

**The Homicide (Scotland) Bill – Final Business
and Regulatory Impact Assessment –
25 September 2025**

Introduction

This Business and Regulatory Impact Assessment (“BRIA”) has been prepared in connection with the draft Homicide (Scotland) Bill designed to implement the recommendations for law reform made by the Scottish Law Commission (“the Commission”) in its Report on the Mental Element in Homicide (Scot Law Com No. 269) published on 25 September 2025. The Report can be found on the Commission’s website [here](#). The draft Bill can be found at Appendix A of the Report. The recommendations aim to modernise, clarify and improve the law of homicide in Scotland, to ensure it is fit for purpose in the 21st century.

This is a Final BRIA.

Executive summary

Issue and why it needs to be addressed

The prospect of a review of the law of homicide was raised by the Criminal Appeal Court in the case of *Petto v HM Advocate*,¹ in which the then Lord Justice Clerk (Gill) said (at paras 21 and 22):

“[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) 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 the doctrine of constructive malice.

[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.”

Petto was the last in a line of cases from the early 21st century – also including *Drury v HM Advocate*² and *HM Advocate v Purcell*³ – which brought into focus certain difficulties with Scots homicide law. These include the suitability of legal terminology for modern day practice, conflicting views on how the mental element in the homicide offences should be defined, and doubt about the applicability of outdated legal principles.

¹ 2011 SCCR 519.

² 2001 SCCR 583.

³ 2007 SCCR 520.

Intended outcomes

The recommendations made by the Commission are intended to modernise, clarify and improve the law of homicide in Scotland. They aim to establish a coherent and accessible statutory framework, and to ensure that this framework is comprised of legal principles that reflect the views of contemporary Scottish society.

Options

There are three main options for reform:

- Option 1 – Do nothing
- Option 2 – Legislate for the entire body of Scots homicide law
- Option 3 – Legislate for only those select aspects of the law that require reform

The Commission has proposed Option 3, to be implemented by the Homicide (Scotland) Bill.

Sectors affected

The recommended reforms will affect those who work in and engage with the criminal justice sector in Scotland.

This includes the following:

- Criminal justice agencies;
- Victims and witnesses in homicide cases;
- People accused of homicide;
- Victim and third sector support organisations;
- The legal profession; and
- Jurors

Engagement completed, ongoing and planned

Over the course of the project, the Commission consulted with a wide range of individuals and organisations. These included criminal law academics and practitioners, criminal justice agencies and charities, and psychology and psychiatry associations. The Commission engaged with these stakeholders through various channels. To determine the scope of the project, the Commission hosted a seminar in October 2018 in conjunction with the Schools of Law at the Universities of Glasgow and Strathclyde and conducted a series of informal focus groups with those working in legal practice (e.g. judges, advocate deputes, defence counsel and solicitor advocates). The Commission then carried out a public consultation on the reform proposals as set out in the [Discussion Paper on the Mental Element in Homicide](#). It also formed an advisory group of criminal law experts to assist throughout the project. A list of respondents to our public consultation and a list of our advisory group members can be found in Appendices B and C of our Report respectively.

To further engage the views of the public, the Commission contracted BritainThinks to conduct an opinion survey on certain aspects of homicide law, and certain potential reforms, with a limited but representative sample of the Scottish public. A copy of the final Report on Public Opinion Research conducted by BritainThinks on our behalf is available on our website [here](#).

Anticipated impacts (intended and unintended, positive and negative) and mitigating actions

The reforms proposed in the Homicide (Scotland) Bill are unlikely to have a major impact on the business sector in Scotland, as they relate to criminal justice and public safety. However, some potential positive and negative effects of the Bill have been identified and outlined in this BRIA.

Enforcement/ compliance

The implementation of the provisions in the Homicide (Scotland) Bill is a matter for the Scottish Courts and Tribunals Service, Crown Office and Procurator Fiscal Service, and Police Scotland, who will be primarily responsible for its operation.

Recommendations/ implementation plans

The Commission recommends that the Scottish Government implement the proposed reforms through the enactment of the Homicide (Scotland) Bill. See Appendix A of the Report.

Evaluation and monitoring of implementation/ review of BRIA

The Commission anticipates that a review of the legislation by the Scottish Ministers would be appropriate 10 years from the date on which it is brought into effect.

Section 1: Background, aims and options

Background to policy issue

The law of homicide in Scotland is almost entirely common law with the exception of the complete defence of mental disorder and the partial defence of diminished responsibility (sections 51A and 51B of the Criminal Procedure (Scotland) Act 1995 respectively). In the early 21st century, a line of cases – *Drury v HM Advocate*, *HM Advocate v Purcell* and *Petto v HM Advocate* – brought into focus certain difficulties with Scots homicide law. These include the suitability of legal terminology for modern day practice, conflicting views on how the mental element in the homicide offences should be defined, and doubt about the applicability of outdated legal principles.

