation to reckless driving, for example, the High Court has said that driving "recklessly" means "driving which demonstrates a gross degree of carelessness in the face of dangers".[31] This, like paragraph (c), includes objective recklessness. The code makes it clear that a person is reckless as to the dangers or possible harmful results of acting if the person is, or ought to be, aware of an obvious and serious risk that those dangers exist or that those results will follow but nonetheless acts where no reasonable person would do so. It tries to introduce a measure of consistency in the use of the concept of recklessness.

Section 11 - Knowledge

For the purposes of criminal liability, and without restricting the ordinary meaning of knowledge, a person is treated as knowing of a circumstance if the circumstance exists and– (a) the person would have known of it but for a wilful and unreasonable failure to allow that knowledge to be acquired; or (b) the person thinks that the circumstance almost certainly exists but nonetheless proceeds where no reasonable person would do so.

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[28] For examples of the common law approach see *Cameron v Maguire*, above; *Carr v H.M. Advocate* 1994 JC 213; 1994 SCCR 521; *H.M. Advocate v Harris* 1993 JC 150; 1993 SLT 963; *Kimmins v Normand* 1993 SLT 1260; 1993 SCCR 476, *Normand v Robinson*, above.

[29] There is an example of this in s.51 (Child abuse) of this Act.

[30] S.2(2) of this Act makes it clear that another statute could provide its own definition of recklessness for its purposes if that were thought desirable. It is to be hoped, however, that future statutes will use the default concept in s.10. This would lead to more coherence in the law.

[31] *Allan v Patterson* 1980 JC 57; 1980 SLT 77.

COMMENTARY

As with "intention" in section 9, no attempt is made to provide a general definition of "knowledge". However, section 11 provides an expanded explanation of the term, and extends it to cases where it would, in any event, be difficult to prove "actual" knowledge on the part of the accused.

Paragraph (a) is akin to the notion of "wilful blindness" which has been accepted as a sufficient state of mind with regard to surrounding circumstances where the primary requirement is knowledge. Paragraph (b) deals with the problem that the distinction between knowledge and virtual certainty can be very fine. Very few things can be known with absolute certainty. This could be used by accused persons in a rather pedantic way. For example, an accused may be asked if he knew there were children on the other side of a wall. He may admit that he heard children's voices. When pressed, he may say that while he thought there were almost certainly children there he did not know this for certain because the voices could have come from a radio or tape recorder. Section 11(b) prevents pedantic quibbles of this type from being put forward as successful defences in any case where the accused has proceeded to act, despite thinking that the relevant circumstance almost certainly exists, where no reasonable person would have done so. This type of situation is not covered by the wilful blindness provision in paragraph (a) because there is no wilful and unreasonable failure to allow the knowledge to be acquired.

The concept of "wilful blindness" is recognised by the common law. For instance, in relation to the crime of reset,[32] the general rule is that it must be proved that the accused knew that the goods were stolen. In the case of *Latta v Herron*[33] it was accepted that "wilful blindness" as to the provenance of various items of stolen property was sufficient to sustain a charge of reset.

Section 12 - Culpably self-induced state of mind

(1) For the purposes of criminal liability, a person cannot found on a temporary state of mind which is culpably self-induced, and accordingly–

(a) where such a state of mind precludes the intention or other mental element required for an offence, the person is to be regarded as having that intention or mental element; and

(b) where such a state of mind gives rise to the availability of a defence or exception, that defence or exception is to be regarded as not being available.

(2) For the purposes of this section, a temporary state of mind is culpably self-induced by a person if it was caused by–

(a) a voluntary taking (by swallowing, injecting, inhaling or any other means) by that person of alcohol or any other drug or substance; or

[32] That is, receiving or retaining possession of goods which have been stolen by someone else- see s.89.
[33] (1967) SCCR Supp. 18.

(b) a voluntary failure by that person to take any medication or precautionary measures, when the person knew, or ought to have known, that the taking or failure to take was likely to lead to a loss of self-control.

(3) Subsection (2) does not apply to anything done in good faith in compliance with the directions of a registered medical or dental practitioner.

(4) The fact that an offence was committed in the circumstances mentioned in this section is not an aggravation of the offence but may, if there is a serious disproportion between the degree of culpability and the seriousness of the offence, be taken into account in mitigation of sentence.

(5) This section does not apply to the offences of presence with intent to commit an offence or possession of tools with intent to commit an offence.

COMMENTARY

This section deals with the problem of the person who commits an offence while his or her mental condition is impaired through intoxication brought about by the voluntary consumption of intoxicants, or by the voluntary failure to avoid a condition of intoxication.

While voluntary intoxication is no defence to a criminal charge, involuntary intoxication may be a defence. The latter will occur when the intoxication is not self-induced (that is, the accused is unaware that he or she is consuming the intoxicant), and produces a total alienation of reason amounting to a complete loss of self-control in relation to the offence charged.

