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# Scottish Law Commission

*promoting law reform*



University of Glasgow | School of Law

SCHOOL OF LAW





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THE HON LORD PENTLAND  
CHAIRMAN  
SCOTTISH LAW COMMISSION

Overview of homicide project



# TENTH PROGRAMME OF LAW REFORM 2018 – Homicide Project

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Outside scope:

- Abortion
- 'Mercy' killings and assisted suicide
- All road traffic offences

# *Petto v HMA* 2011 SCCR 519 LJC Gill

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- “I have the impression that other English-speaking jurisdictions may have attained greater maturity in their jurisprudence on this topic than Scotland has.

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- 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.

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- 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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- 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.

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- It is pre-eminently an exercise to be carried out by the normal processes of law reform."



## Medium-term project – 5 years

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First step –

Discussion paper on mental element and structure of homicide law.

Will include partial defences (provocation and diminished responsibility) so far as relevant.



The current definition of murder:

*Drury v HMA* 2001 SCCR 583

LJG Rodger

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“...Murder is constituted by any wilful act causing the destruction of life, by which the perpetrator either wickedly intends to kill or displays wicked recklessness as to whether the victim lives or dies.”



# Culpable homicide: *Drury* Lord Justice General Rodger

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“...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.”

# Some tentative thoughts on reform:

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- Essentially, the law is out of date,
- It is conceptually uncertain - for example, in regard to the role of the concept of wickedness, which is called upon to play an important part both in the context of intention to kill and in relation to reckless killing,

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- The structure and transparency of the law would be improved by setting it out in statutory form,
  - At the very least the law is expressed in old-fashioned and inaccessible language,
  - The law is difficult for courts and juries to understand and apply,

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- The meaning of a “wicked” intention to kill is opaque,
  - The meaning of “wicked recklessness” in the context of the second branch of the definition is also unclear,
  - The boundaries between murder and culpable homicide are so blurred as to leave too much to intuition and impression,

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- The result is that the offence of culpable homicide is substantially too broad.



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A fundamental restructuring or  
improving the existing structure?



## Another perspective

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House of Lords Select Committee on murder and life imprisonment 1989 (the Nathan Committee)

Evidence of the senior judiciary:

“Juries in Scotland appear to have no difficulty in understanding the definition of murder or of applying it to cases which are tried before them,



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and it is not considered that any alteration in the scope or definition of murder in Scotland is required. We go further, indeed, in saying that it would be contrary to the best interests of the law of Scotland to tamper with our definition of murder which works well in practice."



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LJG Emslie in his oral evidence to the  
Committee:

“The definition of the law murder  
should be left severely alone.”