The prospect of a review of the law of homicide was raised by the Lord Justice Clerk (Gill) in the case of *Petto* (at para 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 process of law reform.”

Following these cases and the comments of the Lord Justice Clerk, the Commission undertook a review of the law of homicide, particularly (i) the language of Scots homicide law, (ii) the boundary between murder and culpable homicide, (iii) the mental element of each offence, (iv) and the operation of certain defences to homicide.

The Commission began its review of homicide in 2018 as part of its Tenth Programme of Law Reform (2018-2022). Work carried over into the Eleventh Programme (2023-2027). The [Discussion Paper](#) identified a number of potential reforms, including:

- Whether the definition of murder should be reformulated to remove reference to the accused acting “wickedly”;
- Whether the second limb of murder should require that the accused acted with an intention to injure;
- Whether the law would benefit from the creation of a new crime of “assault causing death”;
- Whether any reform is needed to the law of self-defence in homicide cases;
- Whether necessity and/or coercion should be recognised as a defence to murder;
- Whether any reform is needed to the partial defences of provocation and diminished responsibility;
- Whether there should be a new defence for victims of domestic abuse who kill their abuser;
- Whether there should be a statutory power for judges to issue jury directions on the possible effects of domestic abuse on an abused partner; and
- Whether statute should expressly state that “rough sex” is not a valid defence to homicide.

The [Discussion Paper](#) was open for consultation between May and October 2021. A list of respondents to our public consultation can be found in Appendix B of our Report. The responses informed the recommendations made in the Report and the drafting of the Homicide (Scotland) Bill. In addition, a public opinion survey was carried out by BritainThinks to gather the views of members of the public on various options for law reform. A copy of the final Report on Public Opinion Research conducted by BritainThinks on our behalf is available on our website [here](#).

Over the course of the project, the Commission was greatly assisted by an advisory group with expertise in criminal law and the criminal justice system. Members included academics, prosecution and criminal defence practitioners, judges, and representatives from Police Scotland and Victim Support Scotland. A full list of our advisory group members can be found in Appendix C of our Report.

Purpose/ aim of action and desired effect

The Homicide (Scotland) Bill gives effect to the recommendations made in the Report on the Mental Element in Homicide, informed by the responses to the [Discussion Paper](#) and to the public opinion survey, as well as input from the advisory group. The Bill seeks to clarify, modernise and improve the law of homicide in Scotland. In particular, it aims to:

- Replace the common law offences of murder and culpable homicide with equivalent statutory offences, thereby providing clear and accessible statutory definitions.
- Remove reference in the definition of murder to the accused acting “wickedly”; a word which in the consultation was broadly seen as archaic, imprecise, and ill-suited to the modern criminal law.
- Introduce the requirement of an assault into the second limb of the definition of murder (currently “wicked recklessness”). This will sufficiently differentiate between the statutory definitions of murder and culpable homicide.
- Clarify in statute that there is no doctrine of constructive malice in Scots law (i.e. clarifying that an accused will not automatically be deemed to have committed murder, in the absence of the requisite mental element, simply because the killing occurred in the commission of another offence).
- Place the partial defences of provocation (currently common law) and diminished responsibility (section 51B of the Criminal Procedure (Scotland) Act 1995), both of which can reduce what would otherwise be murder to culpable homicide, into a modern homicide statute.
- Remove the gendered and outdated sexual infidelity limb of provocation. Instead, only physical violence can be deemed a provocative act capable of triggering the defence.

A modernised and refined framework for the Scots law of homicide would increase legal certainty and accessibility. The Bill would make the law easier to understand, advise on and apply; this, in turn, should lead to decreased legal costs and greater efficiency in the legal sector. It would also introduce further protections for both victims and accused persons and address the inherent gender-bias in certain aspects of homicide law.

The Bill would therefore contribute to the overarching purpose and values of the Scottish Government's National Performance Framework:

- Purpose – 'to create a more successful country, give opportunities to all people living in Scotland, increase the wellbeing of people living in Scotland, and reduce inequalities and give equal importance to economic, environmental and social progress'.
- Values – 'to treat all people with kindness, dignity and compassion, respect the rule of law, and act in an open and transparent way'.