Under the common law, voluntary intoxication is no defence to a criminal charge.[34] The doctrinal basis of this rule is unclear, and it is substantially based on policy considerations: those who commit offences when drunk present a significant social danger, and are deserving of punishment for the harm which they cause notwithstanding the fact that at the time they commit the offence they may be unaware of what they are doing, or unable to control their behaviour. In contrast, the courts have accepted that "involuntary intoxication" may be a defence to a criminal charge, in the circumstances described above.[35]

Section 12 follows the policy of the present law but puts the current rules on a clear statutory basis. Subsection (1) sets out the basic rule that culpably self-induced intoxication is not a defence. Subsection (2) explains what is meant by "culpably self-induced". Subsection (3) contains an exception for anything done in good faith in compliance with the directions of a registered medical or dental practitioner.[36] Subsection (4) introduces an element of flexibility when it comes to sentencing. The reason for subsection (5) is that the offences there

[34] *Brennan v H.M. Advocate* 1977 JC 38.
[35] *Ross v H. M. Advocate* 1991 JC 210; 1991 SCCR 823; 1991 SLT 564; *Cardle v Mulrainey* 1992 SCCR 658; 1992 SLT 1152; *Sorley v H.M. Advocate* 1992 JC 102; 1992 SCCR 396; 1992 SLT 867; and *Ebsworth v H.M. Advocate* 1992 SCCR 671; 1992 SLT 1161.
[36] Here and elsewhere in the Act "registered medical practitioner" means a fully registered person within the meaning of the Medical Act 1983. See the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) sch. 2.

mentioned depend almost entirely on intent and, if the person was to be regarded under section 12(1)(a) as having the intention necessary to commit the offences, their scope would be unacceptably wide.

Section 23 - Self defence

(1) A person is not guilty of an offence against an aggressor, or any property of the aggressor, if the person acts in self defence.

(2) A person acts in self defence only if the acts in question are immediately necessary and reasonable–

(a) to defend that person or another person against unlawful force or unlawful personal harm from an aggressor;

(b) to prevent or end the unlawful detention of that person or another person by an aggressor;

(c) to protect property (whether belonging to that person or another person) from being unlawfully taken, damaged or destroyed by an aggressor; or

(d) to prevent or end an unlawful intrusion or presence by an aggressor on property of which that person, or a person under whose authority that person acts, is lawfully in possession.

(3) For the purposes of this section–

(a) any acts likely to kill a person are not to be treated as reasonable except where they are immediately necessary for the purpose of saving the life of, or protecting from serious injury, the person doing the acts or some other person;

(b) anything justified by the defences of lawful authority, self defence, or necessity is not unlawful; and

(c) a person's presence on property is to be treated as lawful, notwithstanding the fact that that person does not have a legal title to occupy as owner, tenant or otherwise, if that person's occupancy is at the relevant time protected by law.

COMMENTARY

This section reflects the policy that accused persons are entitled to an acquittal where they use reasonable force to repel unlawful violence or certain other types of unlawful conduct by others.

Subsection (1) contains the general rule that a person is not guilty of an offence against the aggressor, or any property of the aggressor, if the person acts in self defence. The most usual application of the defence is in relation to self defence against assault but it also applies to

other situations. A person who is unlawfully locked up by an assailant in the assailant's shed, for example, is entitled to break down the door to escape and would not be committing the offence of criminal damage to property.[37]

The fact that the section refers to "an aggressor" does not mean that there is no available defence where the threat to a person comes from a non-aggressive act or from another source. The defence of necessity provided by section 24 would often be available in such cases. For example, if a climber has to cut a rope and cause the death of a fellow climber in order to prevent himself from being dragged along with the other climber to a certain death that would not be self-defence against an aggressor but may be justified by the necessity defence. Similarly, if a person is locked up in a shed belonging to someone other than the aggressor the breaking of the door in order to escape may be justified by the defence of necessity.

Subsection (2) provides that the conduct of the accused must be immediately necessary and reasonable and must be for one of the purposes set out in this subsection. The only one which requires explanation is paragraph (d). This covers self help which is immediately necessary and reasonable to prevent or end an unlawful intrusion on property but is subject to, for example, the laws that are designed to protect overstaying tenants or spouses against eviction without the use of the appropriate legal procedures. See subsection (3)(c).

Subsection (3)(a) makes it clear that where deadly force is used, the accused must have been acting to repel a threat to his or her own life, or that of a third party. This is in line with Article 2 of the European Convention on Human Rights. A great deal of media attention has focussed recently on the meaning of reasonable force where the accused uses violence against a housebreaker. The English case of Tony Martin serves to illustrate this. The Scottish courts have tended to hold that force may be classed as reasonable so long as it does not, in the circumstances, amount to a cruel excess of violence.[38]

This section largely reflects the common law position, but makes it clear that reasonable force can also be used in defence of property. Subsection (3) (on acts likely to kill) is somewhat narrower than the common law, which allows a woman to kill to prevent rape but does not permit a man to kill to prevent non-consensual sodomy.[39]

Section 24 - Necessity

(1) A person is not guilty of an offence if the acts in question are justified by necessity.

