

HOMICIDE REFORM: lessons from England and Wales

The scope of the project in Scotland appears broadly similar to the one undertaken by the Law Commission for England and Wales ('LCEW') in 2005.

However, the LCEW was under certain Government-imposed constraints. In particular:

1. The life sentence for murder was to remain;
2. Manslaughter as a stand-alone offence would not be looked at in detail;
3. Abortion, assisting suicide and mercy killing would not be considered.

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Although I refer to ‘constraints’, there is some benefit in a brief that is restricted in the way described:

1. Investigations into abortion or mercy killing involve particularly wide-ranging consultation and research. Thousands of people and a large number of specialist groups are entitled to have their views taken into account. It is questionable whether a Law Commission has the resources to do this.

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2. With issues as controversial as mercy killing and abortion, it is doubtful whether a legal expert body such as Law Commission can create the kind of broad consensus needed for a Government to accept its recommendations as a basis for reform.

3. Such issues create jurisdictional problems, with any loosening of restrictions liable to lead to people (whether or not from Scotland) travelling to Scotland to take advantage of the new law.

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Reform of homicide is concerned principally with two issues:

(a) the relationship between homicide offences and

(b) the applicability of defences to offences.

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I put the matter in this way, because, to give a simple example, the scope and nature of the fault element for murder has a direct relationship with the scope and nature of culpable homicide.

A thought experiment: narrowing murder.

Narrowing murder widens culpable homicide, and (usually) vice versa.

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Narrowing murder (with its mandatory life sentence) is likely, other things being equal, to reduce the number of murder convictions.

First, the jury may not find the offence elements to be made out quite as often, but also, the prosecution may charge murder less often, or accept a plea of guilty to culpable homicide more often, reducing the jury's role.

Such changes will increase overall the extent of judicial discretion of sentencing in homicide cases.

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So, in any reform aimed at narrowing murder, a Law Commission should:

- (i) Give some indication of the impact on murder convictions. One way to try to do this is to look at all the files of murder convictions in a recent year, and try to estimate, from the facts, what the result might have been under the reformed law.
- (ii) Indicate in what way, if any, the sentencing regime for culpable homicide will be changed to reflect the new cases falling into that category.

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(iii). Ideally, reform would also be backed by empirical evidence of public opinion that supports the reform.

(iii)(A) Parliament was persuaded by the LCEW not to abolish the old provocation defence entirely, by professional opinion research commissioned by the LCEW which showed strong support for the defence in exceptional circumstances.

(iii)(B) There is now much more comprehensive research on public opinion about murder:
https://www.nuffieldfoundation.org/sites/default/files/files/Public%20Opinion%20and%20Sentencing%20for%20Murder_Mitchell&Robertsv_FINAL.pdf

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Public opinion research is important because:

(i) It is possible that, if too few cases will fall within the murder category, post-reform, the Government will reject the change.

Further:

(ii) If the Government is to accept the change, the public must be re-assured that sentencing for culpable homicide will adequately reflect the seriousness of wrongdoing that was formerly treated as murder

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Offence and defence

A narrower law of murder will also have an impact on defences to murder, in particular provocation.

For example, if murder is narrowed to intent to kill, then the argument that D's rage meant that s/he did not possess that fault element becomes much more plausible.

Hence, provocation becomes another way of denying the fault element (Lord Rodger, in *Drury*).

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The Homicide 'Ladder'

As is well-known, the LCEW recommended a three-tier law of general homicide offences:

First Degree murder, Second Degree murder, and manslaughter.

A Royal Commission had recommended such a structure in 1866.

The recommendation was popular with a broad range of consultees but did not find favour with Government.

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The Homicide 'Ladder'

In the LCEW's initial proposals. First Degree murder was to be confined to intent to kill.

Second Degree murder:

- (a) Would be a stand-alone offence of killing through reckless indifference to death, and
- (b) Was to be the verdict following a successful plea of provocation/diminished responsibility.

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The Homicide 'Ladder'

The LCEW's final recommendations retained the three-tier structure, but the ingredients of each crime were changed.

In essence, they became more complex. This was in order to meet the objection that confining First Degree murder to cases involving an intent to kill would make it too narrow.

The suggestion that a tougher sentencing regime should be introduced for 2nd degree murder was not enough to counter this objection.

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The Homicide 'Ladder'

The LCEW's final recommendations might have caused problem for juries, with their complexity.

It is important to remember the impact on complexity of joint-trials. If D1, D2 and D3 all make different claims about their levels of involvement in a killing, the jury may have difficulty deciding between 1st degree murder, 2nd degree murder, and manslaughter.

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The Homicide 'Ladder'

So, the conclusion I have come to, based on the experience in England and Wales, is that simplicity should be the watchword.

There would be quite a lot to be said for a law of murder confined to intent to kill (as the LCEW originally proposed), with culpable homicide underneath, and no other 'trimmings'.

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What about sentencing under any new regime?

Sentencing was not within the remit of the LCEW, as such.

However, there was a need to give some indication of how sentencing in 2nd degree murder cases might differ from sentencing in manslaughter cases (both crimes having a maximum sentence of life imprisonment).

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Accordingly, without making any recommendations (or, indeed consulting on this point), the LCEW floated the possibility of ‘mini-max’ sentences.

Such sentences indicate both a minimum and a maximum sentence to served, and would apply only to second degree murder.

The need for such sentences arises from the likely longer sentences for 2nd degree murder.

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Suppose someone (D) receives a 20 year sentence for 2nd degree murder.

Under existing rules, D will be eligible for parole at the half way point (10 years). This creates a significant disparity between the possible maximum and minimum period of imprisonment.

It would be possible, in a mini-max sentencing regime, for the trial judge to indicate in such a case that D must serve between 15 and 20 years.

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Defences

There is a risk of saying too much or too little!

With provocation, there is a strong case for confining it, as in England and Wales, to cases involving ‘exceptionally grave’ circumstances.

I think Parliament was right to restrict it in that way, and not rely only on the ‘reasonable person’ restriction. A look at the Parliamentary debates before the 1957 Act shows clearly that provocation was only meant to cover wholly unusual cases.

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Defences (1)

A restriction of this kind can deal to some extent (even if not wholly) with the gender issues, because adultery etc is clearly not an 'exceptional' kind of provocation.

It goes almost without saying that it was also right for Parliament, following the LCEW's recommendations, to broaden the defence to include instances in which fear of serious violence lead to a killing following a loss of self-control.

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Defences (2)

The LCEW sought to modernise the language of the diminished responsibility defence, to make it clearer that what was in focus was an abnormality of mental functioning, supported by medical evidence.

The Law Commission did favour the view that the defence should be phrased in more ambiguous terms, to accommodate e.g. mercy killings in which there was (say) great emotional pressure but no medically recognised abnormality of mental function.

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Defences (2)

A notable omission, though, was that the LCEW did not address the issue of the relevance of intoxication, and Parliament did not consider this point either.

Since 2009, the courts have accordingly sought to apply and develop the old law governing intoxication. I will not go through those developments here, but it is clear that the question should be addressed in any reform.

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Defences (2)

Reforming legislation should simply indicate that voluntary intoxication is not legally relevant to a plea of diminished responsibility.

Suppose voluntary intoxication brings into play a hitherto unknown condition, or triggers alcoholism.

The question – following *Dietschmann*- will be whether the abnormality of functioning was enough, in itself, to satisfy the legal test.

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Conclusion:

It is likely to be difficult to persuade the legislature to make wide-ranging changes in such a sensitive area, whether or not these have been shown to work in other jurisdictions.

So, on balance, it is best to seek to fix 'containable' problems clearly identified by the courts.