Without any reform, the Scots law of homicide would remain to some extent outdated and would continue to attract criticism from practitioners for as being lacking analytical accuracy, providing inadequate protection for certain vulnerable groups within society, and being unsuited to 21st century Scottish society. The Bill introduces reforms to address these problems in the law.

Generally, respondents to the [Discussion Paper](#) supported reform of the law to clarify and modernise the definitions of murder and culpable homicide, explicitly abolish the doctrine of constructive malice, and remove sexual infidelity as an act that is capable of triggering the partial defence of provocation. They were in favour of these particular reforms largely to increase certainty for the most serious offences, and to ensure Scots homicide law is fit for purpose in the 21st century.

Options (considered so far/ still open)

The Scots law of homicide is almost entirely common law. Any reform would require legislation to implement the recommended changes.

There are three main options for reform:

- Option 1 – Do nothing
- Option 2 – Legislate for the entire body of Scots homicide law
- Option 3 – Legislate for only those select aspects of the law that require reform

Option 1

In terms of Option 1, the recommended reforms and draft Homicide (Scotland) Bill would not be introduced. The common law would remain unchanged and so there would be no additional costs or savings associated with this option. However, given the need for change outlined above, the lack of additional costs would not add any positive value.

The law of homicide would remain in need of modernisation, clarity and certainty. The common law homicide definitions would continue to rely on outdated terminology, several High Court decisions would continue to cast doubt on the coherence of the offence of murder, the doctrine of constructive malice would continue to have a questionable existence in the law, and the partial defence of provocation could still be established on the basis of archaic and gendered notions that no longer have a place in Scottish society.

Option 2

In terms of Option 2, this would require an extensive exercise in codification to place the entire body of Scots homicide law on a statutory footing.

The responses to the [Discussion Paper](#) consultation suggested an overall lack of appetite for complete statutory reform. Although there may be shortcomings in the law, there were insufficient consultation responses highlighting significant inefficacy, or failures, in the law which would necessitate a root and branch approach to reform.

Option 3

In terms of Option 3, those select aspects of the law that are currently causing difficulty would be reformed by way of the Homicide (Scotland) Bill. If implemented, the recommended changes to the law would take effect and a number of significant benefits would be realised. These changes should introduce greater certainty in the Scots law of homicide.

Although introduction of the Bill would give rise to some costs, the Commission considers these costs to be reasonable in light of the benefits that reform would bring to the law of homicide in Scotland.

The Commission therefore recommends Option 3.

Sectors/ Groups affected

The recommended reforms will affect those who work in and engage with the criminal justice system in Scotland. This includes the following groups and individuals:

- Criminal justice agencies (e.g. Crown Office and Procurator Fiscal Service);
- Victims and witnesses in homicide cases;
- People accused of homicide;
- Victim and third sector support organisations (e.g. Victim Support Scotland);
- The legal profession (e.g. solicitors, advocates, judges); and
- Jurors

The Homicide (Scotland) Bill, if enacted, would result in several benefits for those mentioned above:

- Introducing statutory homicide definitions, without the outdated concept of “wickedness”, will bring more certainty and clarity to the offences of murder and culpable homicide and ensure they are fit for modern Scotland. This will assist criminal justice agencies and legal practitioners working in homicide law.
- Introducing a requirement of assault into the second limb of murder will give juries clear direction in murder cases and should assist in achieving a careful and consistent assessment of an accused person’s wrongdoing.
- Confirmation in statute that there is no doctrine of constructive malice will bring clarity to the law and ensure that murder charges cannot be brought unfairly against those accused of committing other crimes.

- Removing sexual infidelity as a provocative act that can establish a partial defence to murder will address a feature of the law that has been widely criticised in modern Scotland. Sexual infidelity provocation is a gendered defence, often available to men who kill their partner where there is jealousy/coercive control/domestic abuse; reform will ensure the defence cannot be relied on in such cases, bringing justice to victims and their families.

Section 2: Engagement and information gathering

Engagement approach

The Commission adopted various approaches to engagement throughout the process of developing the policy for the Homicide (Scotland) Bill

In early 2018 the Commission engaged with criminal law academics at the Universities of Dundee, Edinburgh, Glasgow and Strathclyde to advise on the scope of the homicide project, to focus on the most pertinent issues in need of reform. In May 2018, an advisory group was formed to assist with the development of the project. Members included academics, prosecution and criminal defence practitioners, judges, and representatives from Police Scotland and Victim Support Scotland.

In October 2018 the Commission hosted a seminar on the law of homicide in conjunction with the School of Law at the Universities of Strathclyde and Glasgow. The seminar programme included talks on homicide statistics in Scotland, the structure and mental element in Scots homicide law, and lessons from the English experience of homicide law reform. The talks are available to view on the Commission's YouTube channel. The seminar informed the scoping of the project and contents of the Discussion Paper.