(2) A person's acts are justified by necessity if, in circumstances not amounting to self defence or coercion–

[37] This is defined in s 81.
[38] See *Fenning v H.M. Advocate* 1985 JC 76; 1985 SCCR 219; 1985 SLT 540.
[39] *McCluskey v H.M. Advocate* 1959 JC 39, followed in *Elliot v H.M. Advocate* 1987 JC 47; 1987 SCCR 278.

(a) they are immediately necessary and reasonable in order to prevent a greater harm; and

(b) the commission of what would otherwise be an offence could reasonably be regarded as justifiable in the circumstances.

(3) This section justifies the taking of human life only if that is done to save human life.

COMMENTARY

Necessity applies where circumstances other than threats by a third party put the accused in the situation of having to choose between, on the one hand, obeying the law and causing serious ill consequences and, on the other hand, breaking the law. Where the latter course of action is the lesser of two evils, the accused may have a complete defence. There is an obvious public interest in keeping the defence within reasonable bounds. The situation must be such that any reasonable person would believe the commission of the offence to be justified.

Where life has been taken, necessity can only form a defence if the action was taken to save life.

In respect of the common law, the defences of necessity and coercion were conflated by the High Court, in the case of *Moss v Howdle*.[40] They are, however, better treated as two distinct defences. The former involves the accused having to make a decision whether or not to break the law in order to prevent a greater harm, not necessarily a harm to himself or herself. The accused has, as it were, a free choice. In the latter, the accused is under pressure from threats by a third party who is attempting to deny the accused a free choice. Although the person who is coerced into committing a criminal offence is often deserving of as much sympathy as the person who acts to prevent a greater harm, the policy considerations applying to the two offences are not necessarily the same. There is perhaps a stronger public policy argument for keeping coercion within narrow bounds because of the risk of abuse by criminal coercers.

The roles of necessity and coercion are also different in relation to art and part liability,[41] incitement,[42] conspiracy[43] and self-defence.[44]

As with coercion, it is unclear whether, at common law, necessity is available to a charge of murder or culpable homicide. In the case of *R v Dudley and Stevens*[45] the House of Lords ruled out this possibility for English law. In principle, however, even the taking of life may be justified by necessity. For example, a driver whose brakes have failed may opt to steer the car towards a pavement with only one or two pedestrians, rather than steer towards a large crowd

[40] 1997 JC 123; 1997 SCCR 215; 1997 SLT 782.
[41] See s.17(7)(c).
[42] See s.19(3)(b).
[43] See s.20(3)(b).
[44] See s.23(3)(b).
[45] (1884) 14 QBD 273.

of people. A person may throw a bomb out of a window, averting the deaths of hundreds, but causing the death of someone outside the building.

Section 25 - Involuntary conduct

(1) A person is not guilty of an offence if any act or apparent act forming an essential ingredient of the offence was, without fault on that person's part, beyond that person's physical control.

(2) An act or apparent act beyond a person's physical control may include–

(a) a reflex movement, spasm or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) a bodily movement resulting from the person's body or part of it being merely an instrument in the hands of another;

(d) a bodily movement resulting from the person being subjected to the operation of natural forces;

(e) an act or movement resulting from hypnosis.

(3) Where a person is acquitted because of this section and it is proved on a balance of probabilities that the involuntary conduct was due to a disorder which is likely to continue or recur, the person may, where this is necessary for the protection of others, be treated as if acquitted on the ground of mental disorder.

COMMENTARY

This section contains one of the fundamental principles of criminal responsibility, namely that a person should not be held responsible for conduct forming part of an offence which is beyond his or her control.

The circumstances in which this may occur are various. In *HM Advocate v Ritchie*[46] the accused was charged with the culpable homicide of a pedestrian by reckless driving. His defence that he had become overcome by "toxic exhaustive factors" so that he was no longer conscious and in control of the vehicle at the time of the accident was accepted by the court. In *Simon Fraser*[47] an accused was charged with the murder of his infant son. It appeared that the acts resulting in the child's death were carried out by the accused while in a state of somnambulism. The accused was discharged upon giving an undertaking to the court that he would thereafter sleep alone. The basis of the disposal in that case is obscure, but section

[46] 1926 JC 45; 1926 SLT 308.
[47] (1878) 4 Couper 70.

25(2)(b) makes it clear that the accused would be entitled to an acquittal on the ground that the killing was not within his physical control. In cases such as *Fraser*, however, where the conduct was due to a disorder which is likely to continue or recur, the court may decide that the public need to be protected from such a recurrence, and treat the accused as if he or she had been acquitted on the ground of mental disorder. In such cases, the accused may be dealt with according to the procedures described in section 58 of the Criminal Procedure (Scotland) Act 1995. In short, such a person may be made the subject of a hospital order, or other measures involving compulsory medical care.

