

# REPORT ON THE MENTAL ELEMENT IN HOMICIDE

## EXECUTIVE SUMMARY

### Introduction

1. The Scottish Law Commission has published its recommendations for reform of the law of homicide in Scotland, focussing on (i) the boundary between murder and culpable homicide, (ii) the mental element in each offence, (iii) the operation of certain defences to homicide, and (iv) the language of Scots homicide law. The Commission's recommendations are set out in its Report on the Mental Element in Homicide (Scot Law Com No. 269) ("the Report").
2. The draft Homicide (Scotland) Bill accompanying the Report extends to twelve sections, which replace existing common law or statutory provision in relation to the following:
  - The offences of (i) murder and (ii) culpable homicide
  - The partial defences of (i) provocation and (ii) diminished responsibility

The Bill also makes some related consequential provisions and contains standard powers to make ancillary provision and commence the Bill by regulations.

### What is the current law?

3. The law of homicide in Scotland is almost entirely common law,<sup>1</sup> developed and refined over centuries on the basis of institutional works and case law. The prospect of a review of the law was raised by the Criminal Appeal Court in the case of *Petto v HM Advocate* 2011 SCCR 519, in which the Lord Justice Clerk (Gill) said (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 processes of law reform."

*Petto* was the last in a series of cases from the early 21st century – also including *Drury v HM Advocate* 2001 SCCR 583 and *HM Advocate v Purcell* 2007 SCCR 520 – which brought into sharp focus certain difficulties in Scots homicide law.

### Problems with the current law

4. Various criticisms have been levelled at the current law, in particular:
  - The language and concept of "wickedness" used in the homicide definitions is archaic, imprecise, and ill-suited to modern criminal law.

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<sup>1</sup> The partial defence of diminished responsibility is set out in section 51B of the Criminal Procedure (Scotland) Act 1995. The complete defence of mental disorder is set out in section 51A of that Act.

- There are conflicting views on whether the second limb of murder should require that the accused act with an “intention to injure”.
- It is unclear whether Scots homicide law recognises the doctrine of constructive malice (which attributes liability for murder where the killing occurs in the course of some other crime, such as robbery).
- 21<sup>st</sup> century society no longer accepts that the discovery of an intimate partner’s sexual infidelity can constitute the partial defence of provocation (reducing what would otherwise be a conviction for murder to one for culpable homicide).
- The traditional homicide defences (self-defence, provocation, and diminished responsibility) may not be adequate in circumstances where a victim of domestic abuse has been accused of murdering their abusive partner.

## **Reform recommendations**

5. The Commission makes various recommendations for reform to address these criticisms including:

### *Homicide offences*

- There should be a Homicide (Scotland) Bill that provides accessible and complete definitions for the offences of murder and culpable homicide.
- The homicide offences should not be defined in terms of “wickedness” but instead using language and concepts that are appropriate for 21<sup>st</sup> century Scotland.
- The statutory definition of murder should contain two alternative limbs: in the first limb, the accused must act with an intention to kill; in the second limb, the accused must commit an assault on a person AND behave with an utter disregard for whether the person, or any other person, lives or dies.
- The statutory definition of culpable homicide should require that the accused must cause death either by an assault OR by behaving in a manner which endangers another person and with an utter disregard for the consequences.
- The Bill should contain a provision clarifying that there is no doctrine of constructive malice in Scots homicide law (i.e. the mental element for murder cannot be attributed to an accused solely on the basis that the death occurred during the commission of another crime).

### *Partial defences*

- The Homicide (Scotland) Bill should make a new statutory provision for the defence of provocation and a restatement (without changes) of the existing statutory defence of diminished responsibility, both of which are partial defences capable of reducing a murder conviction to one of culpable homicide.

- The defence of provocation should be available only where the accused was provoked by an act of physical violence. Sexual infidelity by an intimate partner should not qualify as a provocative act on the basis of which the accused can establish a partial defence to murder.
6. In addition to the reforms introduced by the Homicide (Scotland) Bill, the Commission further recommends that:
- Scottish Ministers may want to undertake further research and consultation in relation to the potential new statutory defence of provocation.
  - Scottish Ministers should consider undertaking further work and consultation to explore the possibility of a bespoke defence of domestic abuse for victims who kill their abuser.
7. If introduced, the Homicide (Scotland) Bill will implement the recommendations made in the Report. The recommendations seek to simplify, clarify and modernise the law of homicide in Scotland to better reflect 21<sup>st</sup> century Scotland.