Over the course of 2019 the Commission conducted a series of informal focus groups with judges, advocate deputes, defence counsel, and solicitor advocates, to gather views on how homicide law is working in practice.

In May 2021 the Commission published its Discussion Paper on the Mental Element in Homicide. It also published companion papers on homicide laws in other jurisdictions; on homicide appeals in Scotland between 2010 and 2019; and a research paper focusing on the crime of culpable homicide. The last paper was prepared by Professor Claire McDiarmid, who joined the Commission on secondment from the University of Strathclyde between September and December 2018.

The Discussion Paper was open for public consultation between May and October 2021 and generated 34 responses. At publication, the paper was shared directly with organisations whom the Commission identified as having a potential interest, including:

- Senators of the College of Justice
- Law Society of Scotland; the Scottish Criminal Bar Association; the Scottish Solicitors Bar Association
- Rape Crisis Scotland
- Scottish Women's Aid

The consultation received responses from individual criminal law practitioners, individual judges, academics, psychology and psychiatry associations, criminal justice charities, and the

Schools of Law at the Universities of Glasgow, Edinburgh, Dundee, Stirling, Aberdeen, Strathclyde, Durham, and Oxford.

However, there were no responses from members of the public. Therefore, the Commission contracted BritainThinks to conduct an opinion survey on certain aspects of homicide law, and certain potential reforms, with a limited but representative sample of the Scottish public. BritainThinks produced a Report in November 2022 which is available on our website [here](#).

Internal SG engagement/ engagement with wider Public Sector

Internal SG engagement

The Mental Element in Homicide project was part of the Commission's Tenth Programme of Law Reform, which was approved by the Scottish Government and laid before the Scottish Parliament in February 2018.

Copies of the [Discussion Paper on the Mental Element in Homicide](#) and the Report were sent to the Criminal Justice Division of the Scottish Government Justice Directorate prior to publication.

The Commission met with members of the Criminal Law, Practice and Licensing Unit within the Criminal Justice Division before and during the project to keep them informed of its progress and to discuss any issues or concerns that arose.

UK/ Devolved Administrations

The Commission did not directly engage with governments in other parts of the UK in respect of its recommendations.

The Commission met with colleagues from the Law Commission of England and Wales at various stages of the project to discuss its progress. At the request of the Lord Chancellor, the Law Commission of England and Wales commenced a review of the law of homicide in England and Wales in early 2025.

Wider Public Sector

The Commission engaged with a wide range of criminal justice partners and agencies.

Public authorities:

- Crown Office and Procurator Fiscal Service
- Scottish Courts and Tribunals Service
- Police Scotland
- Senators of the College of Justice

Representative bodies:

- Faculty of Advocates

- Sheriffs' Association
- British Psychological Society
- Association of Clinical Psychologists – UK (ACP-UK)
- Royal College of Psychiatrists
- Law Society of Scotland

Academia:

- Centre for Scots Law, University of Aberdeen
- School of Law, University of Glasgow
- Law School, University of Strathclyde
- Law School, University of Edinburgh
- Law School, University of Dundee
- Law School, University of Stirling
- Law School, Durham University
- Faculty of Law, University of Oxford

Regulatory bodies/Advisory bodies:

- Equality and Human Rights Commission
- Scottish Sentencing Council

Victim support organisations/Third sector organisations:

- Victim Support Scotland
- Scottish Women's Aid
- Rape Crisis Scotland
- Centre for Women's Justice

Campaign groups:

- We Can't Consent to This

International

The Commission published a comparative paper entitled Homicide Laws in Other Jurisdictions as a companion piece to the Discussion Paper on the Mental Element in Homicide. The comparative paper provides a deeper examination of the homicide laws that exist in selected other jurisdictions around the world.

Business / Third Sector engagement

The provisions in the Homicide (Scotland) Bill will mainly impact on justice agencies, the third sector, and the legal profession. Accordingly, engagement has primarily focused on stakeholders from these areas during the development of policy for the Bill.

The Faculty of Advocates, Senators of the College of Justice and Law Society of Scotland, which represent the legal profession in Scotland, provided responses to the consultation, as did a number of third sector organisations who provide advocacy and/or support to victims and witnesses.

Public consultation

The [Discussion Paper on the Mental Element in Homicide](#) did not receive any responses from members of the public. Therefore, BritainThinks was commissioned to conduct an opinion survey on certain aspects of homicide law, and certain potential reforms, with a small but representative sample of the Scottish public. BritainThinks produced a report of public opinion research in November 2022, which was published alongside the Homicide Report and available on our website [here](#).