It is important to note that section 25 applies only where the lack of control was "without fault" on the part of the accused. So, for example, where an accused person committed a number of driving offences while in a somnambulistic state, the court held that he could be found guilty since he had contributed to his condition by consuming alcohol, knowing (from past experience) that this could provoke his somnambulism.[48]

Persons who unknowingly consume intoxicants and as a result are unable to control their actions are entitled to be acquitted under the existing law.[49] The section makes no change in that respect.

The current law also draws the distinction made in section 25(3) between the involuntary conduct which results from an external factor (such as a blow on the head or a spiked drink) which is not likely to recur, and a medical condition which is likely to lead to similar loss of control in the future.

Section 27 - Mental disorder

(1) A person is not guilty of an offence if the acts in question were done as a result of a mental disorder which rendered the person incapable of conforming to the relevant requirements of the criminal law or of appreciating the true nature or significance of the acts.

(2) An accused cannot be acquitted on the ground of mental disorder unless the requirements of subsection (1) are proved on a balance of probabilities.

COMMENTARY

An accused who was suffering from a mental disorder at the time of the offence may be entitled to an acquittal. "Mental disorder" is defined later.[50]

[48] See *Finegan v Heywood* 2000 JC 444; 2000 SCCR 234; 2000 SLT 905. Cf the treatment of somnambulism by the Supreme Court of Canada in *R v Parkes* [1992] 2 SCR 871. See also s.12 on the question of a culpably self-induced state of mind.
[49] *Ross v H.M. Advocate* 1991 JC 210; 1991 SCCR 823; 1991 SLT 564.
[50] See s.112(d) and the commentary on that provision.

Subsection (1) makes it clear that an accused would be entitled to the defence of mental disorder not only if the disorder rendered him or her incapable of understanding the true nature or significance of his or her acts but also if it rendered him or her incapable of conforming to the relevant requirements of the criminal law.

Subsection (2) provides rules with regard to the proof of this defence. An accused cannot be acquitted unless the requirements of subsection (1) are proved on a balance of probabilities. This reflects the existing law and the policy consideration that it should not be made too easy for people to use a plea of mental disorder in order to escape criminal responsibility. The existing law has, however, been criticised as an unjustifiable exception to the normal rule that the burden of proof is on the prosecution.[51] If it were to be decided that the law should be changed it would be very easy simply to delete subsection (2) and allow the normal rules to apply.

Under the existing law an accused is entitled to an acquittal on the ground that she or he was "insane" at the time of the offence.[52] Section 27 re-formulates the insanity defence by updating the terminology.

The precise formulation of the plea of insanity in the existing law is uncertain, although it is accepted that the accused, in order to benefit from this plea, must prove (on a balance of probabilities) that he or she was suffering from a "total alienation of reason in relation to the act charged as a result of mental illness."[53] Various objections can be raised to this formulation of the plea, most notably that the term "insanity" has no place in modern medical understanding of mental disorder. It also places much greater emphasis on the accused's ability to reason than might be supported by modern understanding of the nature of mental disorder.

The topic of insanity has recently been considered by the Scottish Law Commission in its discussion paper on Insanity and Diminished Responsibility, DP No 122 (2003).[54] The manifest defects in the existing law are, we believe, met by section 27 although, as noted above, there could be debate about subsection (2).

Section 28 - Error

(1) A person who acts under a mistaken but reasonable belief in a state of affairs is not guilty of an offence if there would have been no criminal liability had the facts been as they were believed to be.

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[51] See the Scottish Law Commission's Discussion Paper on *Insanity and Diminished Responsibility*, Scot Law Com DP No 122 (2003) Part 5.
[52] Hume, i, 37; *Brennan v H.M. Advocate* 1977 JC 38; 1977 SLT 151.
[53] *Brennan v H.M. Advocate* 1977 JC 38; 1977 SLT 151.
[54] See Chalmers, "Reforming the Pleas of Insanity and Diminished Responsibility: Some Aspects of the Scottish Law Commission's Discussion Paper" (2003) 8 Scottish Law and Practice Quarterly, 79.

(2) A person who acts under a mistaken belief induced by reliance on official advice as to the lawfulness of the act is not guilty of an offence if–

(a) it was reasonable in the circumstances for the person to rely on the official advice; and

(b) there would have been no criminal liability had the official advice been correct.

(3) In this section–

(a) an error as to a state of affairs includes an error as to the age of a person, a quality or characteristic possessed by a person, the presence of consent, the existence of a relationship, and the ownership of property but does not include an error as to the requirements of the criminal law; and

(b) "official advice" means advice from a national or local government official charged with some responsibility for the area of activity in question.