Other stakeholders

The Commission did not consult any other stakeholders.

Section 3: Costs, impacts and benefits

Quantified costs to businesses

The Homicide (Scotland) Bill may give rise to some costs for law firms and justice agencies in the criminal justice sector. However, these costs will be offset by the benefits that reform would bring to the law of homicide.

Training costs

An initial training and familiarisation cost for solicitors and other relevant legal professionals would be likely. The costs would be small and would be incurred only on first implementation of the reforms. Any such costs would be quickly offset by the savings made under the Bill.

Generally, familiarisation costs of any change in the law will be incurred by those providing training within the solicitors' firms. Professional Support Lawyers could, for example, prepare a seminar which will explain the reforms to fee-earners. Arrangements may also be made, by firms or individual practitioners, for attendance at seminars provided by organisations, such as CLT and the Law Society, on a commercial basis. However, the provision of such training is typically already provided for within a firm's budget. It is probable that a proportion of the fee that a lawyer charges represents the cost of maintaining the fee-earner's current legal knowledge. For the fee-earners, there is a requirement that 20 hours of Continuing Professional Development is completed throughout the year so the additional time taken by familiarisation will count towards this figure. It is therefore unlikely that initial training on this Bill would represent a significant additional cost to law firms. There may also be additional costs incurred by specialists in homicide law (particularly those accredited by the Law Society) to ensure their specialist knowledge is up to date and complete and meets the requirements for accreditation. Otherwise, it is anticipated that solicitors and counsel will familiarise themselves with changes in the law in their own time, and perhaps also on a case-by-case basis.

Training will also be provided to the judiciary. The Commission understands that in 2025 the average daily cost per head of providing in-person training to the judiciary by the Judicial Institute is between £3000-3500. However, this figure only covers the running costs of the Judicial Institute for an initial training course. It does not include the full extent of other costs that would be incurred by the Scottish Courts and Tribunal Service – such as judicial salary costs, the cost of providing written materials (e.g. a revised Jury Manual) and potentially the cost of running the course multiple times – but these are difficult to accurately estimate at present.

Criminal justice resources

Sentencing

The Commission's proposal that the second limb of the definition of murder (currently known as "wicked recklessness") should require an assault may narrow the offence to some extent. A few cases previously considered to be reckless murder may now be prosecuted as culpable homicide, which, if resulting in a conviction, may carry significantly shorter prison sentences.

This may lead to a reduction in the number of prisoners that depend on state resources whilst serving a life sentence. Conversely, should the partial defence of sexual infidelity provocation be abolished, this could lead to an increase in murder convictions (as the defence can no longer rely on provocation to reduce the offence to culpable homicide) and more prisoners serving life sentences; however, in practice, this is not a commonly pled defence, and so this particular reform is unlikely to have any significant impact on sentencing in homicide cases.

In Scotland, murder carries a mandatory life sentence. There is no such mandatory rule for culpable homicide, and so the full range of disposals are available to the court. The most recent statistics published by the Scottish Government in 2020-21 show that the average prison sentence for a culpable homicide conviction was around seven years (2,589 days). Further, according to data from the Scottish Prison Service's latest Annual Report and Accounts, the average annual cost per prison place was £47,140 in 2023-24. This amounts to a substantial cost for the Scottish Government, especially as there are more prisoners serving life sentences in Scotland as a proportion of the national population than anywhere else in Europe; the high life prisoner rate has been attributed to the broad definition in Scots law of murder, which, unlike in other European countries, captures cases where no specific intent is present. The recommended reform may lead to a reduction in murder convictions and life prisoners, which might help alleviate this heavy financial cost. However, there is a possibility that the sentencing regime for culpable homicide will also change to reflect the degree of wrongdoing in cases that would formerly have been treated as reckless murder. It is still open to the court to hand down a life sentence in such cases.

Appeals

Statutory redefinition of the Scots common law offences of murder and culpable homicide may result in debate about the proper construction of the new statutory provisions and the potential for appeals in the High Court. That might result in an associated increase in the costs and resources required to service the appeals.

However, any additional cost associated with an increase in homicide case appeals can be balanced against the greater clarity and certainty that the Bill provisions would bring to earlier court proceedings, generally improving efficiency and saving in costs for parties.

Other impacts

There are several benefits to be derived from the Homicide (Scotland) Bill, including:

Ensuring Scots homicide law is fit-for-purpose for modern Scottish society

The Bill intends to modernise the law of homicide on a number of fronts, to bring legal jurisprudence and practice in line with the views and values of 21st century Scotland.