COMMENTARY

The accused who acts under a mistaken belief which is reasonable in the circumstances may have the defence of error. The error must be such that there would have been no offence had the state of affairs been such as the accused supposed it to be. For example, the accused who takes someone else's property would have a defence if this was done in the reasonable belief that the property was in fact his or her own. The accused has made an error as to the ownership of the property and, in the words of the section, the error is such that "there would have been no criminal liability had the facts been as they were believed to be". In contrast, if the accused takes someone's else's property, believing that the property belongs to A, when in fact it belongs to B, there is no defence of error available under this section since there would still have been an offence if the property had belonged to B.

An error as to the applicability of the criminal law is not a defence. An example of this is the case of *Clark v Syme*[55] in which the accused shot a neighbour's sheep in the belief that he was under a legal entitlement to do so. He was found guilty of malicious mischief.[56]

Subsection (2) provides for a defence where the error was induced by reliance on official advice. The case of *Roberts v Local Authority for Inverness*[57] may be an example of this. Here the accused had applied for a licence to move cattle from one local authority area to another but was told by the responsible official that no licence was necessary. The responsible official was himself in good faith as he thought, wrongly, that the amalgamation of two local authority areas had affected the position. The accused was convicted at first instance of moving cattle without a licence but his conviction was quashed on appeal. The statute in that case provided

[55] 1957 JC 1.
[56] See now s.81 (Criminal damage to property) of this Act.
[57] (1889) 2 White 385.

a defence of lawful authority or excuse, and the court held that the accused had a lawful excuse.

Subsection (3) provides, for the avoidance of doubt, that an error as to the ownership of property, as to a person's age or as to the existence or non-existence of a relationship counts as an error as to a state of affairs. Ownership or the existence of a relationship might possibly have been regarded as matters of law.

Ignorance of the law is no defence at common law and errors of fact generally can exculpate only if both honest and reasonable. The exception to this is the crime of rape. Section 28 applies to all crimes, including rape. See the commentary to section 61.

Section 29 - Coercion

(1) A person is not guilty of an offence if the acts constituting the offence were done only under the immediate effect of coercion.

(2) Coercion, for the purposes of this section, requires–

(a) a threat by the coercing person to cause immediate fatal or serious injury to the coerced person or another person if the acts constituting the offence are not done;

(b) that the coerced person had not intentionally gone into a situation where it was foreseeable that such a threat might be made;

(c) that the threat was not one which the person could reasonably be expected otherwise to have avoided; and

(d) that the threat was one which would have induced a person of normal fortitude having the characteristics of the coerced person to commit the offence.

(3) This section applies to the taking of human life only if that is done in order to save human life.

COMMENTARY

The rationale for allowing the defence of coercion is that threats of violence addressed to an accused or a third party (perhaps towards a family member) put the accused in the invidious position of having either to obey the law and suffer the consequences, or break the law. Justice requires that an individual ought to have a fair opportunity to conform to the law, and the behaviour of the coercer prevents this. On the other hand there is an obvious public interest in not making the defence of coercion too readily available.

Subsection (1) confers the defence of coercion, but subject to strict limitations. The most general is that what was done must have been done only under the immediate effect of the coercion.

Subsection (2) sets out further requirements. The first, covered in paragraph (a), is that there must have been a threat of immediate serious injury to, or the death of, the coerced person or another person. If the threats are not immediate the threatened person is expected to seek recourse to the police, where appropriate, rather than to succumb to the threats.[58] Paragraph (b) requires that the accused must not have intentionally gone into the situation where it was foreseeable that such a threat would be made. This covers the situation in which the accused has been in some sense responsible for being in the situation e.g.- the accused who joins a terrorist organisation and then later complains that other members of the organisation coerced him or her into breaking the law. This is also the position in other jurisdictions.[59] Subsection (2)(c) requires that the accused must be faced with no other alternatives but breaking the law or suffering the violence offered by the coercer. Subsection (2)(d) requires that the threats must be such as to have had a similar impact on a reasonable person. People can be expected to show a reasonable degree of fortitude.

Subsection (3) addresses the issue of whether coercion can be a defence to murder or culpable homicide. The Act does allow coercion to be a defence when life has been taken, but only if this had been done to save life.

Coercion is a recognised defence under the common law, but its limits have not been clearly established. The issue of coercion in cases of murder or culpable homicide has not been authoritatively decided. Its applicability to the case of murder was touched on briefly by the court in *Thomson v H. M. Advocate*[60] but the court expressly declined to express a view on that point. In *Collins v H.M. Advocate*[61] Lord Allanbridge, in his charge to the jury, stated that the defence of coercion was not available in a case of murder. That statement must, however, be regarded as entirely obiter since neither of the accused in Collins had relied upon the defence of coercion. The House of Lords has held that in English law coercion is not available as a defence to a charge of murder[62] or attempted murder.[63] In principle, however, there is no reason for not allowing coercion to provide a defence, where the taking of life by the accused was the lesser of two evils in the circumstances.

Section 37 - Murder

(1) A person who causes the death of another person with the intention of causing such a death, or with callous recklessness as to whether such a death is caused, is guilty of the offence of murder.

(2) Notwithstanding anything in section 9 (Intention), a registered medical practitioner, or a person acting under the direction of such a practitioner, who, acting with the consent of a patient or with lawful authority, does anything reasonably and in good faith with the primary purpose of relieving the patient's pain or discomfort is not regarded as intending to cause the

[58] See *Thomson v H.M. Advocate* 1983 JC 69; 1983 SCCR 368.
[59] See the cases of *R v Fitzpatrick* [1977] NI 20 and *R v Sharp* [1987] 1 QB 853.
[60] 1983 JC 69; 1983 SCCR 368.
[61] 1993 SLT 101; 1991 SCCR 898.
[62] *R v Howe* [1987] AC 417.
[63] *Gotts* [1992] 2 AC 412.

death of the patient merely because the practitioner or other person foresees that the death is certain or almost certain to occur earlier than it otherwise would.

COMMENTARY

The definition in subsection (1) treats the mental element in the crime as its defining characteristic.[64] Murder embraces not only intentional killing, but also reckless killing. As the subsection makes clear, however, murder requires a particular kind of recklessness. It is not sufficient that the accused is shown to have acted recklessly with regard to death. The Crown must show that the accused acted with "callous" recklessness, suggesting extreme disregard for human life.

The offence is confined to the killing of another person, so that it continues to exclude the possibility of a charge of murder in cases where the death in question is that of an unborn child,[65] and in cases of "self murder" or suicide.[66]

Subsection (2) makes provision for an exception to the general rule set out in subsection 9(1)(a) (intention). It addresses the situation where a doctor treating a patient may, in good faith, act so as to relieve the patient's suffering, foreseeing that the treatment may hasten death. Given the extended definition of intention provided in section 9(1)(a) it would be difficult to avoid the conclusion that the doctor intended death. A similar conclusion has already been reached by the Court of Appeal in England.[67] The purpose of subsection (2) is to ensure that, subject to the safeguards set out in the provision, doctors are not put at risk of prosecution for treatments having a "double effect" - that is treatments which have the primary effect of relieving pain or discomfort but which also have the effect of hastening death.

Until relatively recently the accepted common law definition of murder was that contained in Macdonald's Criminal Law:[68]

"Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."

In *Drury v H.M. Advocate*[69] the then Lord Justice-General, Lord Rodger, expressed the view that murder required a "wicked" intention to kill. This view is unsupported by any of the earlier authorities on the definition of murder, and does not appear to have been referred to by the

[64] This may be contrasted with the provisions of some United States codes which define murder by reference to other criteria, such as the characteristics of the victim or the surrounding circumstances of the killing. See, for example Code of Alabama, s.13A-6-2 (a) (3) (killing while committing first degree arson, burglary, kidnapping, rape or robbery); Indiana Code, 35-42-1-1, s.1(3) (killing while dealing in certain types of drugs).
[65] If, however, a child born alive dies as a result of ante-natal injuries inflicted upon it, or upon the mother, this could be murder. Cf *McCluskey v H.M. Advocate* 1989 SLT 175.
[66] "Self-murder" may at one time have been regarded as a crime: Mackenzie, I, title XIII.
[67] *Re A (Children) (conjoined twins: surgical separation)* [2000] 2 WLR 480.
[68] At p. 89.
[69] 2001 SCCR 583; 2001 SLT 1013.

High Court in the subsequent case of *Galbraith v H.M. Advocate (No. 2)*.[70] The distinction drawn between an "ordinary" intention to kill and a "wicked" intention to kill may, in any event, be rather limited since in *Drury* the Lord Justice-General qualifies his statement by a reference to Hume which suggests that all cases of intention to kill are "wicked" unless the killing is justified or excused.[71] Section 37 follows the interpretation of the law as it was before *Drury*, but uses "callous" rather than "wicked" to describe the special type of recklessness required. "Callous" describes well the type of recklessness required. It must be more than ordinary recklessness. It must involve a callous acceptance of the risk of death created by the acts or a callous indifference to the possible fatal consequences of the acts. The terrorist who plants a bomb and gives the police a short advance warning may argue that he did not intend to kill anyone but, if somebody is killed, could be convicted of murder on the ground that he was callously reckless as to whether death was caused. Callous has the advantage of not carrying with it some of the more artificial baggage which accompanies the term "wickedly reckless" such as the question whether there can be wicked recklessness in the absence of an intention to do some bodily harm.[72]

Section 38 - Culpable homicide

(1) A person who causes the death of another person–

(a) recklessly;

(b) by an assault; or

(c) by another unlawful act likely to cause significant physical harm, provided that the person intended the act to cause such harm or was reckless as to whether it would cause such harm, is guilty of the offence of culpable homicide.