First, the Bill introduces statutory definitions for murder and culpable homicide that are free of any reference to the accused acting “wickedly”. Consultees to the [Discussion Paper](#) and participants in the public opinion survey agreed that the language of “wickedness” is old-fashioned, reliant on subjective moral standards, and does not add any value to how the offences are understood in practice. A number of consultees noted that, despite these

criticisms, the language does not appear to cause difficulties for juries. However, there was strong consensus amongst participants in the limited but representative public opinion survey that the concept of “wickedness” should not be part of Scots homicide law. One of the key principles of the rule of law is that the law must be accessible to the public, and the reformed language of the Bill should provide increased clarity for practitioners and juries in modern day homicide cases.

Secondly, the Bill makes clear that there is no doctrine of constructive malice in Scotland. That doctrine (of English origin) attributes liability for the crime of murder where a killing occurs in the course of some other crime. The doctrine places emphasis on the act rather than the accused’s state of mind, and so forms an exception to the rule that both the *actus reus* and *mens rea* are required before a person can be found liable for a homicide offence. It is not clear whether constructive malice ever applied in Scots law; in fact, many consultees to the [Discussion Paper](#) were of the view that, if it did, the doctrine no longer exists. The Bill will resolve any doubt and make clear that constructive malice has no place in contemporary Scotland.

Finally, the Bill removes sexual infidelity as an act capable of triggering the partial defence of provocation in murder cases (which reduces what would otherwise be murder to culpable homicide). Sexual infidelity provocation has formed a part of Scots homicide law for centuries and is rooted in outdated concepts of male honour and sexual possession that are incompatible with modern societal values. In 21st century Scotland there is greater appreciation of gender biases and gender-based violence. It is apparent from the near unanimity with which consultees to the [Discussion Paper](#) supported reform that the defence is out of step with today’s society. By removing the sexual infidelity limb, the defence of provocation will be fit for modern practice and align with the Scottish Government’s ongoing commitment to address violence against women.

These changes are key benefits in terms of developing law that is accessible to practitioners and juries, consistent with contemporary moral values, and protective of vulnerable groups in Scottish society.

Bringing key elements of homicide law into one place

The existing law of homicide in Scotland is somewhat piecemeal in nature: the law is almost entirely comprised of common law rules, with the exception of the complete defence of mental disorder and the partial defence of diminished responsibility (sections 51A and 51B of the Criminal Procedure (Scotland) Act 1995 respectively). A series of High Court cases have cast doubt on the coherence of the law, and so there would be benefit in a statute that sets out the key elements of Scots homicide law in one place. Modern case law also reflects some uncertainty as to whether certain legal principles, such as the doctrine of constructive malice, exist in Scotland.

The Bill, whilst it does not completely replace the existing common law, places key elements on a statutory footing (e.g. the common law offences of murder and culpable homicide, and related partial defences are replaced with modern statutory provisions). Further, it confirms

the position on outdated legal concepts (e.g. constructive malice and sexual infidelity provocation are explicitly abolished). The benefit of placing these elements into one accessible modern statute is that it brings greater legal clarity and certainty, which should in turn improve the efficiency of criminal court proceedings.

Clarification of the definitions of murder and culpable homicide

One of the most important benefits of the Bill is that it clarifies the definitions of murder and culpable homicide in Scots law. Difficulties in the definitions were brought into sharp focus by a triad of High Court cases in the early 21st century (*Drury v HM Advocate*⁴; *HM Advocate v Purcell*⁵; *Petto v HM Advocate*⁶). The court in *Drury* was criticised for using the word “wicked” to define “intention”, in effect incorporating the defences to murder into the definition of the crime. In the later case of *Purcell*, the court’s ruling that reckless murder has always required an intention to injure was considered by many to be a major change in the law. Further, culpable homicide has no classic definition and is currently regarded as any unlawful killing that does not amount to murder – a description that covers very broad territory. The boundary between murder and culpable homicide can be a fine dividing line in some cases, and has been criticised as relying too much on intuition and impression.

The recommended homicide definitions set out the legal tests for each offence in clear terms. The new definition of murder provides that the accused must either (i) act with an intent to kill, or (ii) act in circumstances that amount to an assault, with an utter disregard for whether the person lives or dies. The new definition of culpable homicide provides that the accused must cause death by either (i) an assault, or (ii) behaviour that endangers another person, with an utter disregard for the consequences. These reformed definitions introduce strict requirements that must be met to satisfy the mental element for each homicide offence, which will assist prosecution and criminal defence practitioners. Further, they mark a clear boundary between murder and culpable homicide. This should improve efficiency in criminal proceedings, as there is a greater likelihood that cases will be charged and prosecuted under the correct offence, and juries will have a stronger sense of what elements must be present in each case. The reforms should therefore improve legal certainty for those who are tasked with establishing and determining guilt for the most serious of crimes.

The Bill introduces the need for an assault into the second limb of the definition of murder (currently known as “wicked recklessness”). The requirement of an assault provides a reasonable middle ground between “wicked recklessness” and “intention to injure”. The second limb of murder will require more than a standard of recklessness, which sufficiently distinguishes reckless murder from culpable homicide, but will not go so far as to uphold the *Purcell* ruling in statute. It also places emphasis on the importance of intentional conduct in murder cases. The new definition should deliver two key benefits. First, it touches on a principle that is implicit in the structure of Scots homicide law: fair labelling. The principle contends that an offender should not be unfairly labelled or have the nature of his wrongdoing misrepresented. Fair labelling is crucial both in terms of fairness to the individual, who, if labelled a murderer, will carry a social stigma forevermore, and to ensure accuracy in how the

⁴ 2001 SCCR 583.

⁵ 2007 SCCR 520.

⁶ 2011 SCCR 519.

legal system records criminal offences. By requiring that a person can only commit murder if there is an intention to kill or there has been an assault, the law in Scotland is less likely to result in a conviction and punishment that are disproportionate to the wrongdoing committed. Secondly, the new definition ensures that individuals accused of murder are treated equally before the law. The traditional definition of “wicked recklessness” was widely accepted as vague and difficult to state in general terms, with the result that various formulations have been adopted by judges when explaining the test to juries and appeal courts. The new definition, which requires that the accused committed an assault, introduces a strict test that must be consistently applied in all murder cases. For these reasons, the proposed reform contributes towards a legal culture that respects the rights of accused individuals.

Abolishing defences that protect gender-based violence

The Bill seeks to address gender-bias that exists in the current law by removing sexual infidelity as an act capable of triggering the partial defence of provocation (which reduces what would otherwise be murder to culpable homicide). Sexual infidelity provocation is a gendered defence that perpetuates outdated and misogynistic concepts of male honour and sexual possession; although not a common defence, it is disproportionately used by men who kill their female partners, often where there is jealousy/coercive control/domestic abuse in the relationship. The recommendation will ensure that the defence cannot be relied on in such cases.

This particular reform is also consistent with the UK’s international treaty obligations and will support wider efforts to tackle violence against women in Scotland, which is the purpose of the Scottish Government’s recent Equally Safe strategy. The impact of gender-based violence is visible in Scottish homicide trends over recent decades: despite the general downward trend in homicide cases, there is a hidden increase in homicides resulting from domestic violence. Abolishing the sexual infidelity limb of the provocation defence will ensure that the perpetrators of such violence are held to account for their actions, and increase the public’s confidence that violence against women is taken seriously by Scotland’s criminal justice sector.

Bringing Scots homicide law in line with England and Wales

Although it was not an aim of the Bill, it is an ancillary benefit that a number of the proposed reforms will better harmonise the laws governing homicide across the UK.

By updating the language of Scots homicide law, introducing new definitions for the homicide offences, and abolishing outdated legal principles, the Bill follows efforts made to modernise homicide law in other UK jurisdictions. Most contemporary Anglo-American systems of criminal law have sought to improve the language of criminal liability to ensure the law is not reliant on subjective moral standards. For example, the *mens rea* of murder in English law requires the accused’s intention to kill or cause serious bodily harm. If the Homicide (Scotland) Bill is implemented, murder in Scots law will no longer be judged in terms of “wicked intention” or “wicked recklessness”, but simply by whether the accused intended to kill or committed an assault. The result should be that homicide cases across the UK are determined on the basis of factual questions rather than vague moralistic standards of “wickedness” and “malice”. Similarly, a clear statement that the doctrine of constructive malice does not apply in Scots

law will bring Scotland in line with England, Wales, and Northern Ireland, all three countries having abolished the doctrine in the mid-1900s.

Observations made by the Lord Justice Clerk in the case of *Petto v HM Advocate*,⁷ which were instrumental in bringing about the Homicide project, noted “I have the impression that other English-speaking jurisdictions may have gained greater maturity in their jurisprudence on this topic than Scotland has.” These reforms will ensure that Scotland does not fall behind its UK counterparts.

The Bill is broadly supported by stakeholders

In addition to the key benefits set out above, there is broad stakeholder support for the Commission’s homicide law reform proposals. The [Discussion Paper](#) drew a healthy number of consultation responses from legal professionals, academics and interested organisations. The Commission also obtained a limited public opinion sample, which is essential for such a contentious and complex area of law. The expert and public opinion that informed the recommendations lends the project a greater degree of legitimacy.