(2) Neither an intention to cause death nor recklessness as to whether death is caused is necessary for guilt under subsection (1)(b) or (c).

(3) A person who, but for this subsection, would be guilty of murder is not guilty of murder, but is guilty of culpable homicide, if–

(a) the person, at the time of the killing, had lost self-control as a result of provocation; and

(b) an ordinary person, thus provoked, would have been likely to react in the same way.

(4) For the purposes of subsection (3)–

[70] 2002 JC 1; 2001 SCCR 551; 2001 SLT 953.
[71] 2001 SCCR 583; 2001 SLT 1013, para. 11.
[72] On this question, see Gane and Stoddart, pp. 402-403.

(a) the provocation may be by acts or words or both (whether by the deceased or another person); and

(b) the ordinary person is assumed–

(i) to have any personal characteristics of the accused that affect the provocative quality of the acts or words giving rise to the loss of self-control; and

(ii) to have a normal ability to exercise a reasonable measure of self-control.

(5) A person who, but for this subsection, would be guilty of murder is not guilty of murder, but is guilty of culpable homicide, if at the time of the act leading to the death the person, although not entitled to a complete acquittal under section 27 (Mental disorder), was suffering from an abnormality of mind of such a nature as to diminish substantially the degree of responsibility.

(6) A person cannot take advantage of subsection (5) unless the abnormality of mind giving rise to the diminished responsibility is admitted by the prosecution or proved on a balance of probabilities.

COMMENTARY

Culpable homicide can be divided into two broad categories. The first embraces (a) all unlawful deaths which result from assault,[73] or other acts which, although not involving an assault, involve conduct which might reasonably involve personal injury (such as fireraising)[74] and (b) reckless acts which are not in themselves unlawful, but which cause death (for example, recklessly installing a gas supply).[75] The second comprises cases of unlawful killing which would be murder, but for the presence of the mitigating factors of provocation or diminished responsibility.

Subsections (1) and (2) deal with the first category of culpable homicide - the category which is self-standing rather than the result of mitigation of murder. The common law concept of reckless culpable homicide is retained in subsection (1)(a), although the Act is more precise than the common law about what is meant by recklessness.[76] Although the common law assault rule has been criticised as being harsh, it is retained in subsection (1)(b). The justification is that, as assault is an intentional invasion of another's bodily integrity, anyone who commits assault can reasonably be held liable for the consequences, however unexpectedly severe they may be. The rule in subsection (1)(c) on deaths caused by other unlawful acts likely to cause significant physical harm is more qualified, because of the

[73] *Bird v H.M. Advocate* 1952 JC 23; *Burns v H.M. Advocate* 1998 SCCR 281.
[74] *Mathieson v H.M. Advocate* 1981 SCCR 196; *Sutherland v H.M. Advocate* 1994 JC 62; 1994 SCCR 80; 1994 SLT 634.
[75] *Paton v H.M. Advocate* 1935 JC 19. Cf *Angus McPherson and John Stewart* (1861) 4 Irvine 85.
[76] See s.10.

potential range of such acts. The accused must have intended the act to cause the harm or have been reckless as to whether it would cause the harm.

Subsections (3) and (4) allow for a partial defence of provocation, the effect of which is to reduce what would otherwise be murder to culpable homicide. The law recognises that a person who has lost self-control due to another person's behaviour is less blameworthy than the person who acts similarly, but in cold blood. Subsection (3) makes it clear that there is both a subjective and an objective dimension to the plea of provocation. The subjective aspect (set out in paragraph (a)) requires that at the time of the killing the accused had lost self-control as a result of the provocation. The objective aspect in paragraph (b) requires that "an ordinary person" faced with such provocation, would have been liable to react in the same way. Subsection (4) makes it clear that the provocation may be by acts or words or both. It also makes clear what qualities the ordinary person is assumed to have for this purpose.

Subsection (3) marks two significant developments on the common law. In the first place it recognises a wider range of provocative behaviour. The common law has insisted that, with one exception, only violence or the threat of violence could provide a foundation for a plea of provocation.[77] Verbal abuse and insults, however extreme, could not provide a foundation for a plea of provocation. The only exception to the rule requiring violence arose in the case of sexual infidelity. Here, an accused could base a plea of provocation on the sudden discovery (or confirmation) of sexual infidelity on the part of a person with whom he or she had a relationship upon which an expectation of fidelity could be based.[78] Subsection (3)(a) recognises that provocation may arise not only from violence, but from "acts or words or both".[79] Subsection (3)(b) reflects the existing law as explained in *Drury v H.M. Advocate*.[80] It requires that "an ordinary person" would have been liable to react as the accused did.

Subsection (4)(b) expands upon the reference to the "ordinary person". It would be possible to approach the "ordinary person" requirement in a wholly objective or a wholly subjective manner. If the former approach were to be adopted, then there would be a risk that the "ordinary person" test would rule out the defence where, for example, certain characteristics of the accused made him or her more susceptible to the kind of provocation offered. (Taunting a person about particular physical or other characteristics not shared by other members of the community would be one example.) If, on the other hand, a wholly subjective approach were to be adopted, then this would run the risk of allowing the defence, for example, to a person who was peculiarly ill-tempered.

Subsection (4)(b) therefore attempts a compromise, by permitting the personal characteristics of the accused to be taken into account to the extent that they are relevant to the provocative quality of the acts or words giving rise to the loss of self-control, while at the same time

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[77] See generally, *Thomson v H.M. Advocate* 1985 SCCR 448; *Cosgrove v H.M. Advocate* 1990 JC 333; 1990 SCCR 358; 1991 SLT 25; *Drury v H.M. Advocate* 2001 SCCR 583; 2001 SLT 1013.
[78] See, generally, *Drury v H.M. Advocate* 2001 SCCR 583; 2001 SLT 1013; *H.M. Advocate v Gilmour* 1938 JC 1; *H.M. Advocate v Hill* 1941 JC 59; *McDermott v H.M. Advocate* 1973 JC 8; 1974 SLT 206; *H.M. Advocate v McKean* 1996 JC 32; 1996 SLT 1983; 1996 SCCR 402.
[79] Cf the Homicide Act 1957, s.3, in respect of English law.
[80] 2001 SCCR 583; 2001 SLT 1013.

disregarding them when considering the accused's ability to exercise self-control. Subsection (4) therefore rejects the approach recently adopted in English law by the House of Lords in which the accused's personal characteristics were held to be relevant not only to the quality of the provocation offered, but also to his ability to exercise self-control.[81]

Subsection (5) provides for a plea of diminished responsibility. The mental abnormality resulting in diminished responsibility must normally be proved by the defence on a balance of probabilities. That will be appropriate if the accused is being tried for murder. However, if the prosecution decides to prosecute only for culpable homicide, accepting that the accused suffers from such a mental abnormality as to give rise to a clear case of diminished responsibility, it should be sufficient that the prosecution admits that the requirements are satisfied. The accused, in other words, should be able to take advantage of the prosecution's decision to prosecute only for the lesser offence.

The defence of diminished responsibility has been recognised at common law since the case of *Alexander Dingwall*[82] in 1867, and was recently reviewed by the High Court in the case of *Galbraith v H.M. Advocate (No. 2)*.[83] In that case the High Court recognised that an accused person's ability to determine and control his or her actions could be impaired by mental abnormality to such a degree as would reduce responsibility for killing from murder to culpable homicide. The mental abnormality could be medical, psychiatric or psychological in origin, and could be based in external causes such as sexual or other abuse. There must, however, be some recognised mental abnormality. That abnormality could take various forms. It may mean that the accused perceives matters differently from a normal person, or it might affect the ability to form a rational judgement as to whether a particular act was right or wrong, or it might affect the accused's ability to decide whether to perform that act.[84] Subsection (5) thus reflects the common law as it appears to be developing in cases such as *Galbraith*.

The plea of diminished responsibility has traditionally been confined to murder cases because of the fixed penalty for murder. It enabled account to be taken of factors which, in the case of other offences, could be taken into account in mitigation of sentence. Under this Act the fixed penalty for murder is abolished.[85] There is, therefore, an argument that the plea of diminished responsibility is no longer necessary. We have retained it for the time being for labelling reasons. For a person to be labelled a murderer when that person was suffering from diminished responsibility may be considered harsh and unfair.

The law on diminished responsibility has recently been considered by the Scottish Law Commission in a very thorough discussion paper.[86] It may be that in the light of the responses to that discussion paper changes will be recommended. It would be a simple matter to amend

[81] See *Smith (Morgan)* [2000] 3 WLR 654.
[82] (1867) 5 Irvine 466.
[83] 2002 JC 1; 2001 SCCR 551; 2001 SLT 953.
[84] 2002 JC 1; 2001 SLT 953, at para. 51.
[85] See sch. 2.
[86] Discussion Paper No 122 on *Insanity and Diminished Responsibility* (2003).

this Bill to incorporate such changes, including the deletion altogether of the provision on diminished responsibility if that were to be thought appropriate.

Mental abnormality resulting in diminished responsibility must normally be proved by the defence on a balance of probabilities. That will be appropriate if the accused is being tried for murder. However, if the prosecution decides to prosecute only for culpable homicide, accepting that the accused suffers from such a mental abnormality as to give rise to a clear case of diminished responsibility, it should be sufficient that the prosecution admits that the requirements are satisfied. The accused, in other words, should be able to take advantage of the prosecution's decision to prosecute only for the lesser offence. This is provided for by subsection (6). This also reflects the common law.

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