Scottish firms’ international competitiveness

Not applicable.

Benefits to business

Not applicable.

Small business impacts

Not applicable.

Investment

The Commission does not anticipate that the provisions of the Homicide (Scotland) Bill will affect Scotland’s potential for investment.

Workforce and Fair Work

The recommendations reflected in the Homicide (Scotland) Bill should make the law easier to understand, advise on and apply. This should improve overall efficiency in the legal sector.

The provisions in the Bill will not affect the ability of businesses or third sector organisations to meet the Fair Work First principles.

Climate change/ Circular Economy

The Commission does not anticipate that the provisions of the Homicide (Scotland) Bill will have any impact on climate change/circular economy in Scotland.

⁷ 2011 SCCR 519.

Competition Assessment

The Commission does not anticipate that the provisions of the Homicide (Scotland) Bill will have any impact on the competitiveness of markets in Scotland.

Consumer Duty

The Consumer Scotland Act 2020 defines a consumer as an individual or small business who buys, uses or receives goods or services in Scotland, or could potentially do so, supplied by a public authority or other public body.

In view of this definition, it is anticipated that the provisions in the Homicide (Scotland) Bill will have a positive impact on the families of victims, jurors, and persons accused of committing crimes, as it contains provisions that seek to clarify and make more accessible the law and the processes of justice.

Section 4: Additional implementation considerations

Enforcement/ compliance

The implementation of the provisions in the Homicide (Scotland) Bill (if enacted) is a matter for the Scottish Courts and Tribunals Service, Crown Office and Procurator Fiscal Service, and Police Scotland, who will be primarily responsible for its operation.

UK, EU and International Regulatory Alignment and Obligations

Internal Market/ Intra-UK Trade

The provisions in the Homicide (Scotland) Bill would not result in any policy or regulatory divergence between UK nations.

International Trade Implications

The provisions in the proposed Homicide (Scotland) Bill would not result in any implications on international trade.

EU Alignment consideration

The provisions in the Homicide (Scotland) Bill would not affect the Scottish Government's policy to maintain alignment with the EU.

Legal Aid

The provisions in the Homicide (Scotland) Bill should not result in any implications on fulfilling individuals' right to access to justice through availability of legal aid and possible expenditure from the legal aid fund.

The Criminal Applications team at the Scottish Legal Aid Board noted that the changes proposed in the Bill may lead to a slight increase in homicide appeals, but that this would be unlikely to have any significant impact on legal aid.

Digital impact

The provisions in the Homicide (Scotland) Bill would not result in any implications for digitalised working practices and processes in the criminal justice system.

Business forms

The criminal justice provisions in the Homicide (Scotland) Bill do not introduce any new forms for businesses etc

Section 5: Next steps and implementation

Recommendations/ preferred options

The Scots law of homicide is almost entirely common law. Any reform would require legislation to implement the recommended reforms. The consultation did not suggest that the existing difficulties in the law necessitate root and branch reform. Rather, these difficulties would be improved by placing on a statutory basis those select aspects of the law for which there has been identified a need for reform.

Therefore, the Commission recommends ‘Option 3 – Legislate for only those select aspects of the law that require reform’ as the preferred approach to reforming the law of homicide in Scotland.

Implementation considerations/ plan

The Commission suggests that the recommended reforms are implemented by the Homicide (Scotland) Bill (see Appendix A of the Report).

If passed by the Scottish Parliament, sections 10, 11 and 12 will come into force on the day after Royal Assent and the other provisions will come into force on the day or days appointed by the Scottish Ministers by regulations, as advised by Scottish Government officials.

Post implementation review

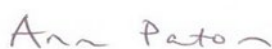
In accordance with section 3(1) of the Law Commissions Act 1965, the Commission has a duty to “keep under review” the laws with which it is concerned and will endeavour to stay informed about how the Homicide (Scotland) Bill is received by the legal profession and wider community. The Commission considers that a review of the legislation by Scottish Ministers would be appropriate 10 years from the date on which it is brought into effect.

Declaration

I have read the Business and Regulatory Impact Assessment and I am satisfied that it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and that these have been taken into account when making the policy decision. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

I am also satisfied that officials have considered the impact on consumers as required by the Consumer Scotland Act 2020 in completion of the Consumer Duty section of this BRIA.

Signed:

A handwritten signature in purple ink that reads "Ann Paton".

Lady Paton, Chair, Scottish Law Commission
25 